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## **WORKERS' COMPENSATION REVIEW COMMITTEE**

Thursday, June 11, 2020

Representative Dan Ruby, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives Dan Ruby, Mary Adams, George Keiser; Senators JoNell A. Bakke, Randy Burckhard, Dave Oehlke

**Members absent:** None

**It was moved by Representative Keiser, seconded by Senator Bakke, and carried on a voice vote that the minutes of the February 18, 2020, meeting be approved as distributed.**

### **REPORT**

#### **Case Processing Standards and Policies**

Chairman Ruby called on Mr. Timothy J. Dawson, Director, Office of Administrative Hearings, for testimony ([Appendix A](#)) regarding the results under the case processing standards and policies.

In response to a question from Senator Bakke, Mr. Dawson said eliminating extraneous delays is the goal behind reducing the average number of days it takes for a case to be issued a decision. He said further reducing the average number of days would be difficult because the injured worker or the injured worker's attorney often requests a continuance.

Chairman Ruby called on Ms. Jodi Bjornson, General Counsel, Workforce Safety and Insurance, for testimony ([Appendix B](#)) regarding the report submitted by the Office of Administrative Hearings (OAH).

In response to a question from Chairman Ruby, Ms. Bjornson said the statistics regarding the decisions issued by OAH align with Workforce Safety and Insurance's (WSI) expectations and WSI is very pleased the number of days for a decision to be issued by OAH has declined by an average of 100 days.

#### **WORKFORCE SAFETY AND INSURANCE APPEAL DEADLINES**

Chairman Ruby called on Mr. Christopher Joseph, Legal Counsel, Legislative Council, to review a bill draft [[21.0072.01000](#)] extending the deadlines for appealing a WSI decision. Mr. Joseph said at the February 18, 2020, committee meeting, the committee requested a bill draft that extends the allotted response time frame in which injured workers and employers have to notify WSI of an intent to appeal or request reconsideration of a decision, from 30 to 45 days. He said North Dakota Century Code Sections 65-01-16 and 65-04-32 provide the 30-day time frame an injured worker or an employer has to dispute or appeal a decision by WSI by requesting reconsideration, assistance from the decision review office (DRO), or a rehearing. He said this bill draft extends the 30-day time frame to 45 days. He said if enacted, the bill draft would be applicable to all claims having a notice of decision issued after July 31, 2021, regardless of the date of injury.

In response to a question from Senator Bakke, Mr. Joseph said the new time frame to request reconsideration or assistance from DRO commences 45 days from the day the notice of decision or administrative order was mailed, and 45 days from the date of service to request a rehearing.

In response to a question from Senator Oehlke, Mr. Tim Wahlin, Chief of Injury Services, Workforce Safety and Insurance, said Section 65-01-16(1), provides failure of an employer to file a response within 14 days from the day a response form was mailed to the employer constitutes the employer's admission that the information in the claim form is correct. He said because only about 10 percent of employers file a response, WSI still has to research and

adjudicate claims and the statutory provision does not affect how WSI processes claims. He said the 14-day time frame has no significance in the claims process because both the injured worker and the employer can dispute or appeal a determination made by WSI and therefore are allowed the 30-day response time frame to appeal. He said Section 64-01-16(1) authorizes WSI to determine an employer's lack of response within the 14-day time frame is an admission the injury is a compensable claim. He said WSI, which no longer views an employer's lack of response as an admission, takes a more proactive approach by researching and investigating the claim to determine whether an injury is compensable. Therefore; he said, the 14-day time frame an employer has to respond does not affect the 30-day appeals time frame.

In response to a question from Representative Keiser, Mr. Wahlin said the two ways to submit a claim are a paper claim mailed to WSI and online claim filing. He said 70 percent of filed claims are submitted online.

**It was moved by Representative Keiser, seconded by Senator Oehlke, and carried on a roll call vote that the bill draft [21.0072.01000] relating to extending the deadlines for appealing a WSI decision be revised to include removing the failure of an employer to file a response within 14 days from the day a response form was mailed to the employer constituting the employer's admission the information in the claim form is correct from Section 64-01-16(1) and that the bill draft, as revised, be approved and recommended to the Legislative Management.** Representatives Ruby, Adams, and Keiser and Senators Bakke, Burckhard, and Oehlke voted "aye." No negative votes were cast.

## CLAIM REVIEW

The committee scheduled three workers' compensation claim reviews brought to the committee by injured workers 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 Ms. Patsy Peyerl, Constituency Services, Workforce Safety and Insurance, of the injured employee's claim; a presentation by the injured worker of the claim and issues; and a response by a representative of WSI.

### Connor Holter

#### Claim Summary

Chairman Ruby called on Ms. Peyerl to provide a summary of Mr. Connor Holter's workers' compensation claim. Ms. Peyerl said:

- Mr. Holter was working for PS Industries Inc. as a welder since 2012. On May 22, 2014, Mr. Holter and a coworker were grabbing a sheet of steel at work and it slipped out of the coworker's hands. The sheet of steel caught Mr. Holter's elbow as it fell. He was considered a full-time employee at the time of the injury.
- Surgery was on May 27, 2014, by Dr. Noren Meland through Altru Health Systems in Grand Forks, during which his right ulnar nerve and the triceps tendon and muscle were repaired.
- Mr. Holter began receiving temporary total disability benefits on May 22, 2014.
- A return to full-time work on June 30, 2014, occurred during which Mr. Holter worked with restrictions his employer could fully accommodate. Mr. Holter's disability benefits ended June 29, 2014.
- Workforce Safety and Insurance received information that Mr. Holter attained maximum medical improvement on April 29, 2016. This was in response to Dr. Meland confirming maximum medical improvement and that he would need a disability rating for the right arm partial paralysis ulnar nerve as he may meet the 14 percent whole person monetary threshold.
- In an internal permanent partial impairment review, WSI concluded Mr. Holter could be offered the opportunity to undergo a permanent partial impairment evaluation, because it was possible he could reach the 14 percent threshold for an impairment award according to the *Guides to the Evaluation of Permanent Impairment*, American Medical Association, (6<sup>th</sup> edition).
- Mr. Holter requested a permanent partial impairment evaluation on November 30, 2016. A permanent partial impairment evaluation completed on December 17, 2016, indicated a 9 percent whole person impairment for the right elbow (ulnar nerve disorder), below the 14 percent whole person threshold for a monetary impairment award.
- Workforce Safety and Insurance issued the notice denying permanent partial impairment benefits on February 15, 2017. Mr. Holter requested reconsideration on February 23, 2017. An administrative order denying permanent partial impairment benefits was issued by WSI on March 14, 2017.
- Mr. Holter requested the assistance of DRO on March 28, 2017. A certificate of completion issued on March 9, 2017, indicated no change in the decision by DRO.

- Mr. Holter appealed the order on June 1, 2017, to an administrative hearing. The hearing occurred on October 19, 2017. The administrative law judge issued the final order on October 28, 2017, affirming WSI's order denying permanent partial impairment benefits.
- The administrative law judge's order became final with no further appeal by Mr. Holter.
- The second issue before the Workers' Compensation Review Committee is Mr. Holter's request to have his right shoulder condition addressed on the WSI claim. Mr. Holter was diagnosed with a right shoulder impingement syndrome in 2015. Workforce Safety and Insurance accepted liability for the right shoulder because he had a mechanism of injury that caused pulling and irritation to the right shoulder; thus, the impingement syndrome.
- Through a WSI physician advisor review, WSI concluded on January 26, 2020, Mr. Holter reached resolution of this right shoulder impingement on June 15, 2015. The medical review concluded that Mr. Holter will continue to have pain into the right elbow, triceps, and ulnar nerve that radiates to the right shoulder, but there is no objective medical evidence to support a medical diagnosis currently for the right shoulder. Workforce Safety and Insurance responsibility to provide coverage for the right shoulder ended on June 15, 2015, as the condition resolved.
- Workforce Safety and Insurance issued a notice of decision on January 27, 2020, denying liability for the right shoulder. Mr. Holter did not appeal that decision and the denial became final.

### Mr. Holter's Testimony

Chairman Ruby called on Mr. Holter to review his claim and discuss the issues related to his claim. Mr. Holter said if permanent partial impairment evaluations are based on the *Guides to the Evaluation of Permanent Impairment*, American Medical Association, 6th Edition, he does not understand how an evaluation can go from an initial assessment of 24 percent whole person impairment to 9 percent whole person impairment. He said he initially was rated as having a 24 percent whole person impairment and after further review of his injury and impairment the evaluator determined the 24 percent whole person impairment would be equivalent to someone who had lost the entire functionality of the hand. He said because the laceration to his ulnar and triceps affected and limited the function of his pinky and ring finger, the evaluator concluded the whole person impairment should be reduced to 9 percent. He said if the *Guides to the Evaluation of Permanent Impairment*, American Medical Association, 6th Edition, puts his impairment at 24 percent, 24 percent is the rating at which he should have been assessed. He said the decision to reduce his whole person impairment from 24 percent to 9 percent appears to be a judgment call by WSI rather than a medical decision based on knowledge and the *Guides to the Evaluation of Permanent Impairment*, American Medical Association, 6th Edition. He said secondary issues derived from the initial injury should be included and factored into the whole person impairment rating.

In response to a question from Chairman Ruby, Mr. Holter said he received letters from WSI regarding the permanent partial impairment reduction but the letters were very vague and gave the impression the reduction was a judgment call made based on fairness instead of based on medical knowledge. He said at 14 percent whole person impairment rating, he would have received \$4,000, which is less than he pays in taxes a year.

In response to a question from Representative Keiser, Mr. Holter said when he was notified by WSI of his initial impairment rating of 24 percent, he was not informed the rating was subject to further review or reduction in the future.

### Workforce Safety and Insurance Response

Chairman Ruby called on Mr. Wahlin, to respond to the issues raised by Mr. Holter. Mr. Wahlin said Section 65-05-12.2 pertains to permanent partial impairment benefits. He said WSI pays wage-loss benefits; medical benefits, including pharmacy; and permanent partial impairment benefits. He said the permanent partial impairment 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 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 permanent partial impairment, which is a stand-alone payment, and has nothing to do with wage-loss or medical benefits. He said permanent partial impairment 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 because WSI evaluates and rates the body objectively not subjectively, a concert pianist losing a finger will receive the same rating as an attorney losing a finger. He said subsection 3 of Section 65-05-12.2 provides an injured worker is entitled to compensation for permanent impairment only for those findings of impairment that are permanent and which were caused by the compensable injury, meaning an injured worker will not get a permanent impairment award for an injury that heals or could get better. He said Subsection 4 of section 65-05-12.2 provides an injured worker is eligible for an evaluation of permanent impairment only when all conditions caused by the compensable injury have reached maximum medical improvement, meaning an injured worker will not qualify for an award until

the worker is as good as the worker can get and there is an objectively measurable permanent injury suffered by the injured worker.

In response to a question from Representative Keiser, Mr. Wahlin said a claim can be reduced or increased during an audit, but the Workers' Compensation Review Committee likely will not hear from an injured worker who has had an award increased by an audit because such an injured worker would not have a reason to have the claim reviewed by the committee.

In response to a question from Senator Burckhard, Mr. Wahlin said when WSI makes a determination on an award amount, the injured worker may use the appeals process to provide additional input if the worker disagrees with WSI's findings and conclusion.

### **Carrie Odegaard**

#### **Claim Summary**

Chairman Ruby called on Ms. Peyerl to provide a summary of Ms. Carrie Odegaard's workers' compensation claim. Ms. Peyerl said:

- Ms. Odegaard sustained a crush injury to her right hand and right upper extremity on November 28, 2001, while working for her employer American Crystal Sugar Company. At the time of injury, she was removing mud chunks from a piece of equipment and her hand was caught between two plates.
- Due to the severity of her crush injury, Ms. Odegaard was off work from the date of injury until September 23, 2002, at which time she returned to work full time but in a restricted capacity with her employer. Ms. Odegaard was back to work for about 2 weeks when she notified WSI she was having difficulty in her modified position.
- At that point, her employer of injury indicated it could not continue to accommodate her physical restrictions. Ms. Odegaard was placed back on full disability benefits.
- To assist with a formal return-to-work plan, WSI assigned vocational services in October 2002.
- Workforce Safety and Insurance issued a formal return-to-work plan that included statewide job goals on an earning capacity. Her functional capacity assessment indicated a light duty release at 8 hours per day. The earnings capacities of the jobs identified in the vocational plan exceeded her average weekly wage of \$374.00. Therefore, WSI issued a final 21-day notice ending disability benefits.
- Workforce Safety and Insurance identified in the formal return to work plan that she could return to work in the following occupations: general clerk, receptionist, customer complaint clerk, and telephone solicitor.
- Ms. Odegaard received her last partial disability payment through July 4, 2003. Workforce Safety and Insurance issued an order denying further disability and vocational benefits on July 25, 2003, due to her vocational plan being completed.
- There was no appeal on the order discontinuing disability benefits, and the decision became final. Ms. Odegaard's medical benefits remain active.
- During the course of her claim, Ms. Odegaard requested a reapplication for disability benefits on two separate occasions: November 10, 2003 and January 6, 2004. Workforce Safety and Insurance denied both requests for a reapplication of disability benefits as she did not meet the criteria for significant change or a loss of earnings that is required under statute and reapplications.
- Multiple reviews for permanent partial impairment occurred on Ms. Odegaard's claim since 2001. Several separate permanent partial impairment evaluations were conducted on the claim since 2001 to address new conditions added to the claim (headaches, chronic pain, complex regional pain syndrome (CRPS), and depression).
- Workforce Safety and Insurance addressed the most recent permanent partial impairment issue in 2018. In April 2018, Ms. Odegaard requested another permanent partial impairment evaluation. She felt her medical condition was declining, which would warrant another assessment.
- Workforce Safety and Insurance determined there was no medical documentation to support a significant change in her medical condition to schedule another permanent partial impairment evaluation. Workforce Safety and Insurance issued a notice denying a permanent partial impairment evaluation on May 10, 2018.
- Ms. Odegaard requested reconsideration of that notice. Workforce Safety and Insurance issued an administrative order denying an additional permanent partial impairment evaluation on the claim dated June 7, 2018.

- Ms. Odegaard requested the assistance of DRO on June 18, 2018. On August 24, 2018, DRO issued a certificate of completion with no change in the decision.
- No appeal was submitted for a hearing and the decision to deny another permanent partial evaluation became final.

### **Ms. Odegaard's Testimony**

Chairman Ruby called on Ms. Odegaard to review her claim and discuss the issues related to her claim. Ms. Odegaard said when it comes to benefits and awards for work related injuries, WSI awards should be changed to be able to provide monthly payments for chronic pain. She said chronic pain should be considered compensable when caused by the work related injury because chronic pain is an effective prohibitor to enjoyment of life and gainful employment.

### **Workforce Safety and Insurance Response**

Chairman Ruby called on Mr. Wahlin to respond to the issues raised by Ms. Odegaard. Mr. Wahlin said because subsection 4 of Section 65-05-12.2 provides an injured worker is eligible for an evaluation of permanent impairment only when all conditions caused by the compensable injury have reached maximum medical improvement, the assumption is when an impairment rating is determined, that is as good as the worker will get. He said if the determination is proven incorrect because the injured worker gets better, WSI does not recover or recoup an award. He said if a substantial worsening of the worker's condition occurs, the injured worker may be reevaluated and given a new impairment rating. He said WSI has two objective criteria for reevaluations, first there must be a supportable and substantial worsening of the condition, and if so, would the supportable and substantial worsening allow the injured worker to receive an additional impairment award. He said Ms. Odegaard's claim involved a request for an award because of chronic pain. He said subsection 7 of Section 65-05-12.2 provides an injured employee is not entitled to a permanent impairment award due solely to pain. He said permanent partial impairment awards based solely on pain probably are prohibited because pain can not be measured objectively.

In response to a question from Chairman Ruby, Mr. Wahlin said an injured worker who believes a condition has undergone a substantial worsening can request WSI for a reevaluation of the initial impairment rating. He said if the request is denied, the denial is appealable.

In response to a question from Senator Oehlke, Mr. Wahlin said if a treatment or procedure became available that would alleviate Ms. Odegaard's chronic pain, WSI would cover the cost of the treatment or procedure because it is medically related to the underlying work-related injury.

## **David Peterson**

### **Claim Summary**

Chairman Ruby called on Ms. Peyerl to provide a summary of Mr. David Peterson's workers' compensation claim. Ms. Peyerl said:

- At the time of the injury, Mr. Peterson had worked as a water hauler for his employer since August 2017. He was throwing a hose when he injured his lumbar spine. He was lifting the hose and twisting at the same time, resulting in the injury.
- At the time of the initial contacts with the employer, WSI questioned the claim due to a late report of the injury, and possible prior issues from a previous farm injury that was not work related.
- Mr. Peterson initially was treated at the emergency room on January 27, 2018, for back pain, sciatica. A magnetic resonance imaging report dated February 12, 2018, had an impression of diffuse degenerative change noticed at the L1-S1 levels.
- On February 15, 2018, Mr. Peterson was referred to Dr. Daniel Dixon at the Bone and Joint Center in Bismarck, North Dakota with a diagnosis of disc herniation on the right side L4-5, which was causing an L5 radiculopathy.
- Workforce Safety and Insurance issued a notice of decision denying benefits on March 21, 2018, because there was no evidence of an acute injury, and that all diagnostic studies revealed underlying and pre-existing degenerative conditions.
- Mr. Peterson requested reconsideration of the claim denial on April 2, 2018.
- Workforce Safety and Insurance's physician advisor reviewed the medical evidence on April 30, 2018, and provided the following opinion:

"Workforce Safety and Insurance's physician advisor has not found anything in the medical notes that confirms an acute injury. The magnetic resonance imaging on February 12, 2018, shows diffuse

degenerative changes. A later magnetic resonance imaging on March 14, 2018 now shows a small disc herniation at L1-L2 along with degenerative changes. Therefore it appears that this was a trigger to an old injury and something else later on would've caused the condition shown on the March 14, 2018, magnetic resonance imaging. The medical dictation supports a trigger to an old injury and WSI would not be liable".

- Workforce Safety and Insurance sent a copy of the WSI physician advisor's opinion to Dr. Dixon to see if he agreed with the physician advisor's opinion. Dr. Dixon responded on May 22, 2018, that he agreed with the opinion of WSI's physician advisor.
- Workforce Safety and Insurance issued the order denying the claim on June 13, 2018. Mr. Peterson requested the assistance of DRO on June 26, 2018. On July 6, 2018, DRO issued a certificate of completion with no change in decision from WSI's order dated June 13, 2018.
- Mr. Peterson requested a hearing on July 19, 2018. The hearing occurred on June 18, 2019. Workforce Safety and Insurance received the administrative law judge's final order dated June 29, 2019, affirming the June 13, 2018, order denying the claim.
- Mr. Peterson's attorney filed a petition for reconsideration on July 19, 2019, of the administrative law judge decision. The administrative law judge denied the petition for reconsideration on July 26, 2019.
- No appeal was filed and administrative law judge decision became final.

### Mr. Peterson's Testimony

Chairman Ruby called on Mr. Peterson to review his claim and discuss the issues related to his claim. Mr. Peterson said when his injury occurred, his employer did not file a claim with WSI. He said if a workplace injury happens and the employer does not file a claim, WSI at minimum should investigate why a claim was not filed. He said his previous injury was to his kidney and not his back, and the injury was evaluated by a nurse, not a physician. He said the injury to his L1-L2 had no bearing on his L3-L4 injury. He said the court sided with the opinion of a family physician over the opinion of a neurosurgeon. He said the Bone and Joint Center he was referred to in New England is not there. He said the medical office in New England is not a bone and joint specialist and is not affiliated with the Bone and Joint Center.

In response to a question from Chairman Ruby, Mr. Peterson said he appealed his claim to district court.

### Workforce Safety and Insurance Response

Chairman Ruby called on Ms. Ann Schaibley, Staff Counsel, Workforce Safety and Insurance, to respond to the issues raised by Mr. Peterson. Ms. Schaibley said a compensable injury must be an accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings. She said under subsection 11 of Section 65-01-2, an injury attributable to a pre-existing injury, disease, or other condition, including when employment acts as a trigger to produce symptoms in the pre-existing injury, disease, or other condition, is excluded from being considered a compensable injury unless the employment substantially accelerates its progression or substantially worsens its severity.

In response to a question from Representative Keiser, Ms. Schaibley said the medical evidence in Mr. Peterson's claim, which included magnetic resonance imaging, indicated Mr. Peterson had a degenerative disease from his L1 to his S1. She said the medical evidence was reviewed by WSI's internal physician who determined the work accident acted as a trigger to make the prior injury symptomatic but the accident did not accelerate the prior injury.

In response to a question from Chairman Ruby, Ms. Schaibley said Mr. Peterson's injury was determined to be non-compensable because his accident injury only triggered symptoms in a preexisting condition.

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

No further business appearing, Chairman Ruby adjourned the meeting at 1:00 p.m.

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Christopher S. Joseph  
Counsel

ATTACH:2