

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

### WORKERS' COMPENSATION REVIEW COMMITTEE

Wednesday, September 26, 2012  
Harvest Room, State Capitol  
Bismarck, North Dakota

Representative Gary R. Sukut, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives Gary R. Sukut, Bill Amerman, George J. Keiser; Senators George L. Nodland, Mac Schneider, Rich Wardner

**Others present:** See [Appendix A](#)

**It was moved by Senator Wardner, seconded by Senator Nodland, and carried on a voice vote that the minutes of the August 1, 2012, meeting be approved as distributed.**

Chairman Sukut noted the committee members had the option of attending the meeting via teleconference. Representative Keiser and Senator Schneider attended the meeting via teleconference.

Committee Counsel distributed a copy of written testimony ([Appendix B](#)) submitted by Mr. Luke Kenner, Dickinson, the injured employee who had his claim reviewed at the August 1, 2012, committee meeting.

#### BILL DRAFTS

Chairman Sukut called on Committee Counsel to review a bill draft [[13.0202.01000](#)] providing for a Workers' Compensation Review Committee study of the workers' compensation preferred provider program. Committee Counsel said the bill draft provides that during the 2013-14 interim, the committee would study the Workforce Safety and Insurance (WSI) preferred provider program. However, she said, the bill draft would allow the committee to comply with the study charge by including the study as one of the elements of the WSI independent performance evaluation conducted under North Dakota Century Code Section 65-03-30.

In response to a question from Representative Amerman, Committee Counsel said although the WSI independent performance evaluations are conducted once every four years, the committee would include this element in the performance evaluation contracted for in 2013 and reported to the committee at the end of the interim in 2014.

**It was moved by Senator Wardner, seconded by Senator Nodland, and carried on a roll call vote that the bill draft providing for a study of the WSI preferred provider program be approved and recommended to the Legislative Management.** Representatives Sukut, Amerman, and Keiser and Senators Nodland, Schneider, and Wardner voted "aye." No negative votes were cast.

Chairman Sukut called on Senator Schneider to review a bill draft [[13.0185.01000](#)] relating to workers' compensation permanent partial impairment (PPI) determinations. Senator Schneider said the bill draft would address the situation in which a PPI determination is contested. If an injured employee's medical provider determined a 15 percent whole body impairment and WSI's medical provider determined a 10 percent whole body impairment, he said, under current law the determination of the independent doctor selected under Section 65-05-12.2(12) would be the determination that is presumed and which could be rebutted only by clear and convincing evidence--regardless of whether that final determination was more than, less than, equal to, or someplace between the determinations of the injured employee's and WSI's medical providers. He said under this bill draft, the determination of the independent doctor would be presumed if it was not more than and not less than the determinations of the injured employee's and WSI's medical providers; however, if the independent doctor's determination was more than the injured employee's medical provider's determination, the presumed whole body impairment would be the determination of the injured employee's medical provider, and if the independent doctor's determination was less than WSI's medical provider's determination, the presumed whole body impairment would be the determination of WSI's medical provider.

In response to a question from Representative Keiser, Senator Schneider said if the independent doctor's determination was based on newly discovered medical evidence or was based on a better medical principle, that new evidence or medical principle could be used to rebut the presumed determination by clear and convincing evidence. Committee Counsel and Mr. Timothy Wahlin, Chief of Injury Services, Workforce Safety and Insurance, agreed with Senator Schneider's analysis.

In response to a question from Senator Wardner, Senator Schneider said the bill draft would work both ways as it could work to the advantage or disadvantage of an injured employee, depending on whether the independent doctor's whole body impairment determination was more than or less than the determinations of the other medical providers.

**It was moved by Representative Amerman, seconded by Senator Schneider, and carried on a roll call vote that the bill draft relating to workers'**

**compensation PPI determinations be approved and recommended to the Legislative Management.**

Representatives Sukut, Amerman, and Keiser and Senators Nodland and Schneider voted "aye." Senator Wardner voted "nay."

Chairman Sukut called on Committee Counsel to present a bill draft [13.0199.01000] relating to WSI's preferred provider program. Committee Counsel said the bill draft strengthens an employer's duty to inform employees of the employer's decision to participate in the preferred provider program.

Mr. Wahlin distributed a copy ([Appendix C](#)) of the workers' compensation notice employers are required to post at the worksite and a copy of the form an employer uses to submit the selection of a designated medical provider.

Senator Wardner said he thinks employers have an obligation to keep employees informed. However, he said, he understands the concerns raised by Mr. Kenner and the perceived lack of enforcement of this duty.

In response to a question from Senator Wardner, Committee Counsel said if an employer does not comply with the notice requirements under the preferred provider law, the employer's preferred provider selection is invalidated; however, there is a circular element to this logic because if an employee does not know the terms of the program, the employee would not know that the employer's selection has been invalidated.

Senator Nodland questioned what incentive an employer has to comply with the notice requirement. He said Mr. Kenner makes a good point about the lack of a meaningful enforcement mechanism for this law.

In response to a question from Representative Amerman, Mr. Wahlin said under the existing law and under this bill draft, if an employer fails to comply with the notice provisions the employer's selection becomes invalid and the employee may choose any provider.

In response to a question from Senator Nodland, Mr. Wahlin said WSI does not take an active role in enforcing the requirement that employers post the notice at a worksite. He said typically WSI only becomes aware of an employer's failure to comply with the posting requirement if a claim is made and the issue is brought to the organization's attention.

In response to a question from Representative Sukut, Mr. Wahlin said there has been a change in the role WSI takes in the relationship between an employer and an employee. He said WSI's role has become less regulatory over time.

Representative Keiser said although it is valuable at the time of hire for an employer to inform the new employee of the employer's designated provider selection, he does not think a typical employee will understand the significance of this notice. However, he said, at the time of injury, he hopes an employer would take that opportunity to once again inform the

employee of the provisions of the preferred provider program.

Senator Schneider said as an adjunct professor at the University of North Dakota School of Law, he was impressed that at the time of hire it was made clear to him that he could opt-out of the university's preferred provider program and select his own medical provider.

Senator Wardner said he supports the bill draft and thinks it will be valuable during the legislative session to continue to consider how to better enforce the notice requirements and help the employee better understand the terms of the preferred provider program.

**It was moved by Senator Wardner, seconded by Representative Keiser, and carried on a roll call vote that the bill draft relating to WSI's preferred provider program be approved and recommended to the Legislative Management.** Representatives Sukut, Amerman, and Keiser and Senators Nodland, Schneider, and Wardner voted "aye." No negative votes were cast.

Chairman Sukut called on Committee Counsel to present a bill draft [13.0203.01000] relating to transparency of medical providers' professional relationships with WSI. Committee Counsel said the bill draft creates a new section of law that provides if WSI enters a professional relationship with a medical provider, one of the terms of that relationship is that at the time of treatment of a patient who is an injured employee the medical provider has an obligation to inform that patient that the medical provider has a professional relationship with WSI.

In response to a question from Representative Amerman, Committee Counsel said although the bill draft language was intentionally drafted broadly to include more than medical providers who are employed by WSI, it is possible the term "professional relationship" is too broad. Mr. Wahlin said WSI contracts with medical providers for a variety of purposes, including utilization reviews, second opinions, and appropriateness reviews for prescribed apparatuses. He said the term "professional relationship" may raise some interpretation issues as it may mean different things to different people.

In response to a question from Representative Sukut, Mr. Wahlin said although a doctor might not realize a patient's medical issue is work-related at the beginning of an appointment, it is likely that the doctor will become aware of the nature of the injury as causation is discussed.

Representative Amerman said he recognizes this bill draft may benefit from additional consideration and possible amendments, but it addresses an issue that should be considered.

**It was moved by Representative Amerman, seconded by Senator Wardner, and carried on a roll call vote that the bill draft relating to transparency of medical providers' professional relationships with WSI be approved and recommended to the Legislative Management.** Representative Amerman and Senators Nodland,

Schneider, and Wardner voted "aye." Representatives Sukut and Keiser voted "nay."

### **WORKFORCE SAFETY AND INSURANCE**

Chairman Sukut called on Ms. Jodi Bjornson, General Counsel, Workforce Safety and Insurance, for a presentation of WSI's proposed legislative package for the 2013 legislative session. Ms. Bjornson provided a general overview of the issues that will be addressed in WSI's legislation. She said WSI plans to introduce two bills--one addressing claimant issues and one addressing the employer services and insurance sides.

Ms. Bjornson said the claimant bill will include:

- A remedy for a North Dakota National Guard inequity that results when soldiers transition from federal employment to state employment back to federal employment;
- A modification to allow WSI to consider postinjury wages of injured employees who move out of state following an injury;
- A modification of the parties from which WSI may seek repayment if an eligible injured employee files and receives workers' compensation in a second state;
- A modification of how long an injured employee may be incarcerated before workers' compensation benefits are suspended or discontinued; and
- Updates to the vocational rehabilitation services provisions made necessary due to WSI bringing these services in-house instead of contracting for these services.

Ms. Bjornson said the employer services and insurance bill will include:

- Provisions that will continue to modify the relationship WSI has with employers so that WSI is allowed discretion in determining whether to seek penalties from employers;
- A provision that will allow WSI to require premium prepayment if WSI determines prepayment is reasonable and necessary;
- An increase in penalties for failure to pay premiums; and
- A revision on how premiums are calculated for volunteers and interns.

**It was moved by Senator Nodland, seconded by Senator Wardner, and carried on a voice vote that the Chairman and 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 Wardner, seconded by Representative Amerman, and carried on a voice vote that the committee be adjourned sine die.**

No further business appearing, Chairman Sukut adjourned the committee sine die.

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Jennifer S. N. Clark  
Committee Counsel

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