

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

### WORKERS' COMPENSATION REVIEW COMMITTEE

Wednesday, August 5, 2009  
Harvest Room, State Capitol  
Bismarck, North Dakota

Representative Dan Ruby, Chairman, called the meeting to order at 8:30 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:** See [Appendix A](#)

#### INTRODUCTION

Chairman Ruby welcomed the committee members and called on committee counsel to review the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management](#).

Committee counsel stated the Workers' Compensation Review Committee is a statutory committee, created under North Dakota Century Code Section 54-35-22, and therefore differs slightly from the typical Legislative Management interim committee. She said the statute provides the "committee shall operate according to the laws and procedures governing the operation of other legislative management interim committees." She said that in addition to the rules of operation and procedure, the Legislative Management chairman has requested to be informed of the committee's meetings scheduled outside the Bismarck area. She said if the committee follows the pattern of the previous Workers' Compensation Review Committees, it is likely the committee will be scheduling meetings across the state to accommodate injured employees having their claims reviewed.

Chairman Ruby called on Ms. Jodi Bjornson, Workforce Safety and Insurance (WSI), to review the workers' compensation legislation enacted by the 61<sup>st</sup> Legislative Assembly. She provided written material summarizing the bills that were enacted affecting WSI ([Appendix B](#)).

Ms. Bjornson said the bills enacted in 2009 which affect WSI can be classified in the following categories:

1. Organizational - Bills that affect WSI operations;
2. Injury services - Bills that affect benefits; and
3. Employer services - Bills that affect employer programs.

Ms. Bjornson reviewed House Bill Nos. 1464, 1035, 1101, 1455, 1061, and 1062; Senate Bill Nos. 2419 and 2056; House Bill Nos. 1063 and 1064; Senate Bill Nos. 2055, 2057, 2058, 2431, 2432, and

2059; House Bill Nos. 1201, 1561, 1151, 1073, and 1036; and Senate Bill No. 2071. She said the expected cumulative fiscal impact of the 2009 legislation will be a \$4.6 million increase in reserves for existing claims and a \$3.3 million per year increase for future claims. She said of these 22 bills, 18 have been implemented by WSI, 3 are in the process of being implemented, and 1 bill requires administrative rules and WSI has begun that rulemaking process.

In response to a question from Representative Wald, Ms. Bjornson said under House Bill No. 1464, the decision of an administrative hearing officer is final for WSI, whereas under the old law WSI had the option of accepting, rejecting, or modifying the administrative hearing officer's decision.

In response to a question from Representative Amerman regarding House Bill No. 1035, Ms. Bjornson said as of May 2009, the WSI fund reserves plus available surplus were at approximately 130 percent of discounted reserve liabilities.

In response to a question from Representative Wald regarding House Bill No. 1101, Ms. Bjornson said effective July 2009, the state's average weekly wage was increased to approximately \$665 per week.

In response to a question from Representative Wald, committee counsel said in considering whether to recommend House Bill No. 1061, the 2007-08 Workers' Compensation Review Committee reviewed the history of the statute defining artificial members; however, the committee did not consider the law of neighboring states. She said the committee did consider the fiscal impact of the proposed legislative change and the legislation was drafted to require the injured employee incur an injury in order to qualify for WSI coverage of a damaged artificial member.

In response to a question from Representative Wald regarding House Bill No. 1063, Ms. Bjornson said when reviewing a claim WSI conducts an extensive review of prior existing conditions, including sending an injured employee a prior injury questionnaire. She said under this new legislation, if WSI determines an injury is not work-related, WSI is no longer responsible or liable for that coverage following the determination.

In response to a question from Representative Ruby, Ms. Bjornson said House Bill No. 1151 clarifies that by virtue of applying for a WSI grant an employer authorizes release of the disclosure of the name of the grant recipient and the amount of the grant.

In response to a question from Representative Wald regarding WSI grant programs, Mr. John Halvorson, WSI, said the worker-grant program has temporarily been suspended as WSI considers funding issues. He said generally there is a continuing appropriation for grants and safety programs.

### CLAIM REVIEW

Chairman Ruby called on committee counsel to review the application and claim review procedure used by the Workers' Compensation Review Committee during the 2007-08 interim. She distributed a proposed application packet ([Appendix C](#)).

Committee counsel first reviewed the application procedure. She said the proposed application packet includes a cover letter explaining the application process and eligibility requirements, a copy of Section 54-35-22, a "Release of Information and Authorization" form, and a "Review Issue Summary" form.

Committee counsel reviewed Section 54-35-22, including the statutory requirement the committee meet once each calendar quarter or less often if the committee chairman determines that meeting is not necessary because there are no claims to review, the statutory eligibility requirements for claim review, the open meeting provisions, and the confidentiality provisions.

Committee counsel said traditionally the committee has considered how best to notify the public of the committee's activities in order to solicit injured employees to have their claims reviewed, confidentiality issues and how to protect the confidentiality of the WSI records of injured employees, and whether there are steps the committee could take to better assist injured employees in organizing their issues for review.

Committee counsel said in the past the committee has posted the application packet on the legislative branch website, informed the AFL-CIO, WSI, and the State Bar Association of North Dakota of the online application packet and has notified all legislators of the committee's charge. Additionally, she said, during previous interims the committee has made an affirmative decision to hold committee hearings around the state as appropriate to try to accommodate the location of the injured employees having their claims reviewed by the committee. She said in considering whether steps could be taken to improve notification, the committee may wish to consider also notifying the North Dakota Chamber of Commerce and the North Dakota Medical Association.

Committee counsel said the committee procedure adopted in the past to determine eligibility for claim review and to prepare the injured employee for the committee meeting at which the claim was reviewed is as follows:

1. An injured employee would submit to the Legislative Council office a complete "Release

of Information and Authorization" form. In addition, the applicant could submit a "Review Issue Summary" form on which the applicant could summarize the issues the applicant wanted the committee to review.

2. Upon receipt of a completed application, the Legislative Council staff forwarded a copy of the application information to an assigned ombudsman at WSI who reviewed the application to make a recommendation regarding whether:
  - a. The applicant was an injured employee or the survivor of an injured employee;
  - b. The workers' compensation claim was final; and
  - c. All of the administrative and judicial appeals were exhausted or the period for appeal had expired.
3. Following this review, the WSI ombudsman contacted committee counsel to provide a recommendation regarding eligibility for review. Upon receipt of this recommendation, committee counsel contacted the committee chairman to make a determination of eligibility.
4. Upon a determination of eligibility, the injured employee was contacted by committee counsel and the ombudsman to begin the case preparation.
  - a. Regardless of whether the injured employee accepted the assistance of the ombudsman, the ombudsman prepared a summary of the case to present at the committee meeting.
  - b. At the injured employee's discretion, the ombudsman assisted the applicant in organizing the issues for review.
  - c. The ombudsman prepared a case review packet and included this in a binder of information prepared for each committee member, committee counsel, and a WSI representative. Although these binders were distributed at each committee meeting, they remained the property of WSI and were returned to committee counsel at the completion of each committee meeting.
5. Before each committee meeting the ombudsman met with committee counsel to review the case summary and workers' compensation issues being raised.
6. Upon receipt of these workers' compensation issues, committee counsel notified the WSI representative of the identity of the injured employee who would be appearing before the committee for a case review, and, as appropriate, the statutory citations of the basic issues being raised by the injured employee.

Committee counsel reviewed the committee meeting procedure that has been followed during previous interims. She said for each of the claims reviewed by the committee:

1. Committee members had an opportunity before and during each committee meeting to review the binder of case review packets and to review each injured employee's WSI electronic records.
2. The ombudsman summarized the injured employee's case.
3. The committee received a list of the workers' compensation issues brought forward for review. At the discretion of the injured employee, these issues were presented by the ombudsman, the injured employee, a representative of the injured employee, or more than one of these individuals.
4. One or more representatives of WSI commented on the workers' compensation issues raised.
5. Interested persons were invited to comment on the workers' compensation issues raised as part of the claim review.
6. Committee members had an opportunity to discuss the issues raised.

Committee counsel said historically each of the claims reviewed is allocated a half day--either the morning, afternoon, or evening portion of the committee meeting--during which the initial review is conducted. Following the initial review, the committee retains the authority to continue to discuss the issues raised as part of the review. Periodically, the committee would request additional information on specific issues and review this information at one or more future meetings. During each committee meeting at which claims are reviewed a WSI representative was available to access the injured employees' records electronically.

Committee counsel said traditionally the role of the WSI ombudsman has been filled by Mr. Chuck Kocher, the WSI representative role has been filled by Mr. Tim Wahlin; and the role of providing WSI electronic records has been provided by Ms. Patsy Peyerl. She said it is her understanding that these same individuals are willing to continue to perform these roles during the 2009-10 interim.

In response to a question from Representative Wald, committee counsel said during the previous two interims the committee has not been faced with a situation of an injured employee filing an application for a second claim review. However, she said, in looking at the statutory charge, the language indicates the committee shall review workers' compensation claims that are brought by qualified applicants.

Representative Ruby suggested if the committee is faced with a situation of an injured employee filing a second application for review, the committee should prioritize claims and make sure that applicants filing for the first time are given priority. However, he said, he is not opposed to allowing an injured employee coming before the committee a second time.

Senator Wanzek said the issue of how to address a second appearance by an applicant seems to

depend on the committee's caseload and whether the committee is able to schedule a second claim review.

Representative Amerman agreed the committee should prioritize if the situation arises.

In response to a question from Representative Wald, committee counsel said during the 2005-06 interim the committee reviewed 11 claims and during the 2007-08 interim the committee reviewed 15 claims. She stated with this caseload the committee was kept very active and this seems to indicate the efforts to spread the news of the committee's activities were successful.

The committee requested Legislative Council staff to publish the proposed application packet on the legislative branch website and notify legislators and the following organizations of the online applications: WSI, North Dakota Chamber of Commerce, North Dakota Medical Association, AFL-CIO, and the State Bar Association of North Dakota.

## **WORKERS' COMPENSATION LAW STUDY**

Chairman Ruby called on committee counsel to present the [Workers' Compensation Injuries Study - Background Memorandum](#). Committee counsel said this is the first time in the committee's history the committee has been charged with a Legislative Management study. She said House Concurrent Resolution No. 3008 provides for the Legislative Management study of workers' compensation laws in this state and other states with respect to prior injuries, preexisting conditions, and degenerative conditions.

Committee counsel said the legislative background of this study indicates the resolution was introduced by individual legislators and supported by WSI. She said the committee testimony indicates the resolution was introduced in response to a recommendation of the 2008 WSI performance evaluation report conducted by Berry, Dunn, McNeil, & Parker (BDMP). She said recommendation 6.6 of the report provides:

In our work, BDMP observed that the North Dakota statute is more conservative than most other jurisdictions as it relates to prior injuries, pre-existing or degenerative conditions, triggers and aggravations and impairment rating percentages. BDMP recommends that a study group formed of all the stakeholder groups be brought together to review how other jurisdictions' statutes handle these important Workers' Compensation issues. Suggested sources of information for this study group include:

- Edward M. Welch, Workers' Compensation Center Michigan State University, *Oregon Major Contributing Cause Study*, <http://www.cbs.state.or.us/wcd/administration/finalmcc.pdf>, (Oct, 2000)
- Clayton, Ann, *Inventory of Workers' Compensation Laws - Beta Version*,

March 2007, Workers' Compensation Research Institute, Cambridge, MA : Only available to members of WCRI and/or IAIABC.

Committee counsel said the background memorandum includes an appendix that provides the performance evaluation addressing this issue, including conclusions and recommendations and WSI's response to these recommendations.

Representative Wald requested committee members be provided copies of the two documents referenced by BDMP.

Chairman Ruby called on Mr. Dean Haas, North Dakota Medical Association, for comments regarding the committee's study of the state's workers' compensation laws. He distributed written material ([Appendix D](#)).

Mr. Haas reviewed Sections 65-01-02(10)(b)(7) and 65-01-02(10)(b)(9), which exclude from compensation injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms to the preexisting injury, disease, or other condition unless the employment substantially accelerates the progress or substantially worsens in severity, and a latent or asymptomatic degenerative condition caused in substantial part by employment duties which is triggered or made active by a subsequent injury. He said the problem with the law is causation is notoriously difficult to untangle. He said almost every injury could be linked to some preexisting weakness or susceptibility. Therefore, he said, the North Dakota Medical Association recommends the Legislative Assembly consider amending Sections 65-01-02(10)(b)(7) and 65-01-02(10)(b)(9). His testimony included proposed amendments.

Chairman Ruby called on Ms. Bjornson to introduce the executive director and deputy director of WSI. Ms. Bjornson introduced Mr. Clare Carlson, Deputy Director, and Mr. Bryan Klipfel, Executive Director. Mr. Klipfel said he looks forward to working with the committee as it pursues its claim review activities and study charges.

In response to a question from Senator Wardner, Mr. Klipfel said as WSI implements its new computer system the new system should help with policyholder services and special investigative services. He said the existing computerized claim system works well, but the new system should work at least as well as the existing system as it relates to the claims system.

In response to a question from Representative Amerman, Mr. Klipfel said there has been a change in the role of the WSI Board of Directors due to the recent initiated measure. He said the transition seems to be working well and the board is now serving in an advisory role. He said the board continues to meet regularly and conduct business.

In response to a question from Representative Wald regarding whether tough economic times relate to an increase in workers' compensation claims, Mr. Klipfel said at this point the data does not indicate

any significant change in the number of filed claims, but as time passes and WSI gathers more data there will be a better basis to make a statement regarding whether there is any relationship between the economic health of the state and the number of claims filed at WSI.

Mr. Klipfel said the special investigative unit is still active at WSI. He said within the unit there is currently one investigator and the remainder are secured through contracts. He said the current organization system seems effective.

## RECEIPT OF REPORTS

Chairman Ruby called on committee counsel to review the committee's charge to receive reports. She said the committee is charged with receiving the following reports:

1. A biennial report from WSI regarding compiled data relating to safety grants issued under Chapter 65-03 (Section 65-03-05).
2. A report from WSI before August 1, 2010, on the results of WSI's study of postretirement benefits available to an individual whose disability benefits end at the time of Social Security retirement eligibility (2009 S.L., ch. 613, § 1).
3. A report from the director of WSI, the chairman of the WSI Board of Directors, and the audit firm regarding the biennial performance evaluation of WSI and select elements included in the performance evaluation (Section 65-02-30).
4. An annual report from WSI which includes reports on pilot programs to assess alternative methods of providing rehabilitation services (Section 65-05.1-06.3).

Committee counsel said the first, second, and fourth reports are rather traditional and the committee will likely schedule receipt of these reports late in the interim; however, the third report is unique in that it also requires the committee select up to four elements for inclusion in the upcoming WSI performance evaluation. She said this is the first interim in which the Workers' Compensation Review Committee has had this charge to select these elements, and due to the timeline for the State Auditor's office publishing a request for proposal, it is necessary that the committee select those elements at this meeting.

Chairman Ruby called on Mr. Gordy Smith, State Auditor's office, for comments regarding the WSI biennial performance evaluation and the selection of elements to be included in the evaluation. He provided written testimony ([Appendix E](#)).

Mr. Smith said the anticipated timeline the State Auditor's office will follow in implementing selection of a firm to conduct the performance evaluation includes establishment of a request for proposal by the end of August which will be followed by a period of time in which the auditor will receive questions from potential vendors. Ideally, he said, a vendor should be selected by January 2010, and typically a draft

document is available by the third week of July 2010 with a final document prepared by September 2010. He said that as the committee selects the elements it would like included in the performance evaluation, the more details that can be provided the better thereby allowing him to prepare the request for proposal with the necessary degree of detail.

In response to a question from Representative Wald, Mr. Smith said typically the State Auditor's office consults with WSI in selecting the elements that will be included in the performance evaluation. Additionally, he said, the State Auditor's office typically provides the request for proposal scope of work to WSI before actually publishing the request for proposal. He said once the State Auditor's office starts receiving proposals, the State Auditor's office provides copies of the proposals to WSI to allow for WSI's feedback before the State Auditor's office selects the firm to conduct the performance evaluation.

In response to a question from Representative Ruby, Mr. Smith said if the committee selects elements that it needs reported on before late July or early September, it might be possible to address this in the request for proposal. He said it might be possible to request different deadlines for different elements of the report.

Chairman Ruby called on Mr. Wahlin for comments regarding the selection of elements for the WSI biennial performance evaluation. Mr. Wahlin provided written information ([Appendix F](#)).

In response to a question from Representative Ruby, Mr. Wahlin said if the performance evaluation includes the element of studying the accuracy of North Dakota's postretirement benefits, he anticipates WSI will continue to do a significant amount of study work on its own. He said the benefit of having this element included in the performance evaluation is that it would allow for a neutral third party to have input in the study.

In response to Representative Ruby's question regarding whether WSI already addresses wellness programs, Mr. Wahlin said he is not able to identify a specific WSI wellness program that specifically recognizes success with employers implementing wellness programs in the workplace.

In response to a question from Senator Wanzek, Mr. Wahlin said the suggested elements provided by WSI in the written material are not prioritized or put in any specific order of priority.

In response to a question from Representative Amerman regarding how WSI and Job Service North Dakota deal with cases that involve both workers' compensation and unemployment insurance, Mr. Wahlin said although he is not in a position to speak in any detail about unemployment insurance, he is aware of issues that periodically arise when dealing with an injury and layoffs or other types of unemployment. He said generally in order to receive unemployment insurance, a claimant needs to be able to seek employment. He said this may be an issue for

which the committee requests additional information at a future meeting.

**It was moved by Senator Wardner and seconded by Representative Wald that the committee select the following four elements for inclusion in the WSI performance evaluation:**

1. **Study the adequacy of North Dakota postretirement benefits;**
2. **Provide comparison of other state's workers' compensation laws with respect to prior injuries, preexisting conditions, and degenerative conditions;**
3. **Evaluate North Dakota usage rates, trends, and costs of narcotic utilization of injured employees; and**
4. **Evaluate the impact of moving to the 6<sup>th</sup> Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*.**

Senator Wardner said the wellness issue seems like something we already know about; whereas, the other four elements seem more unknown and there is more room to gain knowledge from receiving additional information.

Representative Ruby said the community in general should know the benefits of wellness and wellness programs, although he recognizes WSI could benefit from program effectiveness data. He said receiving information regarding additional benefits payable, degenerative conditions, narcotics usage, and the 6<sup>th</sup> Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* would be beneficial.

Senator Wanzek said several of these proposed elements have been raised by injured employees who have had claims reviewed during previous Workers' Compensation Review Committee claim reviews. He said he supports the motion. After this discussion, **the motion carried on a roll call vote.** Representatives Ruby, Amerman, and Wald and Senators Wanzek and Wardner voted "aye." No negative votes were cast.

Chairman Ruby said to the extent the request for proposal can shorten the timeline for receipt of the performance evaluation information on the first and second elements, that would be appreciated by the committee. However, he said, he recognizes there may be cost considerations for accelerating these elements and he fully expects the State Auditor's office will make the appropriate decision on how to address this. Mr. Smith said the request for proposal could be drafted to request that the entire report be provided by July 15, 2010, and then also allow for two different reporting timelines if it is not possible to have the entire report completed by mid-July. Representative Ruby requested the State Auditor's office design the request for proposal to try to get the first two elements earlier, but if there are cost issues, there is no intent by the committee to significantly financially burden WSI in paying for this performance evaluation.

Chairman Ruby called on Ms. Robin Halvorson, WSI, for comments regarding the receipt of annual reports on pilot programs to assess alternative methods of providing rehabilitation services. She provided a handout ([Appendix G](#)). She reviewed WSI's implementation of 2009 House Bill No. 1062, which directs WSI to implement pilot programs to allow WSI to assess alternative methods in providing rehabilitation services.

Representative Ruby said the committee looks forward to receiving a summary some time next summer regarding WSI's implementation of House Bill No. 1062, especially information regarding whether legislation is appropriate to implement any rehabilitation services. Ms. Halvorson said she plans on attending the committee's meetings during the interim and will provide ongoing status reports as appropriate.

## **FUTURE MEETINGS**

Chairman Ruby said as discussed, he expects the committee will be conducting meetings across the state during the interim in order to meet the needs of the location of injured employees having their claims reviewed. He said he will schedule the next meeting of the committee based upon receipt of applications for claim review received by the committee.

No further business remaining, Chairman Ruby adjourned the meeting at 11:45 a.m.

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Jennifer S. N. Clark  
Committee Counsel

ATTACH:7