

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Wednesday, September 21, 2016
Harvest Room, State Capitol
Bismarck, 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 A](#)

It was moved by Representative Keiser, seconded by Senator Kilzer, and carried on a voice vote that the minutes of the August 30, 2016, meeting be approved as distributed.

COMMITTEE WORK
Vocational Rehabilitation

Chairman Poolman called on Ms. Robin Halvorson, Return to Work Services Director, Workforce Safety and Insurance, to provide an overview of the vocational rehabilitation hierarchy used by Workforce Safety and Insurance (WSI). Ms. Halvorson distributed written material ([Appendix B](#)) setting out the hierarchy used for claimants injured through December 31, 2005, and for claimants injured after December 31, 2005. She said of the 2,448 time loss claims filed with WSI in fiscal year 2016, 772 were referred to vocational rehabilitation.

In response to a question from Representative Keiser, Ms. Halvorson reviewed WSI's use of functional capacity evaluations. She said if an injured employee experiences an injury that changes or evolves over the course of vocational rehabilitation, the functional capacity evaluation should address this change as the functional capacity evaluation is a whole-body evaluation. She said, if appropriate, WSI may perform a second functional capacity evaluation.

Representative Keiser said perhaps the next WSI performance evaluation can include consideration of functional capacity evaluations.

In response to a question from Senator Sinner, Ms. Halvorson said \$648 per week is the maximum wage loss benefit WSI will pay an injured employee. However, she said, if the injured employee returns to work at a decreased earning level, that injured employee may qualify for up to 5 years of temporary partial disability payments.

Senator Sinner said he expects a person with a salary, such as himself and Ms. Halvorson, would experience real hardship if the person's earnings were decreased to \$648 per week.

Representative Amerman said he is concerned there may be negative implications for the injured employee due to the use of "position" in option A and the use of "occupation" in option B.

In response to a question from Senator Sinner, Ms. Halvorson said at any given time there are approximately 500 vocational rehabilitation claims in the system. She said WSI can provide the committee with the history of the vocational rehabilitation hierarchy over the last 10 years.

In response to a question from Senator Kilzer, Ms. Halvorson said neuropsychological conditions are only considered only if the workplace injury was a brain injury.

Senator Kilzer said approximately 10 percent of workers' compensation claims include a time-loss element.

Mr. Tim Wahlin, Chief of Injury Services, Workforce Safety and Insurance, said national data shows the percentage of time-loss claims is falling, likely a result of safer workplaces. He said WSI has an incentive to encourage timely filing of workplace injuries. If an employee files a claim with WSI within 24 hours of the injury, he said, the employer's \$250 deductible is waived.

Senator Sinner said the pilot program for counseling seems positive and he said since WSI has the resources, the program should be expanded.

Ms. Halvorson said the expansion of the pilot program does not directly impact WSI's vocational rehabilitation staff because the referral is made before vocational rehabilitation services are provided. However, she said, WSI is evaluating the program to determine whether the services might be offered to injured employees earlier in the process. She said one limitation in expanding the use of the program is the limited availability of counselors.

Legislative Package

Chairman Poolman called on Ms. Jodi Bjornson, General Counsel, Workforce Safety and Insurance, to provide an overview ([Appendix C](#)) of WSI's tentative legislative package for the 2017 legislative session. She reviewed the four bill drafts WSI is considering introducing. She said the drafts have been brought before the WSI Board of Directors for initial consideration, but will go before the board again for final consideration and also will be presented to the Governor for review.

Pre-existing Conditions

Representative Keiser called on Mr. Wahlin to provide an overview of how the state's workers' compensation system addresses pre-existing conditions. He provided an overview of North Dakota Century Code Section 65-01-02(10). He said the basic premise is that WSI will not cover a pre-existing condition unless a work injury substantially worsens or accelerates the pre-existing condition.

Mr. Wahlin said element 5 of the [2010 WSI performance evaluation](#) addressed a 2009 study charge directing the Workers' Compensation Review Committee to study pre-existing conditions.

Overview

Representative Keiser made a computer presentation ([Appendix D](#)) providing an overview of WSI.

CLAIM REVIEW

The committee scheduled time to receive additional information regarding a previously reviewed claim as well as three new claim reviews for the purpose of determining whether changes should be made to the statutes relating to workers' compensation as provided for under Section 54-35-22. For each of the three initial claim reviews, the committee received a summary by Mr. Chuck Kocher, Constituent Liason, 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 WSI; and allowed for comments by interested persons regarding the issues raised by the injured employee.

Clayton Guffey

Representative Keiser called on Ms. Ann Schaibley, Attorney II, Workforce Safety and Insurance, to provide a summary of WSI claims filed by Mr. Clayton Guffey, who presented his claim at the August 30, 2016, meeting. She summarized the claims by body part and also summarized the claims by claim number.

Representative Keiser said Mr. Guffey has a long history of claims, and said he questions whether WSI adequately considers how an injured employee may be experiencing systemic changes.

Representative Keiser called on Mr. Guffey to comment regarding his concerns brought before the committee. Mr. Guffey said he feels like WSI threw him under the bus. He said he does not think vocational rehabilitation plans should be able to tell an injured employee to get a job as a greeter at Walmart, instead the vocational rehabilitation plan should be designed through collaboration with the injured employee. Additionally, he said, every employee is going to have some degree of degenerative disease, and WSI should not be able to deny responsibility claiming a pre-existing condition.

Dan McCorkle

Claim Summary

Chairman Poolman called on Mr. Kocher to provide a summary of Mr. Dan McCorkle's workers' compensation claim. He said:

- Mr. McCorkle injured his left upper arm on January 28, 2014, while working in the oil field.
- On February 18, 2014, WSI accepted the claim and awarded wage loss benefits.
- On March 2, 2015, a vocational rehabilitation plan was approved, indicating Mr. McCorkle has transferable skills to return to work as a manager/owner of land development, cost estimator, first line supervisor of constructions trades, or extraction worker.

- On March 20, 2015, WSI issued a notice of intent to discontinue benefits after 2 months of work search benefits.
- On March 31, 2015, Mr. McCorkle, through his attorney, submitted a request for reconsideration.
- On April 22, 2015, WSI issued an order awarding partial disability benefits.
- On April 22, 2015, Mr. McCorkle requested the assistance of the Decision Review Office, and on May 20, 2015, the office issued a certificate of completion indicating no recommended change to the order.
- On June 2, 2015, Mr. McCorkle, through his attorney, requested a hearing. The hearing was scheduled and Mr. McCorkle continued to the hearing without the assistance of an attorney.
- On December 19, 2015, the administrative law judge issued an order, affirming WSI's order. The administrative law judge found the first appropriate rehabilitation option was a return to work in the statewide job pool.
- This administrative law judge order was not appealed to the district court.
- Mr. McCorkle appealed WSI's order denying permanent partial impairment benefits, based on an impairment of less than 14 percent whole body. This administrative proceeding was dismissed as a result of Mr. McCorkle withdrawing his request.

In response to a question from Representative Keiser, Mr. Kocher said a primary issue on this claim relates to attorneys fees.

In response to a question from Senator Sinner, Mr. Kocher said to qualify for a permanent partial impairment award, an injured employee must be found to have a whole body impairment of at least 14 percent.

Senator Kilzer said it is important to distinguish between disability and impairment. He said disability relates to a loss of ability to work, whereas impairment relates to loss of function of a part of the body.

Injured Employee's Issues

Chairman Poolman requested Mr. McCorkle to review the issues he would like the committee to consider. He said WSI did a good job providing medical benefits. However, he said, he was not adequately compensated for the significant loss of motion and ongoing pain resulting from the injury. Additionally, he said, the system does not recognize an injured employee's needs for legal services.

Mr. McCorkle said the injured employee needs an attorney to pursue any issues the injured employee might have with WSI. He said without an attorney, the deck is stacked against the injured employee.

WSI Response

Chairman Poolman called on Mr. Wahlin to respond to the issues raised by Mr. McCorkle. He said when the workers' compensation system was created, the injured employee gave up the right to sue the employer in exchange for sure and certain relief. He said as part of this bargain, the injured employee has given up the right to sue for pain and suffering.

Mr. Wahlin reviewed Section 65-05-12.2, the law regarding permanent partial impairment. He said he recognizes the permanent partial impairment award might not correlate to the injured employee's value of loss incurred by the injured employee.

In response to a question from Representative Ruby, Mr. Wahlin said after an injured employee reaches maximum medical improvement, WSI hires an expert examiner to perform an impairment evaluation. Following the impairment evaluation, he said, WSI has an in-house expert perform an audit of the impairment evaluation.

In response to a question from Senator Sinner, Mr. Wahlin said he has worked for WSI for approximately 15 years and during this time, the law relating to WSI payment of attorneys fees has not changed. He said 1995 legislative reforms resulted in the current approach to payment of attorneys fees. Before 1995, he said, WSI paid attorneys fees regardless of outcome, and as a result, almost every claim was appealed. He said this approach flooded the system and it was a disaster, with an immense amount of money going to pay for plaintiff's counsel. As a result of the reforms in 1995, he said, the change in the attorney fee law has resulted in premium savings. When WSI contracts for outside counsel, he said, it pays those attorneys the same hourly rate as WSI pays an injured employee's attorney--\$150 per hour.

In response to a question from Representative Keiser, Mr. Wahlin said if an injured employee wins an appeal, resulting in an increase in benefits, WSI pays attorneys fees. However, he said, if the change in WSI's order does not result in increased benefits, WSI does not pay attorneys fees.

In response to a question from Senator Sinner, Mr. Wahlin said if WSI disagrees with the ruling of an administrative law judge or a district court judge, WSI can appeal to the district court or the North Dakota Supreme Court. He said the ultimate decision determines whether WSI will pay attorneys fees. In the case of appeals, he said, it is possible the final determination might take months or years.

In response to a question from Representative Amerman, Mr. Wahlin said "sure and certain relief" is a term of art commonly used at the turn of the century when the workers' compensation system was created.

In response to a question from Senator Kilzer, Mr. Wahlin said WSI tracks its success rate on appeal. He said WSI wins approximately 65 percent of the cases at the administrative hearing level.

In response to a question from Representative Keiser, Mr. Wahlin said he does not have statistics on why injured employees decide to not pursue matters on appeal. However, he said, he will try to provide the committee with data regarding the number of appeals filed versus the number of appeals actually heard in 2016.

Kevin Rice

Claim Summary

Chairman Poolman called on Mr. Kocher to provide a summary of Mr. Kevin Rice's workers' compensation claim. He said:

- On July 6, 2011, Mr. Rice injured his right groin while working for a food manufacturer. On December 6, 2011, WSI accepted the claim and awarded medical benefits for a lumbar sprain and strain and wage loss benefits.
- On March 5, 2014, WSI issued a notice of intention to discontinue benefits as Mr. Rice had received temporary total disability benefits for a total of 104 weeks, and Mr. Rice subsequently became entitled to receive temporary partial disability, with an earnings capacity of \$0, as he was not able to work.
- On November 24, 2014, WSI received an independent medical examination report indicating the substantial contributing factor to Mr. Rice's back pain was degenerative disease. Mr. Rice's treating doctor agreed with the independent medical examination assessment.
- On March 19, 2015, WSI issued a notice denying further benefits based on the independent medical examination report and the opinion of the treating physician. The medical benefits ended on March 6, 2015, and wage loss benefits ended on April 9, 2015.
- On March 24, 2015, Mr. Rice's attorney requested reconsideration.
- On June 10, 2015, WSI issued an order denying further liability on the claim.
- On June 5, 2015, Mr. Rice requested the assistance of the Decision Review Office and on June 25, 2015, the Decision Review Office issued a certificate of completion indicating no recommended change in the decision.
- On July 2, 2015, Mr. Rice requested an administrative hearing and participated in the hearing without legal counsel.
- On January 4, 2016, the administrative law judge issued an order affirming WSI's order. This order was not appealed.

Injured Employee's Issues

Chairman Poolman called on Mr. Rice to review the issues he would like the committee to consider. He said his primary concern is that the system does not recognize that before his workplace injury he could work, but following his injury he has been unable to work. Additionally, he said, he thinks WSI's doctors do not have the injured employee's interests at the forefront, as they work for WSI. He said he would have hired an attorney to help him with his claim, but he cannot afford an attorney. He said overall he feels like WSI cheated him.

In response to a question from Representative Ruby, Mr. Kocher said Mr. Rice never had a permanent partial impairment evaluation because he had not reached maximum medical improvement. He said WSI determined Mr. Rice's ongoing disability was not caused by the work injury.

In response to a question from Representative Amerman, Mr. Kocher said following Mr. Rice's workplace injury, it took WSI a long time to gather the needed medical information to make a final determination.

Mr. Rice said initially he received treatment from his physician, but over time WSI guided him to one of its doctors.

In response to a question from Chairman Poolman, Mr. Rice said although he experienced low back pain since the 1980s, it was the workplace injury that exacerbated the problem.

WSI Response

Chairman Poolman called on Mr. Wahlin, to respond to the issues raised by Mr. Rice. He said Mr. Rice's medical records show he has had significant back injuries beginning in 1988. He said the law provides WSI will not cover a pre-existing condition unless the workplace injury was a substantial contribution to the condition.

Mr. Wahlin said following the initial approval of Mr. Rice's claim, and the resulting ongoing treatment, WSI sought an independent medical examination, which found there were ongoing medical problems that were not work related. He said WSI sent the independent medical examination report to Mr. Rice's treating doctor, who agreed with the independent medical examination report.

In response to a question from Representative Amerman, Mr. Wahlin said he expects Mr. Rice received wage loss benefits for any time loss he experienced.

Lori Mendenhall

Claim Summary

Chairman Poolman called on Mr. Kocher to provide a summary of Ms. Lori Mendenhall's workers' compensation claim. He said:

- On November 17, 2014, Ms. Mendenhall filed a claim with WSI, claiming an injury or infection she incurred while working as a housekeeper for a hotel in Stanley. The date of injury was July 1, 2014. Ms. Mendenhall reported she came to work one day and she began to itch all over. At the emergency room, a physician told her the itching was from the water in Ross.
- Ms. Mendenhall saw several doctors in an effort to determine the cause of her rash and itching. She received a variety of diagnoses. The physicians were unable to determine for certain whether the rash was a result of a workplace exposure.
- On December 12, 2014, WSI issued an order denying benefits, concluding Ms. Mendenhall failed to prove a compensable work injury.
- On January 8, 2015, Ms. Mendenhall appealed WSI's order, requesting reconsideration, indicating her doctor believes the skin condition was something from work.
- On March 25, 2015, WSI issued an order denying the claim, finding no objective medical evidence to support the claimant suffered an injury as a result of the work activities that occurred on July 1, 2014.
- Ms. Mendenhall did not appeal the order and it became final.

Representative Keiser asked Mr. Kocher what WSI does in a situation like this, which seems like a classic case of "he said, she said."

Mr. Kocher said WSI's medical supervisor performed a review of Ms. Mendenhall's claim and found the skin condition was not proven to be work related.

Senator Kilzer said he is not aware of any medical condition with such a long period of time between when the injury was claimed to have occurred and the claim was filed.

Senator Sinner said an emergency room doctor supported Ms. Mendenhall's claim.

Injured Employee's Issues

Chairman Poolman called on Ms. Mendenhall to review the issues she would like the committee to consider. She said she had doctors state her skin infection is related to her employment and her employer sat on her claim after she reported it to the employer.

WSI Response

Chairman Poolman called on Mr. Wahlin to respond to the issues raised by Ms. Mendenhall. He said for an injured employee to be eligible for workers' compensation benefits, the employee must establish eligibility by objective medical evidence.

In response to a question from Representative Ruby, Mr. Wahlin said when WSI receives a claim, it looks at medical evidence and as part of working the claim, the analyst contacts the employer.

In response to a question from Representative Keiser, Mr. Wahlin said to be objective medical evidence, the evidence must be substantiated.

Ms. Mendenhall said the initial doctor she saw said the rash was caused by the water and the next doctor said it was not the water, but could have been from work.

In response to a question from Senator Sinner, Mr. Wahlin said WSI occasionally addresses allergy claims, in which case it is typical to treat the event and then end coverage. He said in some instances, there is proof of increased sensitivity due to a workplace exposure. Additionally, he said, there have been instances of WSI covering exposure to mold, bedbugs, and scabies.

Representative Ruby said in a civil claim, the plaintiff would have the burden of proof. He said perhaps Ms. Mendenhall would have the necessary proof if, in the future, another employee has this same problem.

Mr. Wahlin said if after claim closure, WSI determines it made the wrong decision in not covering a claimant, WSI may exercise its continuing jurisdiction and reopen the claim.

Committee Discussion

Representative Amerman said he is concerned the rehabilitation hierarchy distinguishes between return to the same position and return to the same occupation.

Representative Ruby said he understands that in some instances it may not be reasonable to expect an employer to hold open a job while an employee recovers. He said in some instances recovery takes years.

In response to a question from Chairman Poolman, Mr. Wahlin said in the case of seasonal work, when an employee is injured at work the employee is typically out of work for the remainder of the season. However, he said, in a typical employment situation, in the majority of cases the employee is able to return to work. Additionally, he said, if an employee is unable to return to a previous position, and the new job pays less, the employee may be eligible for up to 5 years of partial temporary disability benefits.

Senator Sinner said WSI should consider revising its administrative rules to allow for payment of attorneys fees if an injured employee is successful on appeal, but then WSI is successful on further appeal. He said the fact a decision is issued in the employee's favor seems to indicate the issue was valid and not frivolous.

Representative Keiser and Chairman Poolman agreed failure to pay attorneys fees in this situation seems unfair.

In response to a question from Chairman Poolman, Mr. Wahlin said WSI has not had any internal discussions regarding changing its administrative rules relating to this matter.

Representative Ruby said in addition to attorneys fees, the committee heard there are ongoing issues with how the workers' compensation system addresses degenerative conditions and pre-existing conditions and how the system deals with complex cases in which there is a later diagnosis that may have changed an earlier finding by WSI.

The committee recognized there will be a WSI performance evaluation conducted during the 2017-18 interim, and perhaps these issues could be addressed in more detail as part of the performance evaluation.

It was moved by Senator Sinner, seconded by Representative Keiser, and carried on a voice vote that the Legislative Counsel staff be requested to prepare a bill draft to provide for payment of an injured employee's attorney's fees if the employee prevails, but due to appeal by WSI, WSI ultimately prevails.

No further business appearing, Chairman Poolman adjourned the meeting at 3:55 p.m.

Jennifer S. N. Clark
Counsel

ATTACH:4