

## NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

**WORKERS' COMPENSATION REVIEW COMMITTEE****TELECONFERENCE CALL**

Tuesday, October 4, 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:** [appendix](#)

Chairman Poolman called on the Legislative Council staff to review two bill drafts directing Workforce Safety and Insurance (WSI) to pay an injured employee's attorney fees on appeal when the employee prevails, regardless of whether WSI ultimately prevails on further appeal. She said at the request of the committee, the initial bill draft [[17.0298.01000](#)] was prepared in consultation with representatives of WSI; however, upon further review, WSI requested the bill draft be revised to address concerns relating to administrative rules. She said the second version of the bill draft [[17.0298.02000](#)] is identical to the first draft, except for the codification of current practice on page 2, lines 8 through 10, providing the total amount of attorney fees paid by the organization may not exceed the fee cap established for the highest appellate level at which the injured employee prevails.

The Legislative Council staff said in addition to the substantive changes, the bill drafts have multiple housekeeping provisions, updating the two pertinent sections of the North Dakota Century Code (NDCC).

Chairman Poolman called on Ms. Anne Green, Staff Counsel, Workforce Safety and Insurance, to comment regarding the two versions of the bill draft. She said the second version of the bill draft codifies and clarifies WSI's current practice.

Senator Kilzer said there appears to be a terrible problem with injured employees being unable to access legal services.

In response to a question from Senator Kilzer, Ms. Green reviewed the origins of WSI's fee schedule for attorneys fees, which is addressed under North Dakota Administrative Code (NDAC) Section 92-01-02-11.2, adopted in 1990.

Ms. Green said WSI pays its contract attorneys the same hourly rate as WSI pays the injured employee's attorney. She said WSI calculates the fee cap based on the average attorney costs per appeal. Additionally, she said, approximately every 2 years WSI updates the hourly attorney fees based on changes in the cost for WSI to contract with outside counsel. She said under NDCC Section 65-10-03, in the case of a judicial appeal with issues that are unusually complex, an injured employee's attorney may request attorneys fees in excess of the maximum fee. She said WSI makes the determination of whether issues are unusually complex.

In response to a question from Representative Keiser, Ms. Green said there is a very low number of instances in which WSI appeals an order in which the injured employee prevails. She said the fee structure WSI has adopted is equitable, as it reflects the heavy lifting that occurs at the administrative level and the fees are weighted to reflect this.

Senator Kilzer said he keeps hearing the attorneys fees structure or amounts are such that they act to prevent attorneys from taking workers' compensation cases.

Ms. Green said there is a limited number of attorneys in the state willing to take workers' compensation cases. However, she said, she cannot speculate why attorneys chose to not practice in this field. However, she said, the bill draft provides an incentive to injured employees' attorneys. She said under this bill draft, she would expect there to be an increase in the amount of attorneys fees paid out by WSI.

In response to a question from Chairman Poolman, Ms. Green said it is possible there are differences between WSI's outside counsel and the attorneys for injured employees.

In response to a question from Senator Sinner, Ms. Green said statute and administrative rules provide WSI pays attorneys fees and costs, which might include travel expenses, postage, and telephone expenses.

Ms. Green said there are instances when WSI contracts with outside legal counsel from out of state. She said the contract rate WSI enters for this out-of-state counsel is very similar to the rates for injured employees. However, she said, if WSI hires outside legal counsel for special projects, WSI does not include this rate in the average used to calculate the rate for injured employees' counsel.

Chairman Poolman called on Senator Sinner to present a bill draft [17.0303.01000] he had prepared for the committee to consider. He said the bill draft is the same as the first version of the committee's bill draft, except it provides if an injured employee prevails at the administrative or judicial level and WSI appeals, regardless of the outcome of the future appeal, WSI pays attorneys fees. He said this bill draft will allow the injured employee to have legal counsel on appeal when WSI appeals an order under which the employee prevailed.

In response to a question from Chairman Poolman, Ms. Green said WSI appeals an administrative decision approximately 5 to 10 times per year. She said there are typically 300 administrative appeals per year.

In response to a question from Representative Keiser, Ms. Green said at the administrative level, WSI has a 65 to 67 percent rate of prevailing, which translates to approximately 90 per year in which the injured employee prevails.

In response to a question from Chairman Poolman, Ms. Green said if the committee's bill draft is enacted, she expects it will have very little fiscal impact on WSI.

In response to a question from Representative Amerman, Ms. Green said she can provide the committee with a list of outside counsel with whom WSI contracts.

Chairman Poolman said next interim the committee may consider adding the issue of attorneys fees to the WSI performance evaluation.

**It was moved by Senator Sinner and seconded by Representative Amerman that the bill draft relating to WSI payment of all levels of attorneys fees for injured workers who prevail at the administrative or judicial level, regardless of which party prevails on further appeal, be approved and recommended to the Legislative Management.**

Representative Keiser said he does not support this motion, as he thinks it goes too far. He said he recognizes the need to keep balance in the appeal process.

Senator Sinner said there seems to be agreement among the committee members that an injured employee's access to legal counsel should be increased. He said this bill draft would affect 5 to 10 claimants per year. At a cost of \$1,700 per claimant, he said, an annual cost of \$17,000 per year seems like a small cost to WSI to allow injured employees access to legal counsel when WSI appeals an order under which the injured employee previously prevailed.

Representative Keiser said it would be helpful to have data regarding how often an injured employee is unable to find legal representation on appeal.

**After this discussion, the motion failed on a roll call vote.** Senator Sinner and Representative Amerman voted "aye." Senators Poolman and Kilzer and Representatives Keiser and Ruby voted "nay."

**It was moved by Senator Kilzer and seconded by Senator Sinner that the bill draft relating to WSI payment of attorneys fees for injured workers who prevail at the administrative or judicial level, regardless of which party prevails on further appeal, be approved and recommended to the Legislative Management.**

In response to a question from Representative Ruby, Senator Kilzer said he prefers this first version of the committee bill draft over the second version, because he does not support codifying things that are already in Administrative Code. He said the role of the administrative rules is to "flesh out" what is put in statute.

Representative Ruby said he differs from Senator Kilzer in that he prefers addressing matters in Century Code versus allowing agencies to address through the adoption of administrative rules.

Representative Keiser said since administrative rules have the force of law, he prefers to codify in statute.

In response to a question from Representative Amerman, Ms. Jodi Bjornson, General Counsel, Workforce Safety and Insurance, said WSI prefers the second version of the bill draft, which includes the codification of WSI's current application of statute and administrative rules, capping attorneys fees. She said the language in the second version of the bill draft clarifies WSI will continue to operate as it does under current statute and rules, so attorneys fees will be capped at the top level of appeal at which the injured employee prevails. She said with the proposed change in statute under the committee's bill draft, WSI likely will amend its administrative rules to clarify this continued application; however, since rule amendments take 9 to 12 months, codifying this provision prevents this possible lapse in clarity.

**After the discussion, the motion carried on a roll call vote.** Senators Poolman, Kilzer, and Sinner and Representative Amerman voted "aye." Representatives Keiser and Ruby voted "nay."

**It was moved by Representative Keiser, seconded by Senator Kilzer, and carried on a voice vote that the Chairman and the Legislative Council staff be requested to prepare a report and the bill recommended by the committee and to present the report and recommended bill to the Legislative Management.**

**It was moved by Representative Keiser, seconded by Senator Kilzer, and carried on a voice vote that the committee adjourn sine die.**

No further business appearing, Chairman Poolman adjourned the meeting sine die at 10:15 a.m.

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Jennifer S. N. Clark  
Counsel

ATTACH:1