

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Tuesday, August 30, 2016
 Conference Center, Student Center, Minot State University
 Minot, North Dakota

Senator Nicole Poolman, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Nicole Poolman, Ralph Kilzer, George Sinner; Representatives Bill Amerman, George Keiser, Dan Ruby

Others present: See [appendix](#)

It was moved by Representative Keiser, seconded by Representative Ruby, and carried on a voice vote that the minutes of the August 3, 2016, meeting be approved as distributed.

Chairman Poolman thanked Dr. Steven Shirley, President, Minot State University, Minot, and his staff for hosting the committee. Additionally, she thanked the two injured workers for their time and willingness to work with the committee in improving the state's workers' compensation system.

CLAIM REVIEW

The committee scheduled two workers' compensation claim reviews brought to the committee by injured employees for the purpose of determining whether changes should be made to the statutes relating to workers' compensation as provided for under North Dakota Century Code Section 54-35-22. For each of the claim reviews, the committee received a summary by Mr. Chuck Kocher, Workforce Safety and Insurance, of the injured employee's claim; a presentation by the injured employee of the claim and issues; a response by a representative of Workforce Safety and Insurance (WSI); and allowed for comments by interested persons regarding the issues raised by the injured employee.

Jerry Holter**Claim Summary**

Chairman Poolman called on Mr. Kocher to provide a summary of Mr. Jerry Holter's, injured employee, workers' compensation claim. He said:

- Mr. Holter injured his hip on January 15, 2009, in the course of working as a concrete foreman.
- Workforce Safety and Insurance accepted a claim for a right hip sprain/strain.
- On April 27, 2009, Mr. Holter was presumed to have reached maximum medical improvement of the work injury.
- On January 16, 2015, Mr. Holter saw a physician regarding right hip pain and the physician noted some fairly severe degenerative changes in the hip, requiring hip replacement.
- On February 23, 2015, WSI denied Mr. Holter's request to reopen his presumed closed claim.
- On March 5, 2015, WSI received Mr. Holter's request for reconsideration, stating he felt his current degenerative changes were due to 30 years of concrete construction work and due to the January 15, 2009, work incident.
- On March 17, 2015, WSI issued an order stating the injured worker was not entitled to additional benefits because the medical evidence did not show his current condition was related to the work injury.
- On April 6, 2015, Mr. Holter requested the assistance of the WSI Decision Review Office to review the March 17, 2015, order.
- On May 19, 2015, the WSI Decision Review Office issued a certificate of completion indicating no recommended change in the decision of the order.
- Mr. Holter did not request an administrative hearing and WSI's order became final.

Injured Employee's Issues

Chairman Poolman called on Mr. Holter to review his claim and discuss the issues related to his claim. He said his medical issues revolve around his right hip. He said before his workplace injury in 2009, he did not have hip issues.

Mr. Holter said he feels like he is being penalized because he did not continue to complain about his right hip pain, resulting in his claim closing. He said if the workers' compensation program is not designed to help hard working people like him, who is it designed for.

In response to a question from Representative Keiser, Senator Kilzer said Mr. Holter's problem appears to be unilateral, which is not uncommon in hip replacement cases. He said the underlying causes for unilateral hip degeneration may vary.

In response to a question from Senator Kilzer, Mr. Holter said there was a single traumatic event at work. He said immediately following the injury he experienced extreme pain and felt his hip pop, as if it was coming in and out of the socket. He said following this initial injury he did not have to leave work, but he had a doctor check the injury.

In response to a question from Representative Ruby, Mr. Kocher said questions regarding how WSI deals with degenerative issues after a claim is closed, how WSI measures degeneration, and whether it is possible to distinguish between a person's naturally occurring joint degeneration and the degeneration attributable to the workplace injury would be better addressed by the injured employee's treating physician and WSI experts. He said although Mr. Holter's occupation puts him at increased risk of degenerative issues, he was able to return to work following his injury and he continues to work.

Senator Kilzer said in the orthopedic specialty there are scholarly studies on joint degeneration. He said in the case of Mr. Holter, he expects preinjury x-rays would have shown degeneration, even if he was not reporting pain at that time.

In response to a question from Senator Sinner, Mr. Holter said although he has not had hip replacement surgery he takes anti-inflammatory medication. Additionally, he said, although he continues to work, due to his hip injury he has had to change the intensity of his work. He said his employer is great to work for and at age 60 he is not ready to retire.

Representative Ruby said an employee's experience is very valuable to an employer.

Mr. Holter said although his health insurance will cover hip replacement surgery, there will be significant out-of-pocket expenses and he will not receive wage loss while he is recuperating. He said his physician recommends he wait as long as possible before he has hip replacement surgery.

In response to a question from Representative Amerman, Mr. Holter said after he went through the WSI Decision Review Office process, he did not consult an attorney because he heard through the grapevine how unlikely it would be for an attorney in North Dakota to even touch his case.

WSI Response

Chairman Poolman called on Ms. Jodi Bjornson, General Counsel, Workforce Safety and Insurance, to respond to the issues raised by Mr. Holter. She reviewed Section 65-01-02(10)(b)(7), which clarifies when an injury attributable to a pre-existing condition is not considered to be a compensable injury. However, she said, under Section 65-05-15, the law addresses circumstances under which coverage may exist when a compensable injury combines with a noncompensable injury.

Ms. Bjornson said Section 65-05-35 establishes the closed claim presumption, which applied in Mr. Holter's claim. She said if a claim is dormant for an extended period of time without treatment, the claim becomes difficult to assess. If a claim is dormant for 4 years or more, she said, the claim is presumed closed. She said clear and convincing evidence is required to reopen a claim presumed closed due to dormancy.

Ms. Bjornson said in reviewing Mr. Holter's claim, the physician's notes indicate the work injury was a soft tissue injury, and 4 years later the physician indicated the problem was osteoarthritis.

In response to a question from Representative Ruby, Ms. Bjornson said if there is medical evidence in a claimant's file to meet the clear and convincing requirement, the claim will be reopened. However, she said, Mr. Holter's claim did not meet the standard for reopening.

In response to a question from Chairman Poolman, Ms. Bjornson said Mr. Holter's medical records lack information linking his current condition to his work injury.

In response to a question from Senator Sinner, Ms. Bjornson said WSI looks to medical experts to establish whether the clear and convincing standard is met. She said Section 65-05-15 requires proof the progression of the pre-existing injury is substantially accelerated by the work injury. She said WSI requires evidence this standard is met.

In response to a question from Representative Keiser, Ms. Bjornson said she is not aware of a re-evaluation being performed of Mr. Holter's initial diagnosis of a soft tissue injury.

Senator Kilzer said based on Mr. Holter's testimony, he is certain he did not dislocate his hip when he injured it at work. He said this appears to be an arthritic problem and it would have been apparent if x-rays had been taken at the time of the initial workplace injury.

Mr. Holter said although he may not have dislocated his hip when he injured his hip, there was an audible pop and immediate pain.

Committee Discussion

Representative Keiser suggested the committee request WSI provide a report to the committee regarding how it addresses workplace injuries that may have impacted or caused accelerated advancement of an existing degenerative condition. He said WSI may consider pursuing a pilot program or other study regarding this issue.

Chairman Poolman said she agreed with Representative Keiser's request. She said this issue is important given the trend of people working later in life.

Representative Ruby said he agreed with Representative Keiser that degeneration is a workers' compensation issue that arises over and over again, and it is not uncommon for legislators to hear complaints from constituents regarding this issue.

It was moved by Representative Keiser, seconded by Representative Ruby, and carried on a voice vote that WSI be requested to present information at a future meeting regarding best practices of other states addressing degenerative conditions and pre-existing conditions.

Clayton Guffey

Claim Summary

Chairman Poolman called on Mr. Kocher to provide a summary of Mr. Clayton Guffey's, injured employee, workers' compensation claim. He said:

- Mr. Guffey injured his lumbar spine on February 19, 2007, in the course of working as a laborer.
- On March 8, 2007, WSI accepted the claim and awarded medical and wage loss benefits.
- Mr. Guffey received wage loss benefits for the period May 24, 2007, through July 8, 2007, after which he was released to return to work.
- On August 28, 2009, WSI issued an order denying further disability and rehabilitation benefits.
- On October 27, 2009, Mr. Guffey, through his attorney, requested a hearing on the August 28, 2009, order.
- On August 4, 2010, Mr. Guffey withdrew his request for hearing and the hearing scheduled for August 10, 2010, was canceled.
- On July 5, 2014, Mr. Guffey reapplied for wage loss benefits, claiming a worsening of his work-related medical condition.
- On October 1, 2014, WSI issued a notice of decision accepting reapplication and awarding medical and wage loss benefits.
- Mr. Guffey received wage loss benefits beginning on July 24, 2014.
- On August 11, 2014, Mr. Guffey's treating physician submitted to WSI information regarding Mr. Guffey's cervical spine because Mr. Guffey felt his cervical spine problem was directly related to his lumbar spine injury.

- On November 25, 2014, WSI issued a notice of decision denying Mr. Guffey's claim, based on a finding Mr. Guffey's cervical spine condition was unrelated to his February 19, 2007, lumbar spine work injury.
- On December 6, 2014, Mr. Guffey submitted to WSI a request for reconsideration indicating why he felt his cervical spine problems are related to his 2007 work injury.
- On March 23, 2015, WSI issued an order stating WSI was not liable for Mr. Guffey's cervical condition.
- On April 2, 2015, Mr. Guffey requested the assistance of the WSI Decision Review Office.
- On April 29, 2015, the WSI Decision Review Office issued a certificate of completion indicating no recommended change in the decision of WSI's order.
- On October 6, 2015, an administrative law judge issued findings of fact, conclusions of law, and final order, affirming WSI's March 23, 2015, order.
- Mr. Guffey did not appeal the administrative decision and the order became final.

Mr. Kocher said his summary is limited to Mr. Guffey's 2007 WSI claim, but Mr. Guffey may address additional WSI claims.

Injured Employee's Issues

Chairman Poolman called on Mr. Guffey to review his claim and discuss issues related to his claim. He reviewed how he was injured in 2007 as a result of a slip and fall at work. Additionally, he reviewed an earlier workplace injury resulting in an injury to his leg. When he injured his leg, he said, he had ongoing groin pain his treating physician disregarded. He said his experience is that WSI's system does not deal well with multiple injuries related to a single work-related event.

Mr. Guffey said over the course of multiple workplace injuries, he has continued to work hard and try addressing unresolved pain issues. He said through his ongoing complaints to his medical providers there have been instances in which his medical provider has found explanations for his ongoing pain which should have been addressed at the time of injury.

Mr. Guffey said he had someone from WSI visit his worksite to suggest accommodations to address some of his physical limitations, but instead of helping him, the person from WSI reported to his employer everything Mr. Guffey was doing incorrectly and how there was nothing WSI could do to help him.

Mr. Guffey said through WSI's vocational rehabilitation services, it was recommended he quit his job and do a computer job or work as a greeter at Walmart. He said he cannot afford to quit a good paying, dependable job with health insurance for an unreliable job available somewhere else in the state which would require him to move. He said WSI should consult with the injured employee to determine what the injured employee's interests are.

Mr. Guffey said WSI should establish a program to help injured employees connect with employers to give injured employees the opportunity to try a job. He said he may need help getting his foot in the door and the opportunity to establish a relationship with a potential employer.

Mr. Guffey said WSI's system is frustrating for medical providers. He said he knew things were bad when his physician said, "we're done with WSI. I am going to treat you like a regular patient." He said he thinks it is best when an injured employee is allowed to go to the employee's medical provider instead of WSI's medical providers.

Mr. Guffey said he thinks the WSI Decision Review Office is biased.

Mr. Guffey said even though his most recent employer was very supportive, and he worked hard and tried to work through the pain, ultimately he had to quit working because he could not ask his coworkers to carry his workload. He said he is trying to pursue Social Security Disability benefits.

WSI's Response

Chairman Poolman called on Ms. Ann Schaibley, Workforce Safety and Insurance, to respond to the issues raised by Mr. Guffey.

Ms. Schaibley reviewed the issue of whether Mr. Guffey's cervical injury should be added to his back injury claim. She said the records indicate that over the course of multiple physical therapy sessions, it was not until 15 months following the injury that the records show the first reference to neck pain, which was claimed to have been related to a shoulder injury.

Mr. Guffey said he has significant health issues and it can be a challenge to follow them all. He said some of his health issues are work-related and some are not.

Ms. Schaibley said the administrative law judge found no causal connection between Mr. Guffey's cervical issues and his lumbar work injury.

Ms. Schaibley said the authorization to release Mr. Guffey provided to appear before the committee is limited to the most recent claim. She said over the course of several years, Mr. Guffey has filed at least 12 claims with WSI, of which WSI has accepted 10 and denied 2. However, she said, without an authorization to release for the other 11 claims, she is not allowed to provide any additional information to the committee regarding the other claims.

Committee Discussion

Representative Keiser summarized some of the issues raised by Mr. Guffey, including how the system addresses multiple injuries, how the system deals with the broad range of services provided and diagnoses and evaluations that are in error, and how the system might be improved to facilitate better communications between various medical providers.

Senator Sinner requested information regarding the workplace injury to Mr. Guffey's leg and the other injuries for which he has filed claims with WSI. The committee requested the Legislative Council staff notify Mr. Guffey of the next committee meeting.

Mr. Guffey signed an authorization to release to allow WSI at a future meeting to discuss all 12 of his WSI claims.

No further business appearing, Chairman Poolman adjourned the meeting at 12:15 p.m.

Jennifer S. N. Clark
Counsel

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