

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Wednesday, August 15, 2018
Harvest Room, State Capitol
Bismarck, North Dakota

Senator Jonathan Casper, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Jonathan Casper, Randall A. Burckhard, Erin Oban; Representatives Joshua A. Boschee, George J. Keiser

Member absent: Representative Dan Ruby

Others present: See [Appendix A](#)

It was moved by Representative Keiser, seconded by Representative Boschee, and carried on a voice vote that the minutes of the May 1, 2018, meeting be approved as distributed.

PERFORMANCE EVALUATION

Chairman Casper called on Mr. Malcolm Dodge, Vice President Risk Services, Sedgwick Claims Management Services, Inc., for presentation ([Appendix B](#)) of the Workforce Safety and Insurance (WSI) performance evaluation.

In response to a question from Representative Keiser, Mr. Dodge said the performance evaluation indicates the number of claims has declined dramatically from fiscal year 2014 through fiscal year 2017. He said 26,395 claims were filed in 2014 and 20,045 claims were filed in 2017. He said the incidence of indemnity claims or time loss claims declined from 3,480 in 2014 to 2,369 in 2017. He said indemnity claims made up 13.2 percent of all claims filed in 2014 and 11.8 percent of all claims filed in 2017. He said fewer of the less serious injuries should lead to fewer cases for which opioids are prescribed.

In response to a question from Representative Keiser, Mr. Dodge said the dispensing pharmacies provide the fill history for controlled substance prescriptions, which in turn is the source of the Prescription Drug Monitoring Program data. He said in certain states, the physician is required to review or check the Prescription Drug Monitoring Program before writing a prescription while other states do not have this requirement. He said the mandate of this requirement is only as good as the enforcement mechanism behind the mandate. He said his company is a payer, and does not have access to a vast majority of the state databases to determine if the physician is checking.

Representative Keiser said most states, including North Dakota, do not have a perfect record with the Prescription Drug Monitoring Program.

Chairman Casper called on Mr. Bryan Klipfel, Director, Workforce Safety and Insurance, for testimony ([Appendix C](#)) regarding the WSI performance evaluation and responses to recommendations.

In response to a question from Senator Oban, Mr. Klipfel said WSI has 14 safety consultants and approximately 24,000 employers. He said WSI is unable to actively recruit all employers to participate in the safety program but WSI actively recruits the biggest employers. He said 40 to 50 percent of employees are working for an employer participating in the safety program. He said WSI is in the process of developing an electronic method of exchanging employment insurance information with the Secretary of State's office.

In response to a question from Senator Oban, Mr. Harvey Hanel, Medical Services and Pharmacy Director, Workforce Safety and Insurance, said 6 months ago payment for opioids was discontinued for 61 injured workers. He said discontinuance typically is based on the prescribed drug not showing up on urine tests or on the use of illicit substances.

Mr. Jason Ehlert, President, North Dakota State Building Trades Council, said opioid use and opioid abuse is a significant issue facing their industry. He said many employees in the building trades are hourly employees.

Consequently, when a member gets injured and is unable to work, he said, the employee does not get paid. He said this may lead to a cycle of abuse to manage pain to continue working. He said opioid abuse is a core issue that will be addressed at his organization's state convention by international representatives, pain management representatives, and individuals representing drug addiction treatment.

ROUGH RIDER INDUSTRIES SAFETY REVIEW

Chairman Casper said, pursuant to North Dakota Century Code Section 65-06.2-09, the committee is tasked with receiving a report from WSI on recommendations based on a biennial safety review of Rough Rider Industries work programs and a biennial performance review of the program of modified workers' compensation coverage by WSI. He said WSI's internal audit division has completed the biennial performance review of the modified workers' compensation coverage, and the loss control division has completed the safety inspections of the Rough Rider Industries' Prison Industry Enhancement Certification work programs. He said WSI made no recommendations for a change in either program as a result of the reviews. He said because the reviews do not make any recommendations for a change in either program, WSI is not required to make a report to the committee.

VOCATIONAL REHABILITATION

Chairman Casper called on Ms. Robin Halvorson, Director, Return to Work Services, Workforce Safety and Insurance, for testimony regarding the vocational retraining programs. Ms. Halvorson said changes were made to the vocational retraining option in 2005. She said the injured worker now can accept or decline retraining. She said if the injured worker declines retraining, WSI identifies a retained earnings capacity for the injured worker, which is wages paid times the number of hours released to return to work. She said if an injured worker gets into a retraining program, and the injured worker determines within the first 20 weeks it is not a good fit, the injured worker is allowed to withdraw from the retraining program. She said upon withdrawal, WSI assigns the injured worker the retained earnings capacity and pays the injured worker temporary partial disability for up to 182 weeks. The 2005 statutory changes also allowed for 104 weeks for participation in a retraining program. She said a statutory change was made in 2009 permitting WSI to extend the 104 weeks of retraining to 124 weeks. She said when an injured worker is considered for a retraining program, WSI attempts to ensure the injured worker is college-ready and has the academic ability to be successful in the retraining program.

In response to a question from Representative Keiser, Ms. Halvorson said WSI does not have the capability to extend the duration of any retraining program beyond 124 weeks. However, she said, there are situations when an injured worker is in a retraining program and a medical issue surfaces preventing the worker from participating in retraining. She said the missed days or weeks do not count against the worker's 124-week retraining period. She said the injured worker then is put on either a temporary total disability or temporary partial disability and paid the full disability benefit.

In response to a question from Senator Oban, Ms. Halvorson said before admittance for retraining, WSI orders functional capacities testing done by an occupational or physical therapist to determine an injured worker's physical strength. She said the results are sent to the treating provider to verify the findings are an accurate reflection of the injured worker's physical capabilities. She said if the treating provider confirms the results are an accurate reflection of the injured worker's physical capabilities, WSI will consider different retraining programs within the physical limitations of the injured worker. She said if there are cognitive issues, psychological tests also are done to ensure the injured worker will be successful in a retraining program.

In response to a question from Representative Boschee, Ms. Halvorson said when she receives a referral into vocational rehabilitation, an attempt is made to acclimate an injured worker to learn something different. She said that can be a frightening experience. She said academic testing is the starting point. She said if academic testing results are low, an attempt is made to transition the injured worker into skill upgrading which is traditionally done in an adult learning center. She said computer proficiency testing is done upfront to determine the computer skill-level an injured worker possesses.

In response to a question from Representative Boschee, Ms. Halvorson said the Injured Workers Assistance Program can be accessed by any injured worker.

In response to a question from Chairman Casper, Ms. Halvorson said 118 students are enrolled in retraining programs. She said 24 of the 118 students are attending retraining in North Dakota.

In response to a question from Senator Oban, Ms. Halvorson said the 94 students who are attending retraining outside North Dakota chose to relocate to their home state.

CLAIM REVIEW

The committee scheduled five 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 Section 54-35-22. For each of the claim reviews, the committee received a summary by Mr. Chuck Kocher, Constituent Liaison, Workforce Safety and Insurance, of the injured employee's claim; a presentation by the injured employee of the claim and issues; and a response by a representative of WSI.

Cassious Masah

Claim Summary

Chairman Casper called on Mr. Kocher to provide a summary of Mr. Cassious Masah's workers' compensation claim. Mr. Kocher said:

- Cassious Masah filed a claim for an injury to his lumbar spine on May 8, 2014, while working as a package handler for FedEx Ground Package System, Incorporated. Mr. Masah described his injury as follows "I was offloading packages from the container, while in the process of getting a box which weighed about 75 pounds out of the container, walking backwards, I fell in an opening behind me. I fell on my back and could not move any parts of my body for five minutes. I gained strength after five minutes and I walked to the office to meet with my supervisors but the pain kept increasing in my back and legs. I was taken to Sanford Health for medical attention. I was told I needed surgery."
- On May 20, 2014, Mr. Masah was seen by Mr. Daryl Sieg, PA, at the Sanford Spine Center. Mr. Sieg diagnosed Mr. Masah with L2 and L3 right-sided transverse process fractures. He explained that Mr. Masah was not a surgical candidate and with rest the fractures should heal on their own.
- On June 5, 2014, WSI issued a notice of decision accepting claim and awarding benefits.
- On June 30, 2014, Mr. Masah saw Dr. Mickelson who indicated that Mr. Masah's pain level was at 0 and discharged him to regular duty.
- On September 8, 2014, Mr. Samuel Vaagen, PA-C, noted Mr. Masah had returned to normal duty work without difficulty or pain.
- On July 29, 2016, WSI issued a notice of decision denying further benefits. Workforce Safety and Insurance indicated that as of February 18, 2015, WSI will have no further liability for treatment of Mr. Masah's lower back injury as there is no objective medical evidence relating his current condition to the May 8, 2014, work injury.
- On September 30, 2016, Mr. Masah submitted a letter of reconsideration stating his current medical problems are related to his work injury and, as such, is appealing the notice of decision.
- On September 12, 2016, Mr. Masah saw Mr. Vaagen once again in regard to back pain. Mr. Vaagen noted the problem began 2 months ago and it was difficult to determine if Mr. Masah's current lumbar condition was due to his previous injury.
- On January 11, 2017, WSI issued an order stating "WSI denies further liability for Claimant's lumbar condition effective February 18, 2015."
- On February 9, 2017, Mr. Masah appealed the order and requested the services of the Decision Review Office (DRO) to review the order of January 11, 2017. On February 24, 2017, DRO issued a certificate of completion and indicated further benefits remain denied.
- On March 10, 2017, Mr. Masah requested a hearing indicating he disagreed with WSI's January 11, 2017, order and wished to appeal the decision.
- On October 6, 2017, Administrative Law Judge Benjamin E. Thomas issued his findings of fact, conclusions of law and final order stating "Based on the foregoing, WSI's January 11, 2017 Order Denying Further Liability for Claimant's lumbar injury effective February 18, 2015, is AFFIRMED."
- Mr. Masah did not appeal the judge's decision to district court and, as such, the order became final.

In response to a question from Senator Burckhard, Mr. Kocher said Mr. Masah did not continue working for FedEx Ground Package System, Incorporated, after his work injury.

Mr. Masah's Testimony

Chairman Casper called on Mr. Masah to review his claim and discuss the issues related to his claim. Mr. Masah reviewed the details of his injury and said he disagreed with WSI's decision to deny him medical treatment benefits because WSI refused to pay attention to his pain. He said paying attention to the treatment of injured employees should be the major focus of WSI, not benefits. He said the administrative law judge did not

consider the pain he was experiencing in his back. He said the administrative law judge should have taken notes of the pain his work injury is causing him. He said he has to live with the pain for the rest of his life because some medical machine could not demonstrate the pain was coming from the lumbar injury he got while working. He said he wished there were more attorneys available to represent injured workers and there were a medical machine that could determine pain.

In response to a question from Senator Burckhard, Mr. Masah said he has been employed with the United States Postal Service since his lumbar injury occurred.

Workforce Safety and Insurance Response

Chairman Casper called on Mr. Timothy Wahlin, Chief of Injury Services, Workforce Safety and Insurance, to respond to the issues raised by Mr. Masah. Mr. Wahlin said Section 65-05-01 provides the claimant bears the burden of proving any entitlements to benefits. He said the entire system is based on the premise that to receive benefits the injured worker has to prove entitlement to those benefits. He said entitlement to benefits is never assumed; the injured worker has to show the link to the work injury to receive those particular benefits. He said Mr. Masah was seen and treated for his injury, surgery was not necessary, Mr. Masah healed in the particular injured areas, and now additional back pain occurs. He said WSI looked at the medical record, found the injury and pain occurred together but inquired whether one caused the other. He said WSI needs medical support showing Mr. Masah's work injury was causing the pain. He said neurosurgeon Dr. Hutchinson saw Mr. Masah and could not correlate the pain with the work injury. He said likewise, neither Dr. Peterson nor Mr. Vaagen could correlate Mr. Masah's back pain to his work injury.

In response to a question from Senator Burckhard, Mr. Wahlin said it is common for injured workers suffering with back injuries to appeal decisions made by WSI denying benefits and request reconsideration. He said identifying the evidence proving back and joint pain was caused at or by work and not caused by aging is a difficult problem, but WSI always goes back to review the medical record to inquire whether an objective link exists.

Nancy Martin

Claim Summary

Chairman Casper called on Mr. Kocher to provide a summary of Ms. Nancy Martin's workers' compensation claim. Mr. Kocher said:

- Nancy Martin filed a claim for a right arm injury she sustained on April 12, 1996, while doing secretarial and data entry work for MidTel L.D. Incorporated, Minot, North Dakota. She described her injury as follows: "Was leaving work, had my purse and a small package in my arms. Going down the stairs, foot caught, grabbed for right railing, was none - fell over half the stairway." She sustained a fractured elbow and forearm.
- Ms. Martin's claim was accepted and the associated medical expenses and disability benefits were paid accordingly.
- On October 23, 2014, Ms. Martin filed a claim for a left thumb injury she incurred while working as a custodian for Velva Public School District 1. Ms. Martin indicated she was taking out a huge bag of garbage when a gust of wind caught the bag. Ms. Martin stated she reached out to catch the door resulting in an injury to her left thumb.
- Ms. Martin's claim was accepted and the associated medical expenses and disability benefits were paid accordingly.
- Ms. Martin was treated by Dr. Troy Pierce and on March 4, 2015, had left thumb carpometacarpal joint arthroplasty surgery by Dr. Pierce for the diagnosis of left thumb carpometacarpal joint osteoarthritis.
- On August 13, 2015, WSI sent a letter to Dr. Pierce inquiring if Ms. Martin reached maximum medical improvement and if she was entitled to a permanent impairment evaluation. On August 26, 2015, Dr. Pierce indicated there was no permanent impairment as a result of the work injury and there was no impairment rating of at least 14 percent.
- On June 20, 2016, WSI received a letter from Ms. Martin requesting an evaluation for permanent impairment.
- On August 25, 2016, Ms. Martin was seen by Dr. Dean Redington, DC, for an assessment of any permanent partial impairment (PPI) caused by the compensable work injury to the right wrist, right elbow, and left thumb. Dr. Redington found Ms. Martin had an overall impairment of 7 percent whole person, which is less than the 14 percent whole person impairment required to receive an impairment award.

- On February 9, 2017, WSI issued a notice of decision denying PPI benefits. The greater weight of the evidence indicated Ms. Martin is not entitled to a PPI award because the injured worker's impairment is less than the 14 percent whole body. According to Section 65-05-12.2, this percentage is below the 14 percent threshold for a monetary award.
- On February 28, 2017, Ms. Martin submitted a request for reconsideration letter indicating she was not in agreement with the notice of decision denying PPI.
- On May 3, 2017, WSI issued an order indicating "WSI denies permanent impairment benefits on this claim."
- On May 31, 2017, Ms. Martin appealed the order and requested the services of DRO to review the order of May 3, 2017. On June 8, 2017, DRO issued a certificate of completion indicating no change to the order.
- Ms. Martin did not request a hearing on the order and, as such, it became final.

Ms. Martin's Testimony

Chairman Casper called on Ms. Martin to review her claim and discuss the issues related to her claim. Ms. Martin reviewed the details of her injury and said part of her problems may have stemmed from her inexperience with laws and unfamiliarity with government processes. She said after the committee reviews her claim history, she is hopeful the process will be changed to provide a little more personal insight to a claimant so a claimant is aware that if they decide to accept a decision by WSI and do not appeal the decision, there will be no further or future ways of resolving or disputing it. She thanked Mr. Kocher and the committee for giving her the time to speak and possibly shedding light on the issues with WSI. She said as a senior citizen she was not ready to retire but found that employers were not looking at a 73 year old with ideas of employment.

In response to a question from Representative Keiser, Ms. Martin said she was misinformed about reopening a claim she was told was closed. She said she wanted to work but could not get a job. She said claimants should be provided instructional tools and service resources to better inform them of their rights and enhance their awareness of the WSI claims process.

In response to a question from Senator Oban, Ms. Martin said she was 53 years old with a child at home, and she did not want to face a lifetime of disability so she fought to work. She said WSI should provide information to claimants in a more clear and concise manner. She said she was told she could not reopen her claim but she did some research and learned she could reopen it.

In response to a question from Senator Burckhard, Ms. Martin said MidTel wanted her to return to work part-time but her orthopedic surgeon advised against her working. She said when MidTel was sold to SRT, she was informed she was out of a job.

Workforce Safety and Insurance Response

Chairman Casper called on Mr. Wahlin to respond to the issues raised by Ms. Martin. Mr. Wahlin said WSI pays for three things: wage-loss benefits; medical benefits, including pharmacy; and PPI benefits. He said the PPI benefit is based upon the *Guides to the Evaluation of Permanent Impairment*, American Medical Association, 6th edition. He said the guide illustrates the human body as a chart and breaks the body down into percentages, quantifies the loss of use of every part of the human body, and factors it into a total percent loss. He said the payment is derived from PPI, which is a standalone payment, and has nothing to do with wage-loss or medical benefits. He said PPI is an attempt to compensate for the loss of use for a person. He said the rating system in North Dakota starts with awards beginning at 14 percent. He said in Ms. Martin's case, the rating came back lower than the 14 percent threshold, resulting in the denial of PPI benefits.

Robin Maland

Claim Summary

Chairman Casper called on Mr. Kocher to provide a summary of Mr. Robin Maland's workers' compensation claim. Mr. Kocher said:

- Robin Maland filed a claim for a February 3, 2016, injury to his left shoulder while working for Integrity Windows and Doors, Fargo, North Dakota. Mr. Maland indicated "pain started while lifting and attaching nail fins and jamb extensions." On March 14, 2016, a notice of decision accepting claim and awarding benefits was issued.
- On March 9, 2016, Mr. Maland saw neurosurgeon Dr. Adam Jackson who diagnosed Mr. Maland's injury as left upper extremity weakness and C6 radiculopathy. An MRI of the cervical spine found a herniated C5-C6 disc. Dr. Jackson recommended surgical intervention and Mr. Maland agreed to proceed with surgery which was scheduled for April 2016.

- On April 5, 2016, Mr. Maland's claim was reviewed by a WSI medical consultant who indicated that he was unable to correlate the February 3, 2016, mechanism of injury at Integrity Windows and Doors with the C6 radiculopathy. He found the MRI results consistent with a pre-existing condition. He concluded the injured worker's work duties from August 2015 and forward did not cause Mr. Maland's multilevel degenerative changes and disc osteophyte ridging outlined in the MRI report which pre-exist the work injury.
- On May 20, 2016, WSI issued a notice of decision denying medical condition.
- On May 26, 2016, WSI received Mr. Maland's reapplication for disability benefits. On June 2, 2016, WSI issued a notice of decision denying disability benefits on reapplication. Workforce Safety and Insurance indicated the disability benefits are denied because Mr. Maland's recent surgery was for his cervical spine. Workforce Safety and Insurance had previously denied the medical condition to his cervical spine on May 20, 2016, concluding that his current loss of earnings is due to a body part that WSI is not liable for.
- On June 20, 2016, WSI received Mr. Maland's request for reconsideration letter stating it was his belief it was the job he was doing that caused the disc to herniate and it happened at work while he was doing his job. He further stated he had absolutely no neck pain or problems leading up to the day when he went to work that morning.
- On August 2, 2016, WSI issued an order stating "WSI shall not pay disability benefits in connection with Claimant's reapplication received May 26, 2016. WSI denies liability for Claimant's cervical spine condition."
- On August 31, 2016, Mr. Maland appealed the order and requested the services of DRO to review the order of August 2, 2016. On September 20, 2016, DRO issued a certificate of completion indicating the reapplication for disability benefits and liability for the cervical spine remains denied.
- On October 19, 2016, Mr. Maland requested a hearing on the August 2, 2016, order.
- On August 3, 2017, Administrative Law Judge Benjamin E. Thomas issued his findings of fact, conclusions of law, and final order stating "WSI's August 2, 2016, Order Denying Disability Benefits in connection with Claimant's reapplication of May 26, 2016, is AFFIRMED."
- Mr. Maland did not appeal the judge's decision to district court and, as such, the order became final.

Mr. Maland's Testimony

Chairman Casper called on Mr. Maland to review his claim and discuss the issues related to his claim. Mr. Maland reviewed the details of his injury and said he works everyday. He said his employer has been great and has stood behind him every step of the way. He said he is fortunate his employer let him keep his job, giving him light-limited work duties due to his previous work injury. He said he resents WSI for determining his medical condition was caused by a pre-existing condition. He said he hurt his neck at work and his subsequent neck problems were a result of the work injury, not a pre-existing condition. He said he can hardly use his arm to enjoy anything outside of work such as golfing, shotgun, or trap shooting. He said WSI kept appealing his claim, thereby putting off his surgery, which in the long run made his arm worse.

Workforce Safety and Insurance Response

Chairman Casper called on Mr. Wahlin to respond to the issues raised by Mr. Maland. Mr. Wahlin said WSI has requirements, one of which is the injury must be a work-related injury. He said state law provides, the injured worker bears the burden of proving the injury complained of is linked to work. He said this is accomplished by reviewing medical opinions received from medical providers. He said in Mr. Maland's case, no medical provider made the correlation between the herniation and the work. He said at first the claim was accepted and paid because the diagnosis was a strained muscle linked to work.

In response to a question from Representative Boschee, Mr. Wahlin said when WSI is unable to make or infer a link between injury and work, WSI requires the physician to identify how the injury is work related. He said when the link between injury and work is not easily inferred, the physician is explicitly asked whether a link exists. He said in Mr. Maland's case, the physician did not provide an answer to whether the injury was work related and, therefore, a medical opinion was requested from WSI's own medical consultant.

Michelle Hoyt

Claim Summary

Chairman Casper called on Mr. Kocher to provide a summary of Ms. Michelle Hoyt's workers' compensation claim. Mr. Kocher said:

- Michelle Hoyt filed a claim for a lumbar injury she sustained on January 19, 2016, while working as a building services custodian for Valley City State University (VCSU), Valley City, North Dakota. Ms. Hoyt describes her injury as follows: "My lower back/right side has been hurting for several months. It had progressively gotten worse to the point it was extremely difficult to do anything, let alone do my job. I consulted my primary physician Tanya Diegel DO. I do believe the injury is related to the ongoing type of work I do at my job, which has been long time employment as custodian at VCSU and is a very physically demanding job." Ms. Hoyt had been employed by VCSU since December 16, 2002.
- A review of Ms. Hoyt's prior medical history indicated she received chiropractic treatment for low back pain in 1985, 1988, and again in 1999.
- She saw Dr. Ragland at Regional Neurological Center on May 16, 2000. Ms. Hoyt complained of back pain, neck pain, vestibular symptoms, double and blurred vision, and numbness and tingling in the left lower extremity.
- On January 3, 2011, Ms. Hoyt once again sought chiropractic treatment from Dr. Jeffrey Brown for the treatment of back pain. Dr. Brown's assessment was lumbar subluxation, lumbago, thoracic subluxation and pain in the thoracic spine. Ms. Hoyt continued to see Dr. Brown for the treatment of back pain in 2011, 2013, and in 2014.
- On February 9, 2016, Ms. Hoyt saw Dr. Daniel Ostlie for an orthopedic consultation as it relates to her January 19, 2016, work injury. Ms. Hoyt reported to Dr. Ostlie she had hip and back discomfort over the last 3 to 4 months. Dr. Ostlie's assessment was "1) chronic low back pain; 2) right SI joint dysfunction; 3) right trochanteric bursitis; 4) multiple trigger points, question fibromyalgia; 5) right hip impingement; and elevated BMI." Dr. Ostlie recommended physical therapy treatment.
- On February 19, 2016, Ms. Hoyt underwent an MRI of the lumbar spine. The impression was multilevel degenerative changes.
- On March 16, 2016, Ms. Hoyt filed a first report of injury regarding her lumbar injury noting the date of injury was January 19, 2016. She stated she has experienced pain throughout the past few months and that she has been a long-time employee of VCSU working as a custodian doing physically demanding work.
- A review of the claim by WSI's medical advisor indicates the medical records notes a pre-existing/underlying lumbar condition as the previous records note treatment for varying myofascial symptoms including her neck, back, (arthritis) conditions which is pre-existing and is common in the general population. He indicates the work activities may have made the pre-existing/underlying degenerative lumbar condition symptomatic but did not significantly worsen or cause the pre-existing degenerative lumbar condition. He concludes the reviewed records do not provide objective findings of a compensable lumbar work injury and the work activity is not a substantial contribution to her lumbar condition.
- On May 10, 2016, WSI issued a notice of decision denying benefits. Workforce Safety and Insurance determined there was insufficient evidence to indicate her condition is the result of a compensable work injury. Workforce Safety and Insurance concluded the medical notes do not support a work injury.
- On May 18, 2016, WSI received Ms. Hoyt's request for reconsideration letter in response to the notice of decision. She stated she believes her work is directly responsible for her lower back injury. Her job duties are physically demanding and the area of the building she is responsible for is almost 60,000 square feet. She concludes in her request for reconsideration letter that her work at VCSU is very physically demanding and she believes this injury occurred over a period of time at her employment with VCSU.
- On July 21, 2016, WSI issued a legal order stating "This claim is denied."
- On August 4, 2016, Ms. Hoyt requested the assistance of DRO to review the order of July 21, 2016. On October 6, 2016, DRO issued a certificate of completion indicating no change to the order.
- On October 31, 2016, Ms. Hoyt requested a hearing. She stated she truly believes over the last several years the repeated wear and tear on her back and body has resulted in this lumbar problem.
- On January 4, 2017, Ms. Hoyt obtained the services of attorney Steven Little to represent her at hearing.
- On February 21, 2017, WSI received an email from Ms. Hoyt indicating she wishes to withdraw her claim and halt the court proceedings. She stated she could not financially proceed forward with the cost of hearing, and therefore, is withdrawing her claim.
- On February 24, 2017, WSI received a letter from Administrative Law Judge Benjamin E. Thomas, who presided over the hearing, to cancel the hearings as Ms. Hoyt informed him she wishes to withdraw her request for hearing.
- Since Ms. Hoyt did not proceed forward with the hearing, WSI's order became final.

Ms. Hoyt's Testimony

Chairman Casper called on Ms. Hoyt to review her claim and discuss the issues related to her claim ([Appendix D](#)).

Workforce Safety and Insurance Response

Chairman Casper called on Mr. Wahlin to respond to the issues raised by Ms. Hoyt. Mr. Wahlin said Section 65-01-02 defines a compensable injury as "an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings". He said under Section 65-01-02(10)(b)(7), the term "compensable injury" does not include injuries attributable to a pre-existing injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the pre-existing injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity. He said WSI does not pay for pre-existing conditions if the conditions become symptomatic, but will pay if work substantially worsens or substantially progresses that underlying condition. He said in the case of Ms. Hoyt, there was a back condition with treatment going back to the late 1980s. He said the claim was a worsening back. He said because there was a pre-existing condition, the question raised was whether work substantially worsened or progressed the condition. He said if so, then the condition is compensable. However, he said, if work simply caused symptoms consistent with the condition to appear, the condition is not compensable. He said the conclusion was the symptoms were consistent with the underlying condition, it has not progressed, and therefore, was not a work-related condition.

In response to a question from Senator Burckhard, Mr. Wahlin said in the early 1990s, North Dakota experimented with paying attorneys representing claimants irrespective of whether the claimant ultimately lost or prevailed in the appeal. He said under that system, WSI's case numbers went up substantially but better results were not achieved because everything was appealed as there was a paycheck at the end, irrespective of the outcome. He said that system was amended as part of the 1995 reform to the current method.

Teena Oestreich**Claim Summary**

Chairman Casper called on Mr. Kocher to provide a summary of Ms. Teena Oestreich's workers' compensation claim. Mr. Kocher said

- Teena Oestreich filed a claim for an injury to her right shoulder, thoracic, and cervical she sustained on February 11, 1995, while working as a nurse's aide for St. Joseph's Hospital and Health Center, Dickinson, North Dakota. Ms. Oestreich's claim was accepted and the associated medical and disability benefits were paid accordingly.
- On June 22, 2016, WSI issued an order denying travel reimbursement expenses Ms. Oestreich incurred while traveling from Dickinson to Bismarck for physical therapy treatment to treat her work injury. Ms. Oestreich requested travel reimbursement expenses for dates of treatment on April 27, May 5, May 9, May 12, and May 16, 2016, for appointments with Ms. Michelle Peake, OTR, in Bismarck. Workforce Safety and Insurance denied the payment of travel reimbursement on the premise it was not deemed necessary for Ms. Oestreich to seek medical treatment outside of her local area, namely Dickinson. The June 22, 2016, order stated "WSI shall not pay travel reimbursement, other than that necessary to obtain the closest available medical or hospital care needed for the injury, effective April 27, 2016."
- On July 1, 2016, Ms. Oestreich requested the assistance of DRO to review the June 22, 2016, order. On July 29, 2016, DRO issued a certificate of completion indicating no change to the order.
- On August 9, 2016, Ms. Oestreich requested a hearing in regard to the June 22, 2016, order.
- On May 8, 2017, the hearing was held before Administrative Law Judge Jeanne Steiner to determine (1) whether Claimant is entitled to travel reimbursement for her April 27, May 5, and May 9, 2016, treatment and (2) whether Claimant's medical care with Dr. Erickstad and physical therapy with Ms. Peake in Bismarck is the closest available medical care needed to treat her injury.
- On May 11, 2017, Judge Steiner issued her findings of fact, conclusions of law and order indicating that WSI's order dated June 22, 2016, is reversed. Judge Steiner concluded the Claimant is entitled to reimbursement for travel-related expenses associated with the treatment she received from Ms. Peake in Bismarck as this treatment was not available in Dickinson.
- On November 22, 2016, (second order being reviewed) Ms. Oestreich underwent an independent medical examination by Dr. Robert Cooper, a physical medicine and rehabilitation doctor with Evaluated. Dr. Cooper was asked to investigate WSI's continued liability for Ms. Oestreich's work injury of February 11, 1995.

- Dr. Cooper concluded his review indicating "There is no casual relationship between the injury Ms. Oestreich sustained on February 11, 1995, and her current condition." Dr. Cooper further indicated Claimant's current principle diagnoses were hypermobility syndrome, fibromyalgia syndrome, thoracic hyperkyphosis, depressive disorder, and anxiety disorder. He further stated these are in each case non-work injury conditions and based on the available information, to a reasonable degree of medical certainty, were pre-existing. Given this information WSI issued an order stating "WSI shall not pay any further workers compensation benefits in connection with Claimant's current right shoulder, thoracic, and cervical condition on this claim after November 22, 2016."
- On January 24, 2017, Ms. Oestreich requested the assistance of DRO to review the January 20, 2017, order. On February 15, 2017, DRO issued their certificate of completion with no change to the order.
- On March 1, 2017, Ms. Oestreich requested a hearing. Judge Jeanne Steiner was appointed to preside over the hearing which was scheduled for October 24, 2017.
- On May 8, 2017, WSI and Ms. Oestreich entered into a stipulation and agreed to settle all past, current, and future liabilities related to her claim for the sum of \$10,000. The stipulation would provide for full and complete settlement of medical expenses, travel expenses, disability benefits, and vocational rehabilitation benefits. Ms. Oestreich acquired the services of attorney Dean Haas to review the stipulation. The stipulation was agreed to by both parties and was finalized accordingly.
- On June 22, 2017, Ms. Oestreich wrote a letter to Judge Steiner expressing her frustration that given the judge's favorable ruling on her travel reimbursement order that WSI should pay her travel reimbursement costs in addition to the \$10,000 stipulation settlement. Workforce Safety and Insurance denied payment of the travel reimbursements as Ms. Oestreich entered into a stipulated settlement closing out her entire claim.

Ms. Oestreich's Testimony

Chairman Casper called on Ms. Oestreich to review her claim and discuss the issues related to her claim ([Appendix E](#)) and provided her medical history, a copy of which is on file with Legislative Council.

Workforce Safety and Insurance Response

Chairman Casper called on Mr. Wahlin to respond to the issues raised by Ms. Oestreich. Mr. Wahlin said Section 65-05-25 authorizes WSI to compromise to resolve a disputed claim with an employee. He said to the extent a dispute arises, WSI has the ability by statute to settle the dispute via payment. He said in Ms. Oestreich's case, an offer to settle was made for a closeout of all matters which was ultimately signed by Ms. Oestreich and her attorney, and returned to WSI.

COMMITTEE DISCUSSION

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

It was moved by Senator Oban, seconded by Representative Boschee, and carried on a roll call vote that the committee be adjourned sine die. Senators Casper, Burckhard, and Oban and Representatives Boschee and Keiser voted "aye." No negative votes were cast.

No further business appearing, Chairman Casper adjourned the committee sine die at 3:25 p.m.

Christopher S. Joseph
Counsel

ATTACH:5