

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

### **WORKERS' COMPENSATION REVIEW COMMITTEE**

Friday, August 13, 2010  
Harvest Room, State Capitol  
Bismarck, North Dakota

Representative Dan Ruby, Chairman, called the meeting to order at 8:00 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](#)

**It was moved by Representative Wald, seconded by Senator Wanzek, and carried on a voice vote that the minutes of the June 24, 2010, meeting be approved as distributed.**

Mr. Schumacher said he is not familiar with the situation of employees in the oilfields affirmatively choosing not to report injuries due to the desire not to lose hours working for high wages. However, he said, if it is occurring that claims are not being reported, this would likely have an impact on the validity of data collection.

In response to a question from Representative Amerman, Mr. Nick Jolliffe, Workforce Safety Insurance, said the safety grant program does offer the possibility of followup on claims.

#### **INTRODUCTION**

Chairman Ruby said the committee has not received any more applications for claim review at this time. He said the committee will receive the reports the committee is charged with receiving and will discuss the four claims the committee has reviewed this interim.

#### **REPORTS**

##### **Safety Grants**

Chairman Ruby called on Mr. Barry Schumacher, Workforce Safety and Insurance (WSI), to present the compiled data relating to safety grant programs issued under North Dakota Century Code Section 65-03-05. Mr. Schumacher distributed written data, a copy of which is attached as [Appendix B](#).

In response to a question from Representative Ruby, Mr. Schumacher said the data regarding total claims from 2007 to present shows a decreasing trend. He said that before 2007 the data had been trending upward. Additionally, he said, this data reflects several safety programs being run in tandem so it does not directly address the effectiveness of any one single safety program.

In response to a question from Representative Wald, Mr. Schumacher said information in the handout regarding health care safety grants does not specify the specific type of health care facility of the safety grant recipient.

Mr. Schumacher said there are approximately 20,250 active WSI policyholders. Within this group of policyholders, he said, the health care industry and construction industry has tended to report favorable results under the safety grants, whereas the policyholders in the oilfield have tended to report unfavorable results.

##### **Rehabilitation Pilot Programs**

Chairman Ruby called on Mr. Timothy Wahlin, Workforce Safety and Insurance, to present the annual report on pilot programs to assess alternative methods of providing rehabilitation services.

Mr. Wahlin said WSI is in the process of collecting and analyzing data. He said at this point in the pilot programs, the two issues that have been recognized as perceived needs are:

1. There may be value in enhancing the scholarship program. These enhancements, coupled with the loan program, may have positive outcomes.
2. There often are unfulfilled needs to allow adults to gain the skills required outside the two-year training. Typically this skills training role is filled by the Adult Learning Centers; however, WSI is looking at whether there may be private providers who would also fulfill this need.

In response to a question from Representative Ruby, Mr. Wahlin said he expects the response from WSI addressing these two issues will be brought to this committee.

In response to a question from Representative Wald, Mr. Wahlin said the WSI student loan program administered through the Bank of North Dakota is being underutilized. He said there are fewer than 20 individuals who have used the program.

In response to a question from Senator Wanzek, Mr. Wahlin said he expects that if WSI implemented a second student loan program, it would be in addition to the existing loan program. He said that under current law, an injured employee is able to access the loan program but is not able to access a scholarship program.

In response to a question from Representative Ruby, Mr. Wahlin said with the services offered through the Adult Learning Centers, there appear to be unfulfilled needs. He said the programs are often full and injured employees are going without these services. He said the services offered through the Adult Learning Centers are great, but WSI is looking at what steps can be taken to address the situations in which the needs are going unmet.

### WSI Forms

Chairman Ruby called on Mr. Wahlin to present information regarding the activities of the WSI Mass Communications Committee relating to form evaluation and revision. He said it appears that at some level, all of the cases that have come before this committee this interim boil down to imperfect communication.

Mr. Wahlin said the Mass Communications Committee is reviewing all outgoing communication and publications. Additionally, he said, the committee is in the process of addressing the reading levels of these communications. He said in complex communications there is a corresponding increase in reading levels. He said there are approximately 1,200 form letters that go out to injured employees and employers. This review, he said, likely will take at least one year.

Mr. Wahlin said in addition to the Mass Communications Committee, WSI recently has put together a Claims Committee. He said the Claims Committee is reviewing how best to convey actions to claimants. Annually, he said, WSI issues approximately 30,000 decisions. He said the Claims Committee is considering how WSI can followup with the most important communications to improve this communication.

In response to a question from Representative Ruby, Mr. Wahlin said although he knows there have been changes made to forms due to the Mass Communications Committee's activities, he is not able to point to a specific form that has been changed.

Representative Ruby asked whether there is a way for WSI to track the effectiveness of these changes to communications. He said data measuring improvements in the communications would be of value. Mr. Wahlin said he is not able to think of a way to track the effectiveness at this time, but he does anticipate these activities will be ongoing.

Chairman Ruby called on Mr. Sylvan Loegering, North Dakota Injured Workers' Support Group, West Fargo, for comments regarding WSI's form review. Mr. Loegering said the steps being taken by WSI are positive; however, an additional step that could be taken is a followup by WSI to ensure the injured employee understands the communications and to determine whether the injured employee needs any assistance.

Senator Wanzek said over the years on this committee, he has come to realize that a common thread in these cases has been a lack of awareness

or understanding on the part of the injured employee. He said he questions whether the committee will be satisfied with making WSI aware of this issue or whether the committee will be pursuing this issue in the form of legislation. He questioned whether it is enough that WSI has been made aware and is taking steps to improve communication.

Mr. Wahlin said in considering the cases reviewed by this committee over the years, he does not recall a single case in which the injured employee missed the 30-day appeal period by a day or so, but instead the issue more frequently is more a result of failure to understand the consequence of the order or the consequence of not appealing.

Representative Wald questioned whether it might be possible and practical for WSI to contact injured employees toward the end of the appeal period. Mr. Wahlin said the Claims Committee is in the process of addressing this issue. He said the committee is focusing on prioritizing these communications as well as considering what steps WSI might be able to take.

### WSI Performance Evaluation

Chairman Ruby called on Mr. Gordy Smith, State Auditor's office, for introductory comments regarding the presentation of the WSI performance evaluation ([Appendix C](#)). Mr. Smith said the contract to perform the WSI performance evaluation was awarded to Sedgwick Claims Management Services, Inc. (Sedgwick CMS). He said that steps have been taken to have this performance evaluation completed earlier than typically completed in order to allow the committee to receive the material during the interim.

Chairman Ruby called on Mr. Malcolm Dodge, Sedgwick Claims Management Services, Inc., to present the WSI performance evaluation. Mr. Dodge briefly reviewed the names of the team members who worked on the performance evaluation. He said in addition to the employees of Sedgwick CMS and cooperation from WSI staff members, Sedgwick CMS used third parties in putting together this performance evaluation.

Mr. Dodge said this performance evaluation differed from past evaluations in that it considered evaluation of how WSI addresses specific claim areas, such as preexisting conditions, degenerative conditions, and narcotic use. He said in this respect the evaluation differs from those done in the past.

### AMA Guides

Chairman Ruby called on Dr. Christopher Brigham, Sedgwick Claims Management Services, Inc., to review the portion of the performance evaluation addressing the sixth edition of the *AMA Guides to the Evaluation of Permanent Impairment* (AMA 6<sup>th</sup>). Dr. Brigham said the performance evaluation specifically addresses:

1. An evaluation of the impact of moving to the AMA 6<sup>th</sup>; and

2. Identification of complications and methods for addressing complications related to the move to the AMA 6<sup>th</sup> as well as any potential financial impact implementation would have.

In response to a question from Representative Ruby, Dr. Brigham said under the AMA 6<sup>th</sup>, pain complaints are addressed as they relate to function and physical impairment.

In response to a question from Representative Ruby, Dr. Brigham said North Dakota is unique in that it sets a threshold for permanent partial impairment (PPI) benefits. He said Mr. Dodge would be in a better position to address the positive and negative features of North Dakota's system; however, in comparing states, it is important to consider the states' entire workers' compensation systems.

In response to a question from Senator Wanzek, Dr. Brigham said as it relates to the application of the AMA 6<sup>th</sup> in the case of posttraumatic stress, the AMA 6<sup>th</sup> likely would address this injury.

In response to a question from Senator Wardner, Dr. Brigham said medical doctors do need to be trained in how to rate an individual under the *AMA Guides to the Evaluation of Permanent Impairment*. He said with appropriate training of the doctor, the injured employee is more likely to receive an accurate, unbiased rating.

In response to a question from Representative Wald, Dr. Brigham said he does not have any information regarding how the transition from the AMA 4<sup>th</sup> to the AMA 6<sup>th</sup> may have a fiscal impact on claims.

In response to a question from Representative Wald regarding those jurisdictions that allow workers' compensation benefits for work-related stress, Dr. Brigham said in a case such as a bank robbery, he is able to comment regarding evaluation. He said it is possible that work-related stress could result in a PPI. He said in the states he is familiar with, the situation of a bank robbery and any resulting posttraumatic stress likely would be compensable.

In response to a question from Representative Amerman regarding WSI's response to Recommendation 7.2, Dr. Brigham said he does not believe training of medical doctors would be onerous.

In response to a question from Representative Ruby, Dr. Brigham said with improving medical treatments, such as joint replacements, patients are having better outcomes now than they had in the past.

Mr. Dodge said as it relates to how other states address PPI, most other states start paying benefits at 1 percent impairment. However, he said, in some states the benefit structure is based on loss of earning capacity. He said more than 40 states use the *AMA Guides to the Evaluation of Permanent Impairment*; however, the states vary regarding the edition used.

Mr. Dodge said in looking at Exhibit 7.1, which was prepared by WSI, the issue of the fiscal impact of moving from the AMA 5<sup>th</sup> to the AMA 6<sup>th</sup> is addressed.

In response to a question from Representative Ruby, Mr. Dodge said he does not think any of the

sample cases reviewed experienced an increase in impairment under the AMA 6<sup>th</sup>.

Mr. Dodge said the most common mental trauma injury is the type in which a specific trauma precipitates an injury versus the situation where an ongoing stress causes an injury.

### **Claim Denials**

Mr. Dodge reviewed the portion of the performance evaluation relating to the analysis of the overall WSI denial rate and the analysis of the trend in denied claims from fiscal years 2005 through 2009.

In response to a question from Representative Wald, Mr. Dodge said the performance evaluation does provide information regarding why there is an increase in the number of claims being denied. He said the raw data shows an increase in claim denials; however, there are factors that should be taken into consideration to adjust these figures.

In response to a question from Representative Ruby regarding Table 1.3, relating to initial claim denial rate by fiscal year, Mr. Dodge said this data has not been adjusted to reflect claims that were reversed. He said there is some data relating to claim denial that does invite additional study.

In response to a question from Representative Ruby, Mr. Dodge said as it relates to independent medical evaluations (IMEs), in the case in which a treating doctor indicates ongoing care is needed which is related to the injury and WSI seeks additional information, it may be more appropriate for WSI to utilize an IME instead of having WSI base its decision on the opinion of the WSI medical director.

In response to a question from Representative Ruby, Mr. Dodge said it is his position, under Recommendation 1.3, that WSI could increase its use of IMEs.

### **Adjudicated Claims**

Mr. Dodge reviewed the recommendations relating to adjudicated claims.

### **PPI Threshold**

Mr. Dodge reviewed the recommendations relating to the PPI threshold.

In response to a question from Representative Ruby regarding updated data for Table 1.13, relating to the distribution of impairments, Mr. Dodge said it is true that the data in Table 1.13 is out of date as it relates to considering whether to convert to the AMA 6<sup>th</sup>; however, there is more up-to-date data included in Exhibit 7.1.

### **Evaluation of Contracts**

Mr. Dodge reviewed the recommendations relating to evaluation of contracts.

### **Evaluation of Internal Audit Division**

Mr. Dodge reviewed the recommendations relating to evaluation of the Internal Audit Division.

In response to a question from Representative Ruby, Mr. Dodge said he does not see a reason to stop the statutory requirement for a performance evaluation of WSI every two years. However, he said, perhaps over time fewer elements may have to be considered as part of the performance evaluation.

### **Evaluation of Adequacy of Postretirement Benefits**

Mr. Dodge reviewed the recommendations relating to the evaluation of adequacy of postretirement benefits.

In response to a question from Representative Wald regarding the increasing age of the Social Security retirement age, Mr. Dodge said if the workforce is working longer and there are fewer injured employees being determined to be eligible for permanent total disability (PTD), the impact of rising retirement age will not result in higher numbers of PTD claims.

In response to a question from Representative Ruby asking for information regarding whether the additional benefit payable (ABP) system is adequately compensating the injured employee for the loss of retirement savings, Mr. Dodge said the performance evaluation does address this to some extent. He said he is not aware of any other states that have an ABP system, although some states terminate benefits at retirement age and some states do not. However, he said, the recommendations in the performance evaluation do not address this issue.

In response to a question from Representative Wald, Mr. Dodge said as medical costs continue to rise, there likely will be an impact on the indemnity side of the equation. Additionally, he said, during tough economic times, it may be less likely that an injured employee will file a claim. He said employees recognize the risk that an employer may terminate employment if there is an injury.

### **Comparison of Workers' Compensation Laws**

Mr. Dodge reviewed the recommendations relating to comparisons of North Dakota's workers' compensation to other states' laws.

In response to a question from Representative Wald, Mr. Dodge said in the states that have second injury funds to deal with preexisting conditions, the fund is typically funded through assessments against employers based on experience ratings.

In response to a question from Representative Ruby regarding the risk that employers may discriminate during the hiring practice if an employer's premium is negatively impacted by subsequent injury, Mr. Dodge said he agrees there may be a risk of discrimination; however, this could be addressed by having the responsible employers share the obligation.

### **Narcotic Utilization**

Mr. Dodge reviewed the recommendations relating to evaluation of narcotic utilization.

In response to a question from Representative Ruby regarding peer review within the medical community, Mr. Dodge said in general the state medical organizations probably will support the medical provider. Therefore, he said, he sees value in having peer reviews.

In response to a question from Representative Wald, Mr. Dodge said oxycontin and oxycodone are commonly prescribed narcotics.

In response to a question from Representative Ruby, Mr. Dodge said North Dakota's use of generics appears to be slightly lower than other states.

### **Prior Recommendations**

Mr. Dodge reviewed the portion of the performance evaluation dealing with prior recommendations.

### **WSI Response**

Chairman Ruby called on Mr. Bryan Klipfel, Executive Director and CEO, Workforce Safety and Insurance, for comments regarding the WSI performance audit. Mr. Klipfel provided written testimony, a copy of which is attached as [Appendix D](#).

In response to a question from Representative Ruby, Mr. Klipfel said he is not prepared to state what PPI award changes would be appropriate to retain a neutral position if the AMA 6<sup>th</sup> would be adopted.

Representative Wald said as it relates to perception of data regarding denied claims, perhaps WSI should consider a third classification that better reflects those claims that were denied because of lack of a complete application.

Mr. Klipfel said he concurs with Representative Wald's comments regarding denial statistics. He said WSI accepts 92 percent of claims and it is important to consider the adjusted rate.

In response to a question from Senator Wardner regarding WSI providing in-house vocational rehabilitation services, Mr. Klipfel expects WSI would be looking at hiring nine additional employees. He said it is likely that WSI would continue to contract to receive vocational rehabilitation services to injured employees out of state.

In response to a question from Senator Wanzek regarding injuries that occur when an employee is reaching retirement age, Mr. Klipfel said he expects WSI will be introducing legislation to address this issue. Mr. Wahlin said WSI likely would present both options recommended in the performance evaluation and let the board make a decision on which approach to pursue in legislation.

In response to a question from Senator Wanzek, Mr. Dodge said there are multiple ways to calculate acceptance and denial statistics.

In response to a question from Representative Wald, Mr. Dodge said he estimates the national average for denial of claims is approximately 6 percent. He said from state to state there is a broad variance. For example, he said, in North Carolina the statutes prohibit coverage for cumulative injuries and therefore have higher denial rates.

Mr. Klipfel said in considering Recommendation 7.2, regarding training of physicians, he would look to Dr. Brigham to provide guidance on how this is done in other states. Mr. Wahlin said one challenge in changing to the AMA 6<sup>th</sup> will be to train physicians. He said testing of competency and requiring certification likely would result in a large number of physicians choosing to not perform PPI evaluations.

In response to a question from Representative Ruby, Mr. Wahlin said WSI currently gets to the right answer by having a PPI expert on staff who reviews PPI determinations. He said he would envision retaining this system of review under the AMA 6<sup>th</sup>.

Mr. Klipfel said WSI struggles to find physicians willing to perform IMEs. He said if WSI is able to increase the number of in-state physicians willing to perform IMEs, WSI likely will increase the utilization of IMEs.

Mr. Klipfel said in reviewing Recommendation 1.8, regarding the PPI evaluation process, in keeping with WSI's preference for personal contact, he would prefer that WSI make telephone contact with the injured employee to schedule PPI evaluation appointments. Overall, he said, WSI agrees with the concept of the recommendation.

Mr. Klipfel said WSI will work to propose a revenue-neutral model to implement the AMA 6<sup>th</sup>. Mr. Wahlin said if the desire is to be revenue-neutral, there are several ways to accomplish this. For example, he said, there could be fewer awards but higher award amounts or the system could be revised to decrease the threshold in an attempt to be "people-neutral."

Mr. Wahlin said as it relates to Recommendation 1.10, regarding claim closures, the notepad entry typically reflects this information. He said this notepad policy can be implemented without legislation.

Dr. Harvey Hanel, Pharmacy Director, Workforce Safety and Insurance, said as it relates to Recommendation 6.1, regarding narcotics usage, WSI recognizes something needs to be done to address these issues. He said the recommendation would require prior authorization for all narcotic prescriptions, and this is not necessarily desirable. Instead, he said, WSI would prefer to address authorization only after the acute stage of the claim.

In response to a question from Senator Wardner, Dr. Hanel said WSI is considering a 90-day timeframe after which WSI would evaluate narcotics usage.

In response to a question from Representative Ruby, Mr. Klipfel said when WSI pursues legislation for Recommendation 6.2, he will consider whether to include the recommendation for 6.1 in that bill draft or whether to introduce the recommendation for 6.1 separately.

In response to a question from Representative Wald indicating his position that WSI has been heavily audited, Mr. Klipfel said there still are recommendations from 2008 that are being

implemented. Personally, he said, he thinks it might be valuable to increase the time between performance evaluations in order to allow WSI the necessary time to implement the recommendations.

Chairman Ruby requested that WSI keep the committee informed of WSI's legislative package. Mr. Klipfel said the WSI Board of Directors will be meeting next week and some of the less complicated issues could be addressed within the next month or so; however, the more complicated issues will take longer.

### Interested Persons

Chairman Ruby called on Mr. Loegering for comments regarding the WSI performance evaluation. Mr. Loegering said the comments he initially intended to make have changed since listening to the information presented at the meeting. He said it would be a welcome change if come the 2011 legislative session, the committee, WSI, the business community, and injured employees were supportive of the legislative package.

Mr. Loegering commented regarding the portions of the performance evaluation regarding the denial rate, aggravation, and PPI.

Mr. Loegering said the North Dakota Century Code currently addresses the employer's risk for work injuries that are partially attributable to a preexisting condition. He said he would encourage the committee to put North Dakota's preexisting conditions more in line with the laws of other states.

Mr. Loegering said if WSI changes to the AMA 6<sup>th</sup>, the transition should be implemented in a way to be "person-neutral." He said it is his understanding that if the threshold were decreased to 10 percent it would be close to being fiscally neutral. He said he is not certain whether North Dakota is prepared to adopt the AMA 6<sup>th</sup> during the 2011 legislative session.

Mr. Loegering said the basic definition for "compensable injury" is in line with most other states, but the definition of "no compensable injuries" is inconsistent with other states.

Chairman Ruby called on Mr. Sebald Vetter, Concerned Advocates Rights for Injured Employees, for comments regarding the WSI performance evaluation. Mr. Vetter said he wants more information regarding the effect of decreasing the PPI threshold to 10 percent. He said he is opposed to this change to AMA 6<sup>th</sup> because he is concerned it will decrease coverage for the injured employee.

In response to a question from Senator Wardner, Mr. Vetter said the injured employee was harmed from the transition from the AMA 4<sup>th</sup> to the AMA 5<sup>th</sup> and he is concerned that the injured employee will be harmed again with a transition to the AMA 6<sup>th</sup>. He said over time the PPI calculations have had the impact of decreasing the number of body parts covered.

Mr. Dodge said the editions of the *AMA Guides to the Evaluation of Permanent Impairment* do not decrease the number of body parts evaluated. Additionally, he said, the proposal under Table 1.14 is

close to being revenue-neutral, but it is hard to determine how "person-neutral" it is.

In response to a question from Senator Wanzek, Mr. Dodge said in the AMA 5<sup>th</sup> the rating is based on loss of function versus the AMA 6<sup>th</sup>, which is based in part on the surgical procedure performed. Additionally, he said, the AMA 6<sup>th</sup> does a more thorough job of rating mental impairment.

In response to a question from Representative Wald, Mr. Dodge said it is his belief that if the AMA 6<sup>th</sup> is adopted, it would not impact existing awards; however, it is a matter of legislative drafting regarding how reratings or existing injuries that have not yet been rated are calculated. Representative Wald said he hopes that employees who already have been injured would be grandfathered under the AMA 5<sup>th</sup>.

### COMMITTEE WORK

Chairman Ruby said that in considering issues raised in the course of the four claims reviewed by the committee this interim, in the second and fourth cases reviewed the employee was injured and there was a return to work. However, he said, after this return to work there was a worsening of the condition but at reapplication the injured employee was not eligible for wage loss benefits because WSI determined there were no lost wages due to the injured employee not being employed.

Mr. Wahlin said under the North Dakota Century Code, the law requires that when an injured employee returns to work, WSI is required to issue an order. He said when there is a reapplication, there are two requirements:

1. Worsening of the condition; and
2. Resulting in an actual decrease in earnings.

Mr. Wahlin said when the injured employee never actually returns to work after the release to return to work or stops working for a reason other than the worsening of the condition, the situation arises that the injured employee does not qualify for wage loss benefits.

Senator Wardner said he will need to continue to review the material in the WSI performance

evaluation. He said it is his sense that in 1995 the Legislative Assembly likely swung too far and since then steps have been taken to address this. Overall, he said, he believes the recommendations in the performance evaluation are positive, but he needs to do more research on his own.

Representative Ruby said WSI is applying the law as it is drafted. If someone does not like the law, he said, it is the Legislative Assembly that needs to be blamed. He said the committee needs to seek feedback from interested persons as the committee considers legislation and reviews WSI's legislative package.

Representative Ruby said the most major issues he heard in the four claims reviewed are rooted in communication issues.

Representative Amerman said WSI will be preparing bill drafts in response to this performance evaluation. He questioned whether WSI will be introducing these measures or whether this committee will be recommending these measures.

Chairman Ruby said he envisions this committee playing a role in recommending these legislative measures that come out of the performance evaluation as committee recommendations.

Senator Wanzek said this is his third interim sitting on this committee and he thinks this committee has served a tremendous purpose in addressing workers' compensation issues. He said the performance evaluation seems to indicate WSI is on the correct path, but there always is room for improvement.

Senator Wanzek said he thinks there are changes needed to address the situation in which a nearly retired employee is injured.

No further business remaining, Chairman Ruby adjourned the meeting at 2:45 p.m.

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Jennifer S. N. Clark  
Committee Counsel

ATTACH:4