

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

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

Wednesday, September 15, 2010  
Harvest Room, State Capitol  
Bismarck, North Dakota

Representative Dan Ruby, Chairman, called the meeting to order at 9:00 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 Wardner, and carried on a voice vote that the minutes of the August 13, 2010, meeting be approved as distributed.**

#### **INTRODUCTION**

Chairman Ruby said the committee has not received any more applications for claim review during the interim. He said the committee will be reviewing the bill drafts requested at the previous meeting.

#### **BILL DRAFTS**

The committee reviewed 10 bill drafts.

##### **Performance Evaluation Bill Draft**

The committee reviewed a bill draft [[10205.0100](#)] relating to the frequency of independent performance evaluations of Workforce Safety and Insurance (WSI). Chairman Ruby said this idea of extending the time between WSI independent performance evaluations was raised at the previous meeting, and a bill draft was prepared for the committee's consideration. He said under the bill draft, the law would be amended to extend the period between WSI independent performance evaluations from once every two years to once every four years.

**It was moved by Representative Wald and seconded by Senator Wardner that the bill draft relating to WSI independent performance evaluations be approved and recommended to the Legislative Management.**

Chairman Ruby called on Mr. David Kemnitz, President, AFL-CIO, for comments regarding the bill draft. Mr. Kemnitz said he recognizes the independent performance evaluation process can be expensive and cumbersome; however, he said, it is very important that all interested parties have current information regarding WSI. He said extending the period of time between independent performance evaluations would make this information less current and therefore less valuable.

Representative Ruby said he recognizes there is a need for transparency and oversight of WSI; however, under the current system, the independent performance evaluations seem to be coming too frequently and WSI does not have enough time to respond to the recommendations.

Chairman Ruby called on Mr. Sylvan Loegering, North Dakota Injured Workers Support Group, West Fargo, for comments regarding the bill draft. Mr. Loegering said in considering the most recent two independent performance evaluations of WSI, there has been significant information provided and significant changes have been made as a result of these reports. He said that instead of decreasing the frequency of conducting independent performance evaluations, perhaps there would be value in decreasing the number of items addressed in the independent performance evaluations.

Chairman Ruby called on Mr. Tom Balzer, Executive Vice President, North Dakota Motor Carriers Association, for comments regarding the bill draft. Mr. Balzer said he supports the bill draft because the current timelines for completing the independent performance evaluations are too condensed, and WSI does not have breathing room between.

In response to a question from Representative Wald, Mr. Balzer said he agrees that legislative measures addressing WSI and the state's workers' compensation system as a whole are subject to great scrutiny, and WSI is subjected to great scrutiny.

In response to a question from Senator Wardner, Mr. Balzer said he is opposed to the idea of decreasing the number of items addressed in an independent performance evaluation because he is concerned important items will be missed. He said he supports the current depth of the evaluation being conducted in the independent performance evaluations of WSI, but he supports decreasing the frequency.

Chairman Ruby called on Mr. Bryan Klipfel, Executive Director and CEO, Workforce Safety and Insurance, for comments regarding the bill draft. Mr. Klipfel said it is important for the committee members to distinguish between an independent performance evaluation and a financial audit. He said WSI undergoes a financial audit on an annual basis.

In response to a question from Representative Amerman, committee counsel said there is a difference between annual financial audits of WSI and

periodic audits conducted at the request of the Legislative Audit and Fiscal Review Committee.

Chairman Ruby called on Mr. Jeb Oehlke, Vice President of Governmental Affairs, North Dakota Chamber of Commerce, for comments regarding the bill draft. Mr. Oehlke said the North Dakota Chamber of Commerce concurs with Mr. Balzer's comments because the current independent performance evaluation system is too excessive.

Representative Amerman said if the frequency of independent performance evaluations of WSI goes down to once every four years, he suggests that halfway through the period, WSI give the Legislative Assembly or the Legislative Management a status report.

Representative Wald said the standing Industry, Business and Labor Committees could request that WSI provide a status report during a legislative session.

Senator Wanzek said sometimes the two-year period between the independent performance evaluations of WSI is not enough time.

**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.

### **Retirement Presumption Bill Drafts**

The committee considered a bill draft [[10208.0100](#)] relating to workers' compensation benefits upon attaining retirement age and a bill draft [[10207.0100](#)] relating to workers' compensation additional benefits payable.

Chairman Ruby called on Ms. Jodi Bjornson, Workforce Safety and Insurance, for comments regarding the bill drafts. She said the retirement age bill draft addresses the situation in which an employee is injured within the two years immediately preceding the employee's presumed retirement date. She said that under this bill draft if an injured employee is injured within those two years immediately preceding the presumed retirement date, the injured employee would be eligible for up to two years of workers' compensation benefits.

Ms. Bjornson said the retirement age bill draft is responsive to Recommendation 4.2 of the independent performance review of WSI which was presented to the committee at the August 13, 2010, meeting. She said under the performance evaluation the consultant made alternative recommendations in Recommendations 4.2 and 4.3. She said under the current law if an employee incurs a postretirement injury, WSI pays up to three years of workers' compensation benefits, whereas if an employee is injured within one year preceding retirement that injured worker does not qualify for additional benefits payable.

In response to a question from Representative Wald, Ms. Bjornson said the anticipated fiscal impact under the retirement age bill draft would be a negligible impact on benefit cost. She said WSI does

not have an official position on the bill draft, as the Governor's office is still reviewing the bill draft.

In response to a question from Representative Ruby, Ms. Bjornson said the two-year coverage provided for under the retirement age bill draft coincides with the two-year cap for temporary total disability benefits and coincides with Recommendation 4.2 of the independent performance evaluation.

Ms. Bjornson said that the bill draft relating to workers' compensation additional benefits payable does not directly address the retirement presumption but instead modifies the requirement that in order to qualify for additional benefits payable an injured employee must have received benefits for at least one year. She said this bill draft is responsive to Recommendation 4.3.

Senator Wanzek questioned why the bill draft addressing the retirement age limits benefits to two years, whereas existing law addressing postretirement injuries allows for up to three years of benefits.

**It was moved by Senator Wardner and seconded by Senator Wanzek that the bill draft relating to workers' compensation retirement age injuries be approved and recommended to the Legislative Management.**

Chairman Ruby called on Mr. Kemnitz for comments regarding the bill draft. He questioned the relationship between the bill draft addressing the retirement age and the bill draft addressing additional benefits payable.

Representative Ruby said the bill draft addressing the retirement age allows for an expansion of eligibility for workers' compensation benefits if an injury occurs near retirement age, whereas the other bill draft is limited to addressing additional benefits payable. Senator Wanzek said in addition to addressing retirement age injuries, the retirement age bill draft also allows for the conversion of benefits to additional benefits payable upon reaching retirement age.

**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.

The committee did not take any action on the bill draft relating to additional benefits payable.

### **Vocational Rehabilitation Grants Bill Draft**

The committee reviewed a bill draft [[10206.0100](#)] providing for a vocational rehabilitation grant program to promote and provide necessary educational opportunities for injured employees within the vocational rehabilitation process.

Chairman Ruby called on Ms. Bjornson to review the bill draft. She said the concept of creation of a vocational rehabilitation grant program stems from WSI's pilot programs to assess alternative methods of providing rehabilitation services required under North Dakota Century Code Section 65-05.1-06.3.

Ms. Bjornson said currently WSI is using the services of the Adult Learning Centers to provide the necessary skills upgrading and to provide for the completion of remedial education requirements; however, she said, there are circumstances under which the Adult Learning Centers are unable to provide these services. For example, she said, sometimes there are waiting lists for utilization of the Adult Learning Centers, and typically the Adult Learning Centers are closed during the summer. She said this bill draft would offer an alternative to using the Adult Learning Centers.

In response to a question from Representative Ruby, Ms. Bjornson said the bill draft does not provide for the appropriation of any new funding but instead uses funds that are already in the WSI educational revolving loan fund. She said it is highly probable that the WSI educational revolving loan fund would have adequate funding to fund this grant program.

In response to a question from Senator Wanzek, Ms. Bjornson said as it relates to establishing an approval process for the grant program, WSI would likely structure the application and approval process in the same manner as WSI has done with other grant programs.

In response to a question from Representative Amerman, Ms. Bjornson said the bill draft is designed to allow WSI to provide grants to business organizations and not to provide grants directly to the injured employee.

In response to a question from Representative Wald, Ms. Bjornson said she does not envision using the grant program funds to provide funding directly to injured employees for tuition because existing programs already provide for this funding.

Representative Ruby said the proposal made in the bill draft is not so much the creation of a new program as it is increasing the availability and use of existing services.

In response to a question from Senator Wardner, Ms. Bjornson said the proposed grant program would allow funds to be used to help enhance existing adult education programs so that more injured employees would be able to benefit.

Chairman Ruby called on Mr. Balzer for comments regarding the bill draft. He said he supports the bill draft. He said as it relates to the trucking industry, the needs of the trucking industry have increased over time, and the minimum qualifications have also increased such that drivers need higher reading skills. He said this grant program may allow more injured employees to enter the trucking industry.

Chairman Ruby called on Mr. Kemnitz for comments regarding the bill draft. He said he agrees with Mr. Balzer's comments, but he said the program may need more than \$100,000 per year of funding.

**It was moved by Senator Wanzek, seconded by Representative Wald, and carried on a roll call vote that the bill draft relating to creation of a workers' compensation grant program for vocational rehabilitation be approved and**

**recommended to the Legislative Management.** Representatives Ruby, Amerman, and Wald and Senators Wanzek and Wardner voted "aye." No negative votes were cast.

### **Aggravation Law Repeal Bill Draft**

The committee reviewed a bill draft [\[10213.0100\]](#) relating to repeal of the workers' compensation aggravation law.

Chairman Ruby called on Mr. Tim Wahlin, Workforce Safety and Insurance, for comments regarding the bill draft. Mr. Wahlin said the bill draft is in response to Recommendation 5.5 of the WSI independent performance evaluation. Under the bill draft, he said, Section 65-05-15 is repealed.

Mr. Wahlin said WSI estimates the fiscal impact of repealing the aggravation law would be \$4.8 million per year, with a 2.25 percent increase to statewide premium rates.

In response to a question from Representative Wald, Mr. Wahlin said that in comparing North Dakota's workers' compensation laws to those of other states, North Dakota is unique. He said other states address the issue of preexisting conditions in a variety of ways. He said North Dakota's treatment of preexisting conditions is relatively conservative when compared to other states.

In response to a question from Representative Ruby, Mr. Wahlin said the workers' compensation industry struggles with how to deal with the issue of degenerative conditions. He said in looking at how other states deal with this issue, some states pay all medical expenses regardless of whether the expenses are related to degenerative conditions; whereas, some jurisdictions such as North Dakota attempt to limit workers' compensation liability to the injury incurred in the workplace. He said the repeal of Section 65-05-15 would increase the likelihood of degenerative conditions being covered under the state's workers' compensation system.

Representative Ruby said North Dakota's workers' compensation system is unique in a variety of ways, and that act alone does not make North Dakota's system wrong or bad. For example, he said, North Dakota's workers' compensation system allows for cost-of-living adjustments as well as additional benefits payable, both of which make North Dakota's system unique.

In response to a question from Representative Wald, Mr. Wahlin said this bill draft does not address how the state workers' compensation law deals with aggravation of other workplace injuries.

Chairman Ruby called on Mr. Kemnitz for comments regarding the bill draft. He said he finds it unusual that the bill draft merely repeals the aggravation law without replacing it with some other body of law. He said he has concerns that repeal of the law without explaining how the state's workers' compensation system will deal with aggravation of a preexisting condition may be problematic. He said before he can support this bill draft he needs to better

understand the impact of the repeal and how the benefit structure is improved for the injured employee. He said he would be happy to submit suggestions on how to deal with the situation at a future date.

Chairman Ruby called on Mr. Loegering for comments regarding the bill draft. He said it is his understanding that the bill draft is intended to address the problems that arise with the workers' compensation treatment of preexisting conditions. He said in practice this often occurs when an employee is working just fine until an injury occurs at work and then that employee comes to find out there was a preexisting injury and workers' compensation benefits are decreased and paid on an aggravation basis.

Mr. Loegering said in reviewing the WSI independent performance evaluation, the consultants noted that of the 49 states and one district surveyed, the most common practice in other states regarding prior medical conditions is to accept the claim on its face value. He said the independent performance evaluation indicates most states consider employees hired "as is," and any injury at work which aggravates, exacerbates, or triggers an underlying preexisting condition is deemed compensable.

Mr. Loegering said he supports the repeal of Section 65-05-15. He said as the issue is addressed through the legislative process, it may be valuable to consider the proposed 2009 legislation that would have repealed the state's preexisting condition laws.

Senator Wardner said the \$4.8 million fiscal note seems to indicate claims will be paid on face value if the aggravation law is repealed.

Mr. Loegering said the bill draft is only a partial fix to address how the state system treats preexisting conditions. For example, he said, the definition of "compensable injury" under Title 65 makes it clear that a compensable injury does not include a preexisting condition or degenerative condition.

Representative Ruby said the North Dakota workers' compensation system is designed to cover workplace injuries, not preexisting injuries.

Mr. Loegering said the original intent of North Dakota's workers' compensation law was to cover those who are injured on the job. He said a majority of the states do cover injured employees on an "as is" basis. However, he said, North Dakota is one of the minority of states that does not do this.

Representative Ruby said he is concerned that if steps are taken to allow for workers' compensation coverage of preexisting conditions, North Dakota would in effect be taking a step backward and would be increasing the number of fraud claims filed. For example, he said, he would not want to see an injured employee be injured over the weekend while recreationally riding on an all-terrain vehicle and then on Monday claim it is a workplace injury.

Representative Ruby said he envisioned the independent performance evaluation's study of preexisting conditions would provide the committee with information with how to better deal with gray areas, such as soft tissue injuries and improving

technology. He said he is disappointed with the approach taken to this study by the consultants.

Mr. Loegering said a problem with the current system in this state is that in order to receive coverage an injured employee needs to participate in litigation, and when this happens treatment is forgone and the employee is then burdened with a chronic problem. He said in comparing our state's workers' compensation system to the automobile insurance system, under the automobile insurance system if an individual is hurt in a motor vehicle accident, that individual receives the appropriate medical treatment and the automobile and the health insurance companies work out between themselves which company will pay the medical bills. The bottom line, he said, is the individual injured in the motor vehicle accident receives the medical treatment that is appropriate in a timely manner.

Senator Wanzek said that if preexisting conditions were covered under the state's workers' compensation system, he is concerned that the employers would be negatively impacted.

Mr. Loegering said the current workers' compensation law addresses employer liability so there would be no risk to the employer if preexisting conditions were covered. He said under existing law an employer is charged with the immediate injury, and ongoing medical expenses are spread amongst all employers.

Senator Wanzek said he is also concerned that if preexisting injuries were covered under the workers' compensation system, employers may be hesitant to hire somebody with a preexisting condition. He said the last thing he wants is to increase the likelihood of an employee being discriminated against.

Mr. Loegering said under the current system an employee takes the risk that in working for the employer the employees may be injured and not be covered under the workers' compensation system.

Representative Wald said existing law relating to the Americans with Disabilities Act already addresses employment discrimination based on a preexisting condition. He said the issue raised by this bill draft is a tough decision, and it raises the issue whether the state has a social obligation to cover preexisting conditions.

Mr. Loegering said under today's workers' compensation system, employers take a risk anytime they hire an employee. He said everyone has an unknown, preexisting, or degenerative condition. He said he is concerned the bill draft does not directly address the issues raised by the independent performance evaluations relating to preexisting conditions and degenerative conditions.

Representative Wald suggested there be further study on this issue based upon the information contained in the independent performance evaluation.

Chairman Ruby called on Mr. Balzer for comments regarding the bill draft. He said he agrees with the comments made by Mr. Kemnitz. He said the bill draft

errs in repealing all of the current law and associated case law without replacing it with something.

Mr. Balzer said he is concerned that if the state's workers' compensation system were changed to allow for coverage of preexisting conditions and degenerative conditions, employers may be incentivized to pass over potential employees based upon a preexisting condition. He said not all preexisting conditions equate to an Americans with Disabilities Act-covered disability.

Senator Wanzek said he thinks the whole issue should revolve around what is work-related and what is not. He suggested the committee not forward this bill draft to the Legislative Management.

The committee did not take any further action on this bill draft.

### **Guides to the Evaluation of Permanent Impairment Bill Drafts**

The committee reviewed two bill drafts relating to the issue of the proposed change from using the fifth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* to the sixth edition. The first bill draft [\[10211.0100\]](#) the committee reviewed provides for the move from the fifth edition to the sixth edition and also removes the current law that allows an injured employee to defer payment of a permanent partial impairment award. The second bill draft [\[10220.0100\]](#) the committee reviewed modifies the formula used to qualify for and calculate permanent partial impairment awards.

Chairman Ruby called on Mr. Wahlin for comments regarding the bill drafts. He said the bill draft that specifies the change from the fifth edition to the sixth edition of the *Guides to the Evaluation of Permanent Impairment* also overstrikes language relating to deferred payment of a permanent partial impairment award. He said the overstruck language regarding deferred payment has been used only one time, and due to problems implementing the deferred payment, WSI seeks removal of this language.

In response to a question from Representative Ruby, Mr. Wahlin said that the one injured employee who has used this deferral provision would not be impacted by the changes in this bill draft.

Mr. Wahlin distributed a copy of the January/February 2010 issue of the *AMA Guides Newsletter* ([Appendix B](#)). He said this article provides a good discussion of the similarities and the differences between the fifth and sixth editions of the *Guides to the Evaluation of Permanent Impairment*.

In response to a question from Representative Wald, Mr. Wahlin said both the fifth edition and sixth edition of the *Guides to the Evaluation of Permanent Impairment* deal with loss of use or amputation based on a whole body impairment; however, North Dakota also has a schedule of benefits in the case of amputation.

In response to a question from Representative Amerman, Mr. Wahlin said it is anticipated that the change from the fifth edition to the sixth edition of the

*Guides to the Evaluation of Permanent Impairment* would result in a 37 percent decrease in awards.

Representative Ruby said he finds it interesting that when WSI moved from using the fourth edition to the fifth edition of the *Guides to the Evaluation of Permanent Impairment*, there was no move to decrease coverage based upon the more generous guidelines.

Chairman Ruby called on Mr. Loegering for comments regarding the bill drafts. He said the independent performance evaluation of WSI addresses the topic of changing from the fifth edition to the sixth edition of the *Guides to the Evaluation of Permanent Impairment*. He said Table 7.1 in the independent performance evaluation report reflects a comparison between the two editions as it relates to 52 reviewed cases.

Mr. Loegering said in addition to the impact that moving from the fifth edition to the sixth edition of the *Guides to the Evaluation of Permanent Impairment*, North Dakota is unique in that its statutory framework does not provide for a permanent partial impairment award to an individual until there is at least a 16 percent whole body impairment. He said that most states provide permanent partial impairment awards at 1 percent whole body impairment.

Mr. Loegering said he is concerned with the proposed move from the fifth edition to the sixth edition of the *Guides to the Evaluation of Permanent Impairment* because it seems as though nobody fully understands the difference between the two editions.

Senator Wardner said he is concerned that medical professionals may not have the necessary training or qualification to perform evaluations under the new edition.

Mr. Wahlin said that if a move is made to the sixth edition of the *Guides to the Evaluation of Permanent Impairment*, WSI will need to perform training across the state in order to prepare medical providers in using the new edition.

**It was moved by Senator Wanzek and seconded by Senator Wardner that the bill draft relating to using the sixth edition of *Guides to the Evaluation of Permanent Impairment*, as amended to include an application clause, be approved and recommended to the Legislative Management.**

Representative Amerman said he is concerned there are risks associated with keeping these two bill drafts separate. He said if one bill passes without the other, there would be unintended consequences.

Representative Ruby said if the bill draft relating to the transition to the sixth edition of the *Guides to the Evaluation of Permanent Impairment* passed but the bill draft relating to the modification of the calculation of permanent partial impairment awards did not pass, there would be a fiscal savings of \$1.2 million per year.

Senator Wanzek, Senator Wardner concurring, **withdrew the motion.**

The committee reviewed the bill draft relating to revision of the calculation of permanent partial impairment awards.

Chairman Ruby called on Mr. Wahlin to comment regarding the bill draft. He reviewed the distribution of the permanent partial impairment formula schedule. He said under the bill draft, the eligibility for a permanent partial impairment award would decrease from a 16 percent whole body impairment to a 10 percent whole body impairment. Under the bill draft, he said, the schedule would remain the same once 26 percent whole body impairment was reached.

Mr. Wahlin said it is difficult to establish the fiscal impact of changing the permanent partial impairment award schedule because WSI does not gather data on injuries for which impairment is less than 16 percent whole body impairment. He said in establishing the fiscal impact of moving from the fifth edition to the sixth edition of the *Guides to the Evaluation of Permanent Impairment*, the auditors used the fourth edition to make pricing assumptions. However, he said, there are limitations to this method of calculation because the fourth edition uses old data from the 1980s, and WSI was not as accurate then as it is now. He said the estimates used by WSI are rough estimates intended to be revenue-neutral.

Senator Wanzek said he supports merging the bill drafts into a single bill draft.

Representative Ruby said if the data used by WSI is not solid, he questions how the Legislative Assembly should address the situation.

Mr. Wahlin said WSI does not have a position yet regarding the best way to address the transition to the sixth edition of the *Guides to the Evaluation of Permanent Impairment*. He said the bill drafts the committee is reviewing reflect the recommendations of the consultants in the independent performance evaluation. He said uncertainty will result regardless of what calculation schedule is used.

In response to a question from Representative Ruby, Mr. Wahlin said in establishing the methodology used for pricing under the sixth edition of the *Guides to the Evaluation of Permanent Impairment*, WSI is relatively secure in calculating there will be a dropoff in awards; however, WSI is not secure that the proposed change in the awards schedule will accomplish the goal of being revenue-neutral. He said it is not a matter of waiting for more complete data, it is that the data does not exist.

Representative Ruby said he supports amending the current award schedule from 16 percent to 14 percent. He said the Legislative Assembly can reevaluate the award schedule in 2013 and determine whether additional changes should be made at that time.

Senator Wanzek said he views the intent of the Legislative Assembly to be revenue-neutral in changing from the fifth edition to the sixth edition of the *Guides to the Evaluation of Permanent Impairment*.

**It was moved by Senator Wanzek and seconded by Representative Wald that the bill draft relating to the change to the sixth edition of the *Guides to the Evaluation of Permanent Impairment*, as amended to include an application clause and to include a revised permanent partial impairment whole body impairment awards schedule that provides for a multiplier of zero for a whole body impairment of 1 to 13 percent; a multiplier of 10 for 14 percent impairment; a multiplier of 10 for 15 percent impairment; a multiplier of 15 for 16 percent impairment; a multiplier of 15 for 17 percent impairment; a multiplier of 20 for 18 percent impairment; a multiplier of 25 for 19 percent impairment; a multiplier of 25 for 20 percent impairment; a multiplier of 25 for 21 percent impairment; a multiplier of 30 for 22 percent impairment; a multiplier of 30 for 23 percent impairment; a multiplier of 30 for 24 percent impairment; and a multiplier of 35 for 25 percent impairment, be approved and recommended to the Legislative Management.**

In response to a question from Senator Wanzek, Mr. Wahlin said the basis of the proposal to move to the sixth edition of the *Guides to the Evaluation of Permanent Impairment* is the independent performance evaluation of WSI recommendations.

Chairman Ruby called on Mr. Klipfel for comments regarding the bill drafts. He distributed written material ([Appendix C](#)) summarizing the permanent partial impairment awards provided by WSI.

Chairman Ruby called on Mr. Loegering for comments regarding the bill drafts. He said in reviewing the independent performance evaluation of WSI it appears that if the 10 percent threshold for whole body impairment is used, the change to the sixth edition of the *Guides to the Evaluation of Permanent Impairment* would still result in decreasing the number of awards made. He said although the recommendations of the independent performance evaluation include changing to the sixth edition, the recommendations also include training doctors on how to perform the evaluations under the new guidelines--a recommendation that is not being considered by the committee.

Mr. Loegering said he suggests the committee take no action to change to the sixth edition of the *Guides to the Evaluation of Permanent Impairment* and instead allow a couple of years before reconsidering. He said by waiting, WSI would be able to gather data regarding other states and how they have fared in the transition to the sixth edition.

Representative Wald said by changing the impairment award schedule it would appear that Mr. Loegering's issues are being addressed.

Mr. Loegering said he is concerned that if the committee recommends a bill draft, during the legislative session the legislators will give significant weight to the committee's recommendation under the belief the committee thoroughly studied the issue. He

said to the contrary, the independent performance evaluation recommendation is that the award schedule be decreased to 10 percent. He said he does not want the injured employee to be harmed as the result of the Legislative Assembly learning how the change to the sixth edition will impact the fund. He said this change should not be on the back of the injured employee.

Senator Wanzek said he supports the permanent partial impairment formula that is more heavily in favor of individuals who have more significant injuries.

Representative Amerman said he understands the intent is to be revenue-neutral in this transition to the sixth edition of the *Guides to the Evaluation of Permanent Impairment*; however, it is wrong to make this change in such a way that it is put on the injured employees' backs. He said the independent performance evaluation of WSI made a recommendation of changing the impairment schedule to 10 percent, and WSI is not able to clearly refute the numerical analysis performed in the independent performance evaluation. However, he said, the committee recommendation of 14 percent whole body impairment is not based on solid data, it is just based on a gut feeling that 10 percent would be too high.

**The motion carried on a roll call vote.** Representatives Ruby and Wald and Senators Wanzek and Wardner voted "aye." Representative Amerman voted "nay."

### **Managed Care Bill Draft**

The committee reviewed a bill draft [[10212.0100](#)] that addresses records of the workers' compensation managed care program which are open to the public.

Chairman Ruby called on Ms. Bjornson for comments regarding the bill draft. She said the bill draft is made in response to the independent performance evaluation Recommendation 6.6, which recommends creation of a process for the profiling of pain management providers. She said under current law, data regarding prescription medication is collected by WSI but only released to the medical provider. She said as amended, the law would allow the release of final report information, including medication prescription.

In response to a question from Representative Ruby, Ms. Bjornson said that the information released by WSI would be limited to the information regarding the medical provider and would not include information regarding the injured employee. She said this bill draft can stand on its own and is not reliant on the passage of any other legislation. She said under this bill draft, WSI is put in the position of gathering and making available information for the public.

**It was moved by Representative Wald, seconded by Senator Wardner, and carried on a roll call vote that the bill draft relating to managed care information be approved and recommended to the Legislative Management.** Representatives Ruby, Amerman, and Wald and Senators Wanzek and Wardner voted "aye." No negative votes were cast.

### **Generic Drugs Bill Draft**

The committee reviewed a bill draft [[10219.0100](#)] relating to workers' compensation coverage for generic drugs.

Chairman Ruby called on Mr. Wahlin for comments regarding the bill draft. He said generic equivalent medications are approximately 20 percent to 30 percent less expensive than brand name drugs. This bill draft would provide that WSI provide coverage equivalent to the use of generic drugs unless the use of the generic drug would create a life-threatening side effect.

Mr. Wahlin said under current coverage, branded overrides account for approximately 5 percent of WSI's total prescription costs.

Chairman Ruby called on Mr. Loegering for comments regarding the bill draft. He said he takes issue with the requirement that a side effect be life-threatening and would support changing that standard to something less than life-threatening. He said the side effect of having hives all over your body may not be life-threatening, but it would have a significant impact on the quality of life. He said health insurance has a protocol to deal with overrides for the use of brand name drugs, and WSI should have the same process.

Mr. Wahlin said WSI's current system allows for a brand name override, but then the issue becomes what side effects qualify as serious and justify a brand override. He said the requirement that there be a serious side effect becomes a mere hoop to jump through and that is why 5 percent of WSI's total prescription costs relate to branded overrides.

In response to a question from Representative Ruby, Mr. Wahlin said he has not been able to find a case in North Dakota of a life-threatening side effect occurring with the use of a generic. He said the benefit of using the life-threatening standard is that WSI has a reliable, crystal clear standard. He said as a related issue, when narcotics are sold on the street, the brand name narcotics are worth approximately two times more than the generic drugs, so prescription of the generic medication may decrease the improper use of the medication.

Senator Wardner said as this bill draft is drafted, it is not very flexible; however, he is not able to think of a more flexible standard that accomplishes the desired goal.

Representative Ruby said if a rash occurs due to use of a generic drug, he would think that would indicate an allergy that would be considered life-threatening.

Senator Wanzek said he understands the need for WSI to move toward the prescription of generic drugs, but questions whether it might be possible to use a carrot approach instead of a stick approach.

Mr. Wahlin said in looking at how other entities have addressed the issue of the use of brand names versus generics, the Department of Human Services implemented a \$3 copay for the use of name brand drugs, and the result was a 5 percent override

decrease to a .1 percent override. However, he said, the \$3 copay did not dissuade narcotic dealers.

**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.

### **Pain Therapy**

The committee reviewed a bill draft [[10221.0100](#)] relating to workers' compensation coverage of prescription drugs as part of pain therapy.

Mr. Wahlin said the bill draft is in response to Recommendation 6.9 of the independent performance evaluation of WSI. He said this bill draft is intended to address the problems associated with overprescription of opiates. He said these problems include the high expense for WSI, the habit-forming and addictive nature of opiates, and the concern of opiates being resold and entering the drug trade.

Mr. Wahlin said the bill draft is based in part on West Virginia administrative rules. He said the bill draft distinguishes between general opiate therapy during the acute stage of treatment and long-term opiate therapy. He said the recommendation of the performance evaluation did not specify use of the West Virginia approach, but instead suggested a "second fill evaluation." He said WSI does not have the resources to evaluate this high number of prescription fills, and this approach also would require an unneeded amount of resources on reviewing opiate prescriptions during the acute phase of treatment. He said it is the long-term treatment and use of opiates that is of concern to WSI.

**It was moved by Senator Wanzek, seconded by Senator Wardner, and carried on a roll call vote that the bill draft relating to workers' compensation coverage of prescription drugs as part of pain therapy, as amended to address typographical errors on page 2 and page 3, be approved and recommended to the Legislative Management.** Representatives Ruby and Amerman and Senators Wanzek and Wardner voted "aye." No negative votes were cast.

### **CLOSING REMARKS**

Chairman Ruby thanked the representatives of WSI who helped make this interim run so smoothly, as well as the advocates for the injured employees.

**It was moved by Representative Wald, seconded by Senator Wanzek, and carried that the chairman and the staff of the Legislative Council be requested to prepare a report and the bill drafts recommended by the committee and to present the report and recommended bill drafts to the Legislative Management.**

**It was moved by Senator Wanzek, seconded by Senator Wardner, and carried that the committee be adjourned sine die.**

No further business remaining, Chairman Ruby adjourned the committee sine die at 1:55 p.m.

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Jennifer S. N. Clark  
Committee Counsel

ATTACH:3