

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Thursday, June 24, 2010
Harvest Room, State Capitol
Bismarck, North Dakota

Representative Dan Ruby, Chairman, called the meeting to order at 10:00 a.m.

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

Members absent: Representative Francis J. Wald; Senator Richard Marcellais

Others present: See [Appendix A](#)

It was moved by Senator Wanzek, seconded by Senator Wardner, and carried on a voice vote that the minutes of the March 22-23, 2010, meeting be approved as distributed.

INTRODUCTION

Chairman Ruby said the committee will conduct committee work during the morning and in the afternoon will review one workers' compensation claim. He said the claim review will follow the same basic framework the committee has followed, with Mr. Chuck Kocher, Workforce Safety and Insurance (WSI), assisting the injured employee in presenting her case for review by the committee. He said committee members have a binder containing information prepared by WSI which includes a case summary of the injured employee's records.

COMMITTEE WORK

Chairman Ruby called on Mr. Gordy Smith, Audit Manager, Performance Audit Section, State Auditor's office, for a status report of the independent performance evaluation of WSI being conducted under North Dakota Century Code Section 65-02-30 and the components of the evaluation related to the committee's study of workers' compensation laws in this state and other states with respect to prior injuries, preexisting conditions, and degenerative conditions as required under 2009 House Concurrent Resolution No. 3008 and relating to the WSI study of postretirement benefits available to an individual whose disability benefits end at the time of Social Security retirement eligibility as required under 2009 House Bill No. 1525. Mr. Smith said the request for proposal for the independent performance evaluation was issued August 31, 2009, and the contract was awarded December 2009.

Mr. Smith reviewed the eight elements that will be addressed in the independent performance evaluation:

1. Claims.
 - a. Evaluate denied claims.
 - b. Analyze the percentage of claims adjudicated within 14 days.
 - c. Evaluate the permanent partial impairment threshold.
2. Contracts.
 - a. Review large contracts with vendors in effect during the period covered by the evaluation and conduct an analysis of the performance and cost-effectiveness of the vendors for these contracts.
 - b. Determine if the costs of the services performed by the vendors are reasonable in comparison with other workers' compensation organizations. Evaluate if the outside vendor's performance is reasonable in relation to the contract and to the performance of similar duties in other workers' compensation organizations. Determine if contracting the services with outside vendors is more efficient or effective than performing the service in house.
 - c. Determine if the contracts were appropriately bid and awarded in compliance with state laws, rules, and regulations as well as WSI policies. If contracts were extended rather than rebid, determine if this was appropriate and if the extension was beneficial to WSI versus rebidding the contract.
3. Evaluate the Internal Audit Division.
4. Study of adequacy of North Dakota's postretirement benefits and additional benefits payable.
 - a. Evaluate the additional benefits payable benefit structure.
 - b. Determine how current additional benefits payable recipients' total benefits received are impacted when Social Security retirement benefits are considered in conjunction with additional benefits payable.
 - c. Make recommendations as to whether any changes are necessary and indicate the corresponding fiscal impact to the premium rate structure as a result of the proposed changes.

5. Compare other states' workers' compensation laws with respect to prior injuries, preexisting conditions, and degenerative conditions.
6. North Dakota narcotic utilization by injured employees.
 - a. Evaluate North Dakota prescription narcotic utilization trends.
 - b. The evaluation should determine if North Dakota's profiles are outside the national trends after adjustment for our labor force.
 - c. The evaluation should include recommendations for methods to control and address any variations in narcotic prescription rates and treatment methodologies.
7. Evaluate the impact of moving to the 6th Edition of the *AMA Guides to the Evaluation of Permanent Impairment*.
 - a. Evaluate the impact of potential adoption of the *AMA Guides to the Evaluation of Permanent Impairment*, 6th Edition, to rate permanent partial impairment in North Dakota.
 - b. Identify complications and methods for addressing them within any implementation and project the potential financial impact implementation would have.
8. Evaluate the implementation of the most recent performance evaluation recommendations.

Mr. Smith said the vendor has provided a draft of the report, and a finalized version of the report is expected to be provided July 30, 2010. He said once this report becomes finalized, it will be open to the public. He said the vendor will come to Bismarck to present the independent performance evaluation report to the Workers' Compensation Review Committee.

In response to a question from Representative Ruby, Mr. Smith said as it relates to the 5th and 6th Editions of the *AMA Guides to the Evaluation of Permanent Impairment*, he is not aware of anything preventing the Legislative Assembly from directing a hybrid approach be used which utilizes some elements of the 5th Edition and some elements of the 6th Edition. However, he said, creating a hybrid approach likely would be a very complicated approach.

In response to a question from Senator Wanzek, Mr. Smith said the major substantive differences between the 5th and 6th Editions of the *AMA Guides to the Evaluation of Permanent Impairment* is that generally the 6th Edition makes some movement away from rating pain and moves toward the focus on how pain may limit an individual.

Mr. Sebald Vetter, Concerned Advocates Rights for Injured Employees, stated that he is concerned the 6th Edition will negatively impact injured employees and will negatively impact permanent partial impairment awards. He urged the committee to be

careful and look closely before adopting the 6th Edition.

Chairman Ruby called on Mr. Sylvan Loegering, North Dakota Injured Workers' Support Group, West Fargo, for comments regarding the status report on the WSI independent performance report evaluation. Mr. Loegering said he is not familiar with the differences between the 5th and 6th Editions of the *AMA Guides to the Evaluation of Permanent Impairment*.

In response to a question from Representative Ruby, Mr. Timothy Wahlin, Workforce Safety and Insurance, said in comparing the 5th Edition to the 6th Edition of the *AMA Guides to the Evaluation of Permanent Impairment*, the permanent partial impairment measurements in the 6th Edition more closely mirror the measurements in the 4th Edition than they do the 5th Edition. He said if a hybrid or blended approach were used, it would likely be difficult to administer.

Chairman Ruby called on Mr. Wahlin to present information regarding the outcome of WSI's continuing jurisdiction review project. He said during the 2007-08 interim, WSI conducted a voluntary continuing jurisdiction project in which WSI accepted applications requesting WSI to exercise its continuing jurisdiction. He said in order to qualify, an injured employee must have a claim accepted between 1995 to present and could not have any litigation pending.

Mr. Wahlin said in the course of the continuing jurisdiction project, WSI reviewed 426 applications, which covered a 13 and one-half-year period of claims history. He said of these 426 claims, WSI granted some form of continuing jurisdiction as follows:

- Eleven claim reviews resulted in complete reversal. He said this was typically the case in which there was discovery of new evidence.
- Eight claim reviews resulted in partial reversal due mainly to application of the aggravation law based on newly acquired evidence.
- Three claim reviews resulted in partial reversal requiring payment of a medical bill.
- Three claim reviews resulted in partial reversal based on payment of some portion of indemnity payments.
- Seven claim reviews resulted in the parties signing a stipulation, usually resulting in the payment of a medical bill.
- Two claim reviews resulted in some type of stipulation of an indemnity payment.
- Two claim reviews resulted in the injured employee being granted a permanent partial impairment evaluation.
- Three claim reviews resulted in reopening a case in which there was an appeal period but no further adjudication.
- Three claim reviews resulted in reopening of a claim within an appeal period and some further adjudication.

In response to a question from Representative Ruby, Mr. Wahlin said WSI exercises continuing jurisdiction when there is new information or missed information. He said annually WSI typically exercises continuing jurisdiction 10 times to 12 times. He said the frequency with which WSI exercises continuing jurisdiction varies, but generally it is infrequent. Additionally, he said, when WSI determines it was wrong, it also uses continuing jurisdiction.

In response to a question from Senator Wardner, Mr. Wahlin said the continuing jurisdiction project limited its review to 1995 claims forward. He said continuing jurisdiction review was denied if the case was pre-1995.

PREVIOUS CLAIM REVIEW DISCUSSION

Representative Ruby said in the case of Mr. Arlo Weisser, one of the primary issues raised was the situation of the long-term disability and the related use of medications which may have resulted in further injury. As it relates to this claim review, Representative Ruby questioned whether there might be any studies related to this issue and whether there might be any information relating to how other states deal with this issue of injury resulting from long-term medication. He suggested this issue should be addressed in further detail at a future meeting.

In response to a question from Representative Ruby, Mr. Wahlin said to the extent the injury is work-related, it is covered under the state's workers' compensation system. Additionally, he said, the same is true for injuries related to a work-related injury that is impacted by malpractice, as well as those work-related injuries impacted by medication side effects.

Representative Ruby said in the case of Mr. Weisser, if stomach problems or stomach cancer occur, it would be very difficult for an injured employee to establish causation.

Mr. Wahlin said Mr. Weisser made allegations that his stomach problems were related to medication side effects; however, WSI found no link to the work-related medications. Therefore, he said, that claim was denied. He agreed that it is very difficult to link cancer to a workplace injury or to workplace injury-related medications.

Representative Ruby questioned whether it would be possible for WSI to take actions to revise its forms commonly used in notifications without requiring legislative directive.

Mr. Wahlin said WSI has a mass communications committee that is charged with reviewing standard forms used by WSI. He said this review is an ongoing process, and as part of this review, the committee will consider the grade level or readability of the WSI forms.

Representative Ruby said at a future meeting, he would like WSI to provide a status report on these ongoing activities to review forms and would like to review changes that have been made to these forms as a result of the mass communications committee activities.

Representative Ruby said at his claim review, Mr. Weisser questioned whether he would be eligible to receive confirmation that his dependents or spouse would be eligible to receive benefits or funeral benefits upon his death.

Mr. Wahlin said to his knowledge WSI has not provided Mr. Weisser written confirmation that he would be eligible for these benefits upon his death. He said he is apprehensive to issue a letter because a situation may arise between the issuance of the letter and the death of a claimant, such as the law may change.

Representative Ruby requested WSI issue the confirmation it said it would issue by drafting a carefully worded letter that conveys its confirmation to Mr. Weisser.

Representative Amerman said as a member of the interim Industry, Business, and Labor Committee, he has become aware of issues relating to federal health care reform. Of particular interest, he said, is the issue of how in 2014 health insurance policies will not be able to deny coverage for preexisting conditions. He questioned how this might impact workers' compensation. He said he posed this question to Mr. Joshua Goldberg, National Association of Insurance Commissioners, that with the implementation of federal health care reform legislation in 2014, health insurance plans will not be permitted to deny coverage to an individual and would not be allowed to impose a preexisting condition exclusion for a workplace injury; however, nothing in the new law would prevent health plans from specifying, as most do today, that their coverage of such a claim would be secondary to the state's workers' compensation insurance policy.

Mr. Wahlin said that as it relates to federal health care reform, he is not aware of any changes that will impact how WSI adjudicates claims.

Senator Wardner said a common thread in the three claims the committee has reviewed is that the injured employee did not appear to understand the process.

In response to a question from Senator Wardner regarding whether WSI sends injured employees a document that lays out the pertinent times in the form of a timeline, Mr. Wahlin stated all WSI notices provide notice of the injured employee's opportunity to appeal. He said WSI does a fairly good job at notifying injured employees, but he does recognize WSI always could do more.

Chairman Ruby said committee members should have received the brochure *Workers' Compensation: A Guide for Injured Workers*, which all injured employees are supposed to receive when they file their claim.

Senator Wanzek said the common thread in the cases reviewed is that the injured employee does not understand the consequences of the 30-day window for appeal. He questioned whether it might be possible to provide injured employees with a telephone number an injured employee could call to

receive information to better understand the consequences of the WSI notices.

Representative Ruby questioned what steps WSI takes to inform an injured employee of the consequences of that injured employee's actions. For example, he said, the consequences of attempting return to work.

Mr. Wahlin said to the extent the injured employee has a rehabilitation plan, the rehabilitation plan attempts to provide the return-to-work information. He said these communications with injured employees are very complex.

In response to a question from Representative Amerman regarding possible ways WSI can help employers do a better job in assisting employees, Mr. Wahlin said in North Dakota there are approximately 21,000 employers. He said of these 21,000 employers, more than 60 percent are mom and pop shops, and it is difficult for WSI to train these employers. He said WSI has been more successful in training large employers.

Representative Ruby said he supports WSI's efforts to inform employers, but he would request that WSI seek to continue to improve this service.

Senator Wanzek said as it relates to the 30-day appeal deadline, he would like the committee to consider the concept of allowing one-time extensions if there are extenuating circumstances. He said he understands there is a need for finality; however, he also sees the value to providing a one-time exception.

Mr. Wahlin said to the extent the Legislative Assembly wants to change the 30-day appeal period, he would request that that change be very clear, to minimize WSI being put in the position to make the judgment call on whether an injured employee has established an extenuating circumstance. For example, he said, in the case of Mr. Weisser, he missed his appeal deadline by 11 years, and he questioned how this might be addressed under such an extenuating circumstances exception. Additionally, he said, during previous interims there has been discussion of extending the 30-day appeal period to a longer period, such as 45 days, but the reality is that those 15 extra days would not make any meaningful difference.

Representative Ruby questioned whether it might be of some assistance for WSI to provide a 10-day reminder notice for injured employees during the 30-day appeal period. He said the reminder notice would have very little cost but may have a large benefit.

Mr. Loegering said he would like to see services for injured employees which offer proactive assistance before the 30-day appeal period expires. He said as it relates to this proactive approach, he distributed written remarks ([Appendix B](#)).

Chairman Ruby called on Mr. Bryan Klipfel, Executive Director and CEO, Workforce Safety and Insurance, for comments regarding the issues raised by the injured employees who have had their claims reviewed by the Workers' Compensation Review

Committee. Mr. Klipfel said that after listening to the injured employees, he has taken to heart the communication issues that were raised. He said WSI could consider whether a telephone call could precede the final notice. He said it would not be a perfect solution but would offer some proactive assistance.

Senator Wanzek said injured employees are not familiar with the workers' compensation system, and this makes them especially vulnerable.

Mr. Klipfel said it is not feasible to telephone every injured employee for every notice, but he said it should be possible to arrive at some system that makes sense to better inform injured employees.

Representative Amerman said in the case of large employers, such as Bobcat, which has monthly safety meetings, it might be possible to use these meetings to slip in information such as the importance of the 30-day appeal period.

Mr. Klipfel said WSI takes additional efforts to educate employers through what is called workers' compensation 101 training.

Chairman Ruby called on Mr. Vetter for comments regarding the issues raised by injured employees. Mr. Vetter said he supports the idea of WSI notifying injured employees by telephone. He said he understands that WSI needs to draw the line someplace and have some finality, but it seems steps could be taken to improve this system.

CASE REVIEW

Case Summary

Ms. Sharon Eslinger was the injured employee presenting her case for review. She was accompanied by her daughter, Ms. Michelle Eslinger, and by Mr. Vetter.

Mr. Kocher provided a summary of Ms. S. Eslinger's case. He said Ms. S. Eslinger filed an application for workers' compensation benefits in connection with an injury to her right knee, left wrist, and cervical spine which occurred on February 20, 1995, while working as a manager of the American Legion Club. He said the accident occurred while she was carrying out garbage and she slipped on some ice. He said Ms. S. Eslinger was diagnosed with a medial meniscal tear on the right and Grade II chondromalacia over the interior pole of the patella. He said WSI accepted liability for Ms. S. Eslinger's injury, and benefits were paid accordingly.

Mr. Kocher said Ms. S. Eslinger was paid temporary total disability benefits from May 1, 1995, through August 24, 1995, at which time she was released to return to work without restrictions. He said upon release to return to work, Ms. S. Eslinger received a notice of intention to discontinue/reduce benefits (NOID). He said Ms. S. Eslinger appealed the NOID, and an order denying further disability benefits was issued.

Mr. Kocher said Ms. S. Eslinger and her attorney appealed the order, and an administrative hearing was held. He said on August 27, 1996, the

administrative law judge issued his recommended findings of fact, conclusions of law, and order indicating the order denying disability benefits was affirmed. He said WSI adopted the administrative law judge's findings of fact and conclusion of law and Ms. S. Eslinger did not appeal this order, and as such the order became final.

Mr. Kocher said on August 4, 1996, Ms. S. Eslinger filed a reapplication for benefits, and on September 11, 1996, WSI issued an order denying disability benefits upon reapplication. He said Ms. S. Eslinger requested a hearing on the September 4, 1996, order, and on April 10, 1997, the administrative law judge issued recommended findings of fact, conclusions of law, and order indicating "it is ordered that the order denying disability benefits upon the reapplication dated September 11, 1996, is reversed in so far as it held of a matter of law that the claimant had not proven actual wage loss attributable to the work injury in connection with her reapplication for disability benefits. It is further ordered the claim be remanded to the bureau for determination of whether the claimant has sustained a significant change in medical conditions as set forth in Section 65-05-08(2)(a), N.D.C.C."

Mr. Kocher said on May 16, 1997, WSI issued an order adopting the recommended findings of fact and conclusions of law of the administrative law judge. He said Ms. S. Eslinger's temporary disability benefits were reinstated retroactive to May 4, 1996, and she was paid temporary total disability benefits from May 4, 1996, through May 3, 2007, at which time she was declared permanently and totally disabled. He said Ms. S. Eslinger was notified by WSI at that time that she would receive permanent total disability benefits until she reached full retirement age as determined by the Social Security Administration. He said Ms. S. Eslinger appealed the notice indicating she did not agree that her permanent total disability benefits should end at the time she reached retirement age.

Mr. Kocher said on August 2, 2007, Ms. S. Eslinger requested the services of the Decision Review Office. He said the review specialist reviewed the order and on August 30, 2007, issued a certificate of completion indicating no change to the order. He said that on September 28, 2007, Ms. S. Eslinger and her attorney requested a hearing on the July 19, 2007, order. He said a hearing was held before an administrative law judge, and on February 6, 2008, the administrative law judge issued her recommended findings of fact, conclusions of law, and order. The order indicated in the conclusion "I concluded that while Ms. Eslinger had a vested interest in an expectation that she would receive undiminished benefits when she was injured in 1995 that interest changed as time progressed and her situation changed. When she was released to return to work on July 28, 1995, she was no longer qualified to receive, and had no vested interest in receiving disability benefits. Likewise, WSI no longer had an obligation to pay her disability benefits after

her doctor released her to return to work. It does not matter that WSI paid her benefits after August 1, 1995, and until August 24, 1995, because she was not entitled to any benefits after August 24, 1995, and, until she demonstrated that she was again eligible for benefits, WSI had no obligation to pay benefits after that date." He said the order went on to state "I conclude that under the facts agreed to by the parties in this case, the presumption that an injured employee who begins receiving Social Security retirement benefits, or who attains retirement age for Social Security retirement benefits is not eligible for disability benefits, applies to Ms. Eslinger's claim. She is therefore not entitled to receive disability benefits for her work injury after she becomes eligible for Social Security retirement benefits." He said the WSI order dated July 19, 2007, was affirmed.

Mr. Kocher said on February 12, 2008, WSI adopted the administrative law judge's recommended findings of fact and conclusions of law. He said Ms. S. Eslinger and her attorney appealed WSI's order. He said on June 26, 2008, the district court judge issued her decision stating "the order awarding permanent total disability benefits dated July 19, 2007, is affirmed." He said she stated that "In the present case the issue revolves around whether the gap in receipt of the benefits divested Ms. Eslinger of her expectations and WSI's obligations to continue to receive benefits after she reached retirement age. The administrative law judge correctly concluded that when Ms. Eslinger was released to return to work on July 28, 1995, she lost her vested interest in receiving disability benefits. She did not regain that interest when she was awarded benefits at a later date. Therefore, Ms. Eslinger is not entitled to receive disability benefits for her work injury after she became eligible for Social Security retirement benefits under the provisions of Section 65-05-09.3(2)."

Mr. Kocher said on September 8, 2008, Ms. S. Eslinger and her attorney appealed the district court judge's decision to the North Dakota Supreme Court. He said on May 27, 2009, the Supreme Court issued a decision in this case. He said the Supreme Court stated "[w]e affirm, concluding WSI did not error in determining the retirement presumption statute, N.D.C.C. Section 65-05-09.3(2) applied to Ms. Eslinger's claim." He said the Supreme Court decision went on to indicate "Ms. Eslinger did not receive disability benefits for the eight month period between August 24, 1995, and May 4, 1996. Although she now suggests she remained disabled and unable to work during that period, Ms. Eslinger did not appeal from WSI's final order finding that she had been released to return to work, was no longer disabled, and was not eligible for further disability benefits. Furthermore, Ms. Eslinger applied for and received unemployment compensation benefits from October 1995, until April 1996, an individual is eligible for unemployment compensation benefits only if she is able to work, available for work, and actively seeking employment. N.D.C.C. Section 52-06-01(3)." He said

the decision went on to state "[w]here, as in this case, a claimant receiving total disability benefits experiences an improvement in her medical condition, is released to return to work, and is found to be no longer disabled, resulting in termination of her disability benefits, the claimant no longer has a reasonable expectation, or right to rely upon, continued disability benefits."

Mr. Kocher said Ms. S. Eslinger continued to receive permanent total disability benefits and supplemental benefits through August 31, 2009, at which time she reached full retirement age as determined by the Social Security Administration. He said effective September 1, 2009, Ms. S. Eslinger began receiving the additional benefits payable under Section 65-05-09.4. He said her weekly benefit amount was calculated to be \$139.65. He said her additional benefit rate was determined in accordance with Section 65-05-09.4, calculating Ms. S. Eslinger had received 13.5 years of disability benefits which placed her in the category of "at least 13 years and less than 15 years of disability, 35 percent of weekly benefit" calculation. He said Ms. S. Eslinger will be entitled to receive this additional benefit payable from September 1, 2009, through March 17, 2023.

In response to a question from Representative Ruby, Mr. Kocher said Ms. S. Eslinger reapplied for benefits, claiming that there had been a worsening of her medical condition. He said upon her reapplication, coverage would be retroactive to the date of the reapplication. Chairman Ruby called on Ms. S. Eslinger to further clarify the case summary and to address the issue she would like the committee to consider.

Ms. S. Eslinger distributed the following three documents:

1. Doctor's return to work confirmation dated August 4, 1995, and signed by Ms. Kim Nelson;
2. Letter from Lawrence A. Dopson, Special Assistant Attorney General, to J. W. Carlson, M.D., dated August 13, 1996; and
3. Correspondence from J. W. Carlson, M.D., to Mr. Dopson dated October 29, 1996.

These documents are on file in the Legislative Council office.

Ms. S. Eslinger said in reviewing her case there are two very important dates--July 28, 1995, and October 25, 1995. She said she takes issue with the documentation WSI used to determine she could return to work. She said within her file she has been unable to find any documentation other than the doctor's return-to-work confirmation form which would support the finding that she could return to work. Additionally, she said, the doctor's return-to-work confirmation form was not even signed by a doctor, but was instead signed by a Ms. Kim Nelson, who is employed by the Bone and Joint Center. Furthermore, she said, the correspondence from her treating physician indicated he did not have any recollection of a specific conversation with Ms. Nelson

in regard to the completion of the doctor's return-to-work confirmation form. She said although the doctor did ultimately confirm the return-to-work form, he was not able to recall whether he had ever told Ms. S. Eslinger whether she could return to work.

Ms. S. Eslinger said she takes issue with this doctor's return-to-work confirmation form for several reasons, including the fact that she had to ask WSI several times to receive a copy of this form, and when she finally did receive it she realized it was not signed by her physician. Additionally, she said, she questions why her physician did not take any steps to contact WSI in October 1995 when her medical condition deteriorated even further. She said it seems like there are ethical problems with an office worker signing a form that is intended to be signed by a physician. Additionally, she said, WSI should not have accepted this return-to-work form without the physician's authorization. She said this particular transaction had a negative impact on her WSI claim.

In response to a question from Representative Ruby, Mr. Kocher said in Ms. S. Eslinger's case, although the physician did not sign the doctor's return-to-work confirmation form, the doctor did validate the return to work via his letter to the special assistant Attorney General dated October 29, 1996.

Ms. M. Eslinger stated that in her experience in a clinical setting, typically when a professional signs a document, that professional includes initials designating the professional's level of education, such as RN, CNA, or MD. She said in the case of the doctor's return-to-work confirmation form, the individual who signed the form did not use any initials indicating a level of medical expertise.

In response to a question from Representative Ruby, Mr. Kocher said Ms. S. Eslinger's appeal of the return-to-work decision was upheld. He said when an injured employee is released to go back to work and then experiences a worsening of the condition, typically the appropriate action is to reapply for WSI wage loss benefits. Ms. S. Eslinger said she did not appeal this decision because she was told the appropriate action was to reapply for benefits.

Representative Ruby said in the case of Ms. S. Eslinger, between July 28, 1995, when Ms. S. Eslinger was authorized to return to work, and October 25, 1995, there appears to have been a worsening of her condition.

Ms. S. Eslinger said that in her case when the doctor came to realize there was a worsening in her condition, the doctor never took any steps to notify WSI of her condition. She said she thinks a medical provider should update WSI each time a patient is treated.

In response to a question from Representative Amerman, Ms. S. Eslinger said she had a very difficult time finding and receiving a copy of the doctor's return-to-work confirmation form. She said although the form indicates she was cleared to return to work, she has no recollection of the doctor ever having this discussion with her.

Ms. S. Eslinger said it is very difficult for an injured employee to navigate through the workers' compensation system. She said she would hope that other injured employees who have to deal with WSI are provided the material they need and the resources they need to better understand the system.

Representative Ruby stated that if he understands Ms. S. Eslinger's case correctly, the reason she is covered under the new retirement presumption law instead of the old retirement presumption law is that there was an eight-month gap between when she was authorized to return to work and when her condition worsened and the physician said she would be unable to work.

Mr. Kocher said the North Dakota Supreme Court decision does a good job of summarizing the events of the case. Senator Wanzek pointed out that in the Supreme Court decision, Justice Mary Muehlen Maring issued a dissent, focusing on the inadequacy of the return-to-work notice.

Senator Wanzek said in a previous interim, the committee reviewed a similar case relating to the retirement presumption law. He said the committee will be receiving additional information regarding the retirement presumption law as part of the WSI performance audit. He said he recognizes that there are issues related to an injured employee who has a long-term injury and how that individual is impacted by the inability to set money aside for retirement.

In response to a question from Senator Wardner, Ms. S. Eslinger said she agrees that the doctor's return-to-work confirmation form is a very important document; however, her attorney did not see this form until after the 1997 hearing.

Ms. S. Eslinger said that in addition to her medical issues, when she initially filed for workers' compensation benefits, her employer disputed the claim. Additionally, she said, following her injury, her employer terminated her employment.

Representative Ruby said he views workers' compensation as a wage replacement program. He said typically an employee will retire once the employee reaches retirement age. However, he said, the issue arises whether the additional benefits payable program is adequate to compensate the injured employee for lost earning history.

In response to a question from Senator Wanzek, Mr. Kocher said Ms. S. Eslinger's additional benefits payable is scheduled to continue until the year 2023. Additionally, he said, it is interesting to note that when an injured employee receives workers' compensation benefits and Social Security disability benefits, there is an offset that decreases the amount to the workers' compensation benefits. However, he said, when an injured employee receives additional benefits payable and Social Security retirement payments, there is no offset and the injured employee receives the full amount of each benefit.

Mr. Vetter said he takes issue with the retirement presumption that was created in 1995. He said when the original deal was struck with the injured employee

in 1919, it was not intended to have benefits terminated at retirement age. He said he recognizes that workers' compensation is not a retirement plan, but it is an insurance plan.

Mr. Vetter said in Ms. S. Eslinger's case, mistakes have been made, and now she is suffering as a result. He questioned whether there might have been foul play in her case.

Ms. M. Eslinger said through her mother's presentation, it should be apparent that there are some redundancies in the system, and there may be ways to improve the system. Additionally, she said, injured employees undertake a very emotional journey, which can take over that injured employee's life. For example, she said, not only is she aware of her mother's situation, but a colleague has been injured and has come to realize how consuming and challenging it is to deal with the state's workers' compensation system. She said she would not wish a workplace injury on anyone. She said she would recommend the workers' compensation program be changed to provide mental health support to help injured employees deal with issues such as anger management.

Ms. M. Eslinger said in her mother's case, she takes issue with the doctor's return-to-work confirmation form and how it was dealt with by WSI. She said overall if we were to look at the facts of her mother's case instead of focusing on the process, she feels there would be a different outcome. She said her mother's medical condition has not improved, and she is unable to work and unable to earn a living.

Ms. M. Eslinger said one portion of the system that seems inappropriate is that WSI is allowed to have an advocate that attends medical consultations of the injured employee. She said a medical consultation is private, and it is unacceptable for WSI to interject that advocate into the process unless that patient authorizes that participation.

Ms. M. Eslinger said she appreciates the opportunity for her mother to be able to present her case to the committee, as well as for the committee to consider her comments as well as Mr. Vetter's comments.

Chairman Ruby clarified that the purpose of the case review is for the committee to consider whether the law should be changed. He said the review is not intended to change the outcome of the injured employee's case, but instead is designed to modify the law as it applies to future claimants.

Workforce Safety and Insurance

Chairman Ruby called on Mr. Wahlin to provide testimony regarding the issues raised regarding Ms. S. Eslinger's case. Mr. Wahlin said Ms. S. Eslinger's case focuses on the retirement presumption, which was enacted in 1995. He said when the law was initially enacted in 1995, the legislation clarified that workers' compensation is a wage loss benefit. He said initially the intent was that the law would apply retroactively to all claims

regardless of the date of injury. He said in 1997 the additional benefits payable law was enacted. He said the additional benefits payable law was intended to compensate injured employees for the loss of their contribution to Social Security retirement. Then, he said, in 1998 there were two Supreme Court cases that recognized an injured employee has a vested interest or an expectation interest in workers' compensation benefits; therefore, the 1995 law does not apply to an injured employee who has a 1995 injury and receives uninterrupted wage loss benefits.

Mr. Wahlin said the workers' compensation system is a balance, seeking to have a fiscal balance of zero at the end of the year. He said there are financial issues related to retroactive application of workers' compensation laws.

Mr. Wahlin said since 1995, legislation has been introduced each legislative session to repeal the retirement presumption. He said in 2009, Senate Bill No. 2426 and House Bill No. 1525 would have repealed the retirement presumption. The fiscal impact of such a repeal is estimated at \$20 million to \$27 million with an approximate \$4 million per year rate impact.

Mr. Wahlin said in calculating Ms. S. Eslinger's benefits, preretirement presumption, and postretirement presumption, she has recognized a decrease of \$63 per week. He said this calculation takes into account the fact that she no longer experiences a Social Security offset.

In response to a question from Senator Wanzek, Mr. Wahlin said in the case of an injured employee who is injured while working after the age of the retirement presumption, the wage loss benefits are capped at three years.

Mr. Wahlin said an interesting element in Ms. S. Eslinger's case is that in 1995, when her claim was filed there was an excess of cases being litigated. Therefore, he said, WSI was trying to deal with high caseloads with limited staff, and as a result there were some imperfections in how WSI dealt with these claims. He said technically, her reapplication should have been denied because there was no actual loss of wages.

Interested Persons

Chairman Ruby called on Mr. Loegering for comments regarding Ms. S. Eslinger's case. He said it is important for the system to recognize the mental

health of an injured employee. He said a workplace injury can consume an injured employee, and support should be provided to support the injured employee as well as the injured employee's family.

Mr. Loegering said the issues raised by Ms. S. Eslinger regarding her requests for records should be considered. He said an injured employee needs to know how to request a complete file, as there are very specific things that need to be specified in the request. Overall, he said, requesting a copy of the injured employee's file is very complicated to a layperson.

Mr. Loegering said the issues Ms. S. Eslinger raised regarding her termination following her injury are not uncommon. He said even though an employer is prohibited from terminating an employee's employment based solely on the workplace injury, the reality is that this takes place more often than you would think. He said the current fraud law under Section 65-05-33 addresses fraud.

Mr. Loegering said current law requires proof of wage loss when an injured employee reapplies for benefits. Therefore, he said, when an injured employee is released to return to work and then loses his or her job and reapplies, that injured employee is not eligible for wage loss benefits. He said the system is designed so the injured employee has the burden of proof to show loss of wages.

Chairman Ruby thanked Ms. S. Eslinger for attending the meeting and presenting her claim for review. He said it is likely that the committee will address some of the issues raised at future committee meetings. He said the committee meetings are open to the public, and she is welcome to attend anytime she wishes.

Chairman Ruby said in scheduling the next meeting, he will work with the necessary parties to schedule the presentation of the WSI performance evaluation.

No further work remaining, Chairman Ruby adjourned the meeting at 4:18 p.m.

Jennifer S. N. Clark
Committee Counsel

ATTACH:2