

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Wednesday, March 14, 2012
Lake Region State College, 1801 College Drive North
Chautauqua Gallery
Devils Lake, North Dakota

Representative Gary R. Sukut, Chairman, called the meeting to order at 9:30 a.m.

Members present: Representatives Gary R. Sukut, Bill Amerman, George J. Keiser; Senators Mac Schneider, Rich Wardner

Member absent: Senator George L. Nodland

Others present: See [Appendix A](#)

It was moved by Representative Keiser, seconded by Senator Schneider, and carried on a voice vote that the minutes of the August 24, 2012, meeting be approved as distributed.

Chairman Sukut encouraged committee members to take a few extra minutes to visit Lake Region State College while they are on campus. He also recognized Senator Dave Oehlke, Devils Lake, and Mr. Edward Grossbauer, member, Workforce Safety and Insurance Board of Directors, who were also in attendance.

Senator Oehlke invited the committee members to attend the county development meeting taking place on campus over the lunch break.

RECEIPT OF INFORMATION

Chairman Sukut called on Mr. Bryan Klipfel, Executive Director and CEO, Workforce Safety and Insurance, to give a presentation regarding the status of the implementation of the 2010 Workforce Safety and Insurance (WSI) performance evaluation recommendations. Mr. Klipfel distributed written testimony ([Appendix B](#)). Additionally, committee counsel distributed the executive summary of the 2010 WSI performance evaluation. A copy of the *2010 Performance Evaluation of North Dakota Workforce Safety and Insurance* is available at www.legis.nd.gov/assembly/61-2009/docs/pdf/wc081310appendixc.pdf

In response to a question from Representative Keiser regarding the WSI safety program, Mr. Klipfel said WSI does not gather statistics that would help determine whether the safety program would be more effective and improve workplace safety if focused on process or more effective if focused on outcome. He said the award of safety program grants is moving away from providing grants for equipment and is moving toward providing grants for ergonomic programs and grants for ergonomic-related equipment purchases.

Mr. Klipfel said in the past there has been an average of 20,000 reported claims in a typical fiscal year. However, at this point in the current fiscal year there have been 25,000 reported claims. He said so far, WSI has been able to deal with this increase in the number of claims using the 247 full-time equivalent employees WSI has been authorized, and so far the premium collected has been adequate to cover these claims.

In response to a question from Senator Wardner, Mr. Klipfel said the increase in the number of claims filed has kept pace with the increase in the number of employers. He said the premiums have been keeping up with the increase in claims.

Mr. Klipfel said it is important for WSI to educate new employers regarding safety, which is especially important in oilfield jobs, which are typically relatively dangerous. He said larger employers are usually more attuned to the importance of workplace safety, but the smaller or startup employers are often less aware of the importance.

In response to a question from Senator Schneider, Mr. Klipfel said most of the state's new employers comply with all of the new business requirements, including workers' compensation coverage for employees. He said the more common problem with new employers is that once they get set up in the state, they may forget to keep WSI informed of increases in hires.

In response to a question from Representative Sukut, Mr. Klipfel said although in the past WSI has participated in efforts to address special work-related situations, such as compliance teams sent to Minot in response to the recent flooding, WSI is not taking any specific actions to address or respond to the increased employment growth in the oilfield.

Representative Keiser said another issue related to the growth in the oilfield is the impact this growth is having on the area hospitals, including Minot, Williston, Dickinson, and Bismarck hospitals. He said not only are the hospitals experiencing increased treatment of workplace injuries, but the current reimbursement schedule is not adequate.

Mr. Klipfel said it is not uncommon for an injured employee of an out-of-state employer to go "home" for treatment. He said in this situation WSI is faced with the issue of the out-of-state medical providers seeking reimbursement based on the home state's

reimbursement schedule. He stated there are ongoing discussions regarding the reimbursement schedule. Additionally, he said, it is not uncommon for out-of-state employers doing business in North Dakota to have out-of-state workers' compensation coverage but no North Dakota coverage, which is a violation of North Dakota's laws.

Mr. Klipfel said effective July 2012 it is expected that WSI premium rates will experience a 4.5 percent decrease; however, because there has been an increase in the statewide average weekly wage of approximately 5 to 6 percent, the amount of premium paid will translate to about a 1.1 percent increase.

Mr. Klipfel provided a brief update on the status of the WSI computer system replacement project. He said effective July 2011, an order of the Governor provided that if there is an increase in the dollar amount or time provisions of an information technology project, the amendment must be reviewed by the executive steering committee. He said WSI is currently in negotiations with the contractor because the contractor is not meeting the time schedule provided under the contract. He said as a result in this delay, there are resulting increases in costs paid to third parties.

In response to a question from Representative Sukut, Mr. Klipfel said under the WSI computer system replacement project, although WSI is not currently paying the contractor, WSI is incurring expenses related to the contract.

Mr. Klipfel said the final issue he would like to address is the status of WSI issues currently being covered in the news media. He said the circumstances being covered in the media relate to two calls made to the WSI hotline in August 2011.

Mr. Klipfel said one hotline tip related to the medical documentation of WSI's medical director. He said the hotline tip raised the concern WSI was pressuring the medical director to change his medical opinions. He said WSI did not question the medical director's opinions, but did take issue with the process and format the medical director took in reaching and documenting his medical opinions. He said WSI was concerned that in providing his medical opinion the medical director gave his medical opinion and then included counterarguments on why the medical opinion may not be accurate. He said the hotline tip reported two incidents of this concern.

Mr. Klipfel said the second hotline tip reported a concern that WSI was deleting notepad entries on a claim. He said that upon a WSI review of the notepad entry in question, WSI determined upon review of a notepad entry by the claims director, the claims director deleted an entry because she felt the entry was based on opinion and not fact.

Mr. Klipfel said upon receipt of these hotline complaints, the WSI internal audit division reviewed the matters, and following this review, WSI followed the division's recommendations. He said the recommendation regarding the hotline tip relating to the medical director's opinions was that WSI should

work with the North Dakota Medical Association and the State Board of Medical Examiners to establish a documentation format that will be uniform and used for all medical opinions.

Mr. Klipfel said as it relates to the hotline tip regarding the notepad deletion, WSI takes the position the notepad entries are WSI's notes; therefore, WSI can revise these notepad entries and do what it wants with them. However, he said, he understands the concerns regarding the public's perception; therefore, WSI has decided to establish a procedure to follow if a notepad entry is going to be deleted. He said WSI has adopted a new process for dealing with deletions of notepad entries, providing if the claims director determines a deletion is appropriate, consultation is required with the chief of Injury Services and the chief executive officer. He said if a notepad deletion is made under this new process, WSI will keep a record of the deleted information.

In response to a question from Senator Wardner, Mr. Klipfel said the WSI medical director is a full-time WSI employee. He said as a result of the hotline tip, WSI did consult with the North Dakota Medical Association in recognition of the association's expertise as it relates to medical opinions.

Representative Keiser said he supports WSI's approach to addressing the medical opinion format issue; however, he also recognizes the practice of medicine is an art form and a medical opinion can therefore come in all types of formats. He said he would not want WSI to take any actions that might decrease the willingness of North Dakota physicians to provide WSI with medical opinions.

Representative Keiser said he is concerned about the deletion of notepad entries. He said although he sees the value of clarifying WSI's protocol, he does not support deletion of these entries and does not think there is any reason to delete notepad entries.

Mr. Klipfel said he recognizes the public's perception is very important; therefore, WSI took the middle road in addressing these issues. He said WSI will ensure a record is kept of all notepad deletions.

In response to a question from Representative Amerman, Mr. Klipfel said he does not think the people who filed the complaints are satisfied with WSI's resolution with these issues; therefore, the media has covered this issue. He said the Bureau of Criminal Affairs will be investigating the two hotline tips because the Highway Patrol declined the investigation due to Mr. Klipfel's past connection to the Highway Patrol.

In response to a question from Senator Schneider, Mr. Klipfel said in the case of the notepad deletion, the claims director deleted the entry. He said the motivation for the deletion was that the entry was rambling and was based on opinion. Additionally, he said, the deleted information was also addressed in other portions of the injured employee's record. He said under the new protocol, only the claims director will be allowed to delete a notepad entry.

Senator Schneider said he echoes Representative Keiser's comments and thinks it is never appropriate to delete a notepad entry. He said it is not appropriate to put the injured employee in the position of having to make a special request--setting up an additional hoop--for access to a supersecret file.

Representative Sukut requested that WSI provide Committee Counsel with a copy of WSI's new procedure for dealing with medical opinions and notepad entry deletions.

Representative Keiser said he would support the committee's consideration of addressing this issue of notepad deletion through the committee's recommendation of legislation.

Chairman Sukut called on Mr. Tim Wahlin, Chief of Injury Services, Workforce Safety and Insurance, to give a presentation regarding current workers' compensation claim trends. Mr. Wahlin gave a computer presentation ([Appendix C](#)). He said in recent history, WSI typically has 20,000 employers covered under WSI and receives 20,000 claims per year; however, this stable model has recently changed due to the oil development in the western half of the state.

In response to a question from Representative Keiser, Mr. Wahlin said WSI does track data regarding the number of companies that leave the state, and he can provide this data to committee members. However, he said, if an employer changes its name or its corporate structure, the employer's claims history follows that company.

In response to a question from Representative Sukut, Mr. Wahlin said the transportation class of accounts is primarily trucking. He said it is important to distinguish between the data addressing the increase in premium collected and the data addressing the increase in the number of employees.

In response to a question from Representative Keiser, Mr. Wahlin said WSI's data is not reliable in tracking the severity of an injured employee's injury. He said a claim needs time to mature and to determine the severity.

In response to a question from Senator Schneider, Mr. Wahlin said in considering the increase in the number of claims WSI is experiencing in oil well trucking employers, it may be valuable to focus on the premium collected in the composite trucking classification. He said he expects the number of claims in this classification will continue to see increases.

In response to a question from Representative Keiser, Mr. Wahlin said although WSI does not link its rates to the National Council on Compensation Insurance (NCCI) data, WSI does stay apprised of the NCCI trends. However, he said, North Dakota does have some anomalies and differs in some ways from the NCCI data trends.

Chairman Sukut called on Mr. Wahlin to provide an annual report from WSI as required under North Dakota Century Code Section 65-05.1-06.3, which includes a report on pilot programs to assess

alternative methods of providing rehabilitation services.

Mr. Wahlin reviewed the ongoing and recently completed pilot programs and recent program changes. He said the three primary rehabilitation programs have been the passage of 2011 Senate Bill No. 2114 to expand the WSI scholarship program to apply to the spouse and child of a catastrophically injured employee, passage of 2011 House Bill No. 1050 to provide grants to entities that promote and provide necessary educational opportunities for injured employees within the vocational rehabilitation process, and the collection of data from injured employees regarding feedback on WSI's vocational rehabilitation programs.

In response to a question from Representative Sukut, Mr. Wahlin said the balance of the WSI scholarship fund is adequate to fund the expansion of the program. He said WSI uses a single-page scholarship application that is intended to be user-friendly.

In response to a question from Representative Keiser regarding whether WSI continues to receive complaints from injured employees regarding the vocational rehabilitation services, Mr. Wahlin said vocational rehabilitation is a notoriously difficult issue, and it is very emotional for injured employees. He said it is understandable that people do not like having to change jobs, but some injuries require these changes. He said WSI is taking positive steps to address vocational rehabilitation issues. For example, he said, WSI is taking the positive step of bringing the previously contracted for vocational rehabilitation services in-house. He said initial data indicates this has been a positive change.

In response to a question from Representative Sukut, Mr. Wahlin said Section 65-05.1-01 provides a hierarchy of appropriate vocational rehabilitation options. He said retraining, such as college, is the last option in this hierarchy. However, he said, there are some people who do not have the necessary skills or background to successfully complete a college program.

Chairman Sukut called on Ms. Anne Jorgenson Green, Director of Legal Services, Workforce Safety and Insurance, to review the independent contractor determination process used by WSI. Ms. Green gave a computer presentation ([Appendix D](#)).

In response to a question from Representative Keiser, Ms. Green said there is one standard for determining whether a trucker is an employee or an independent contractor, and there is a second standard that applies to all other workers. Additionally, she said, although North Dakota's independent contractor analysis is not perfect, she is not aware of any other model that would "fix" any of the perceived weaknesses or "gray areas."

Representative Keiser said the independent contractor model the state had been using did not work well for the trucking industry; therefore, this model was changed in 2009. He said perhaps there

are similar changes that could be made for other industries.

In response to a question from Representative Sukut, Ms. Green said most independent contractor coverage issues come to the attention of WSI as a result of claim filings, although some do come in through the tip hotline.

In response to a question from Senator Schneider, Ms. Green said if an employee is injured on the job and the employer is not covered under WSI, WSI has the authority to assess against the employer penalties, premium, and interest. She said the amount assessed against the employer may not be less than the amount of the related claims paid to date for the employer.

In response to a question from Representative Keiser, Ms. Green said for injuries that take place in North Dakota, the law of this state should govern the situation; the reality is that if a claim is filed out of state for an injury that took place in North Dakota, WSI may never become aware of the injury.

In response to a question from Senator Wardner, Ms. Green said it is difficult to provide complete answers to hypothetical out-of-state coverage questions because the answer will typically depend on several factors.

Chairman Sukut said as the committee continues its work for the remainder of the interim, it may request additional information regarding WSI coverage of volunteers and pain management.

Chairman Sukut said the interim Health Care Reform Review Committee is also receiving information regarding issues related to the prescription of pain medications. He said this issue is broader than workers' compensation, as the issue impacts the entire health industry. He said the State Board of Medical Examiners, North Dakota Medical Association, and North Dakota Hospital Association are all following this issue.

Chairman Sukut said at upcoming committee meetings, in addition to reviewing any applicant's claims, the committee will receive a biennial report from WSI regarding compiled data relating to safety grants issued under Chapter 65-03, will receive a report from WSI on recommendations based on a biennial safety review of Roughrider Industries work programs, and will review any bill drafts.

CLAIM REVIEW

Case Summary

Ms. Marliss Platz, injured employee, applied and was approved to have the committee review her claim. Chairman Sukut called on Ms. Platz and Mr. Chuck Kocher, Workforce Safety and Insurance, to present the claim for committee review.

Mr. Kocher provided a summary of Ms. Platz's case. He said Ms. Platz filed an application with WSI for workers' compensation benefits on June 12, 2008, for an injury sustained to her left index finger. He said she sustained the injury while working as a department lead at Kmart. He said the injury occurred

as Ms. Platz closed the safe door, catching her finger inside the safe door. He said on June 13, 2008, WSI accepted the workers' compensation claim and awarded wage loss benefits from June 13, 2008, through July 13, 2008, at which time Ms. Platz returned to work.

Mr. Kocher said on August 1, 2008, Ms. Platz requested permanent partial impairment (PPI) benefits for the injury to her finger. He said that on September 19, 2008, WSI reviewed the medical records to determine whether the injury to Ms. Platz would result in an impairment rating of at least 16 percent whole body. He said the review concluded the injury would not meet the 16 percent required whole body impairment and would not qualify for a PPI award under the scheduled injury subsection of the law.

Mr. Kocher said on October 17, 2008, Ms. Platz made a timely appeal and submitted a request for reconsideration and to be granted a PPI evaluation. He said on November 25, 2008, WSI issued an order denying the request, stating the injured employee did not meet the PPI requirements under Section 65-05-12.2. He said the order found that WSI had not received any objective medical evidence indicating the claimant's work injury would result in a 16 percent whole body impairment rating. The order included a finding of fact that:

According to the 5th Edition of the American Medical Association (AMA) Guides to Permanent Partial Impairment, the impairment for the amputation would equate to approximately 3% WP (approximately 30% digit = 6% hand = 5% EU = 3% WP). The above calculated impairment from the Guides does not take into consideration of the ROM or sensory loss of the remaining digit. However, an amputation of the entire 1st index finger, per the Guides equates to 11% WP.

Mr. Kocher said on December 24, 2008, Ms. Platz made a timely appeal and on January 6, 2009, requested the assistance of the Decision Review Office. He said on February 17, 2009, the Decision Review Office issued a Certificate of Completion indicating no change in decision to the order. He said at this point, Ms. Platz stopped the appeal process and the order became final.

In response to a question from Representative Keiser, Mr. Kocher said at the time Ms. Platz requested a PPI determination, WSI was still using the fifth edition of the *AMA Guides to the Evaluation of Permanent Impairment (Guides)*. He said WSI is now using the sixth edition for PPI determinations.

In response to a question from Senator Schneider, Mr. Kocher said Ms. Platz never actually received an official PPI rating; however, the WSI review indicated the impairment would likely not exceed 3 percent whole body impairment.

In response to a question from Representative Amerman, Ms. Platz said after using the services of the Decision Review Office, it was her understanding

she had taken all the steps available, and there was no other recourse. She said she did not understand that she could continue the appeal process.

In response to a question from Representative Keiser, Ms. Platz said she recalls receiving a final notice from WSI but does not recall receiving a 30-day appeal notice.

Senator Wardner said that it sounds like even if Ms. Platz had appealed, WSI was following the law and would have prevailed. He said legislators need to remember that when they draw the lines, some people are going to be left on the other side.

Mr. Kocher said as it relates to the notice of the 30 days in which to appeal, there may have been some confusion as Ms. Platz originally requested a hearing but instead the claim was routed to the Decision Review Office.

Representative Keiser said he is concerned about how the appeal notice was implemented. Mr. Kocher said although it appears Ms. Platz did actually request a hearing and instead her request was routed to the Decision Review Office, the decision of completion issued by the Decision Review Office would have given notice of the 30 days in which to request an appeal.

Ms. Platz said her recollection is that both WSI and an attorney informed her she had completed the process; therefore, she did not take any further action on the denial of PPI benefits.

Issues for Review

Ms. Platz stated she finished her college education in 2010 and has since entered the workforce as a professional. However, she said, as a result of her work injury, she has permanent disabilities for which she thinks she should be compensated by WSI. She said due to the partial amputation of her finger, she is unable to key with her injured hand; therefore, is unqualified for jobs that require any significant amount of keying. She said this injury will be a disability that impacts her ability to qualify for jobs the rest of her life. Additionally, she said, she has ongoing physical issues due to her injury, including continued pain in her finger and a constant chill in her finger.

In response to a question from Representative Sukut, Ms. Platz said she would like the law to be changed to allow for a more individualized analysis of PPI determination. She said the analysis should consider factors, such as work requirements, educational background, and career goals. She said if 10 people had the same injury, there would be different impacts based on how the injury impacted each unique set of circumstances.

Ms. Platz said in her case, the loss of function of her finger impacts her ability to pursue her career goals. She said in today's computer-based culture, it is especially important for a job seeker to be able to use a keyboard. She said if WSI would have evaluated the specific circumstances of her claim it would have found that with the injury occurring when she was age 48, she had 20 years to 30 years

remaining in the workforce. Additionally, she said, loss of the use of her injured finger will negatively impact her ability to meet the qualifying requirements for jobs for the remainder of her time in the workforce.

Workforce Safety and Insurance

Chairman Sukut called on Mr. Wahlin to comment on the issues raised by Ms. Platz. Mr. Wahlin reviewed the three types of benefits available through the state's workers' compensation--disability benefits, medical benefits, and PPI benefits. He said the disability benefits are cash benefits designed to address loss of wages, whereas the PPI benefits are designed to compensate the injured employee for a permanent injury. He said PPI is an objective measurement of whole body impairment which is based on how the permanent injury impacts the activities of daily living. Additionally, he said, there is a PPI schedule that allows an injured employee to qualify based on a list of amputations.

Mr. Wahlin said if Ms. Platz had lost the first joint on her finger, which she did not, she would have qualified for PPI benefits based on the PPI amputation schedule. He said since her injury, Ms. Platz has returned to work at or above her preinjury employment level; therefore, her WSI claim has been closed.

In response to a question from Senator Wardner, Mr. Wahlin said under the PPI amputation schedule, an amputation of the first joint of a finger would qualify an injured employee for an impairment multiplier of 28. He said the multiplier is calculated based on one-third of the state's average weekly wage.

In response to a question from Representative Keiser, Mr. Wahlin said the PPI evaluation under the *Guides* does take into account neurological damage.

In response to a question from Representative Amerman, Mr. Wahlin said the PPI amputation schedule does not address loss of use; however, the PPI evaluation under the *Guides* would consider loss of use in determining the degree of whole body impairment.

In response to a question from Representative Keiser, Mr. Wahlin said North Dakota's workers' compensation benefits do not take into consideration the fact that the injured employee was a college student at the time of the injury and was working to improve his or her skills and earning potential.

In response to a question from Representative Amerman, Mr. Wahlin said as a result of 2011 legislation, WSI is now using the sixth edition of the *Guides*. He said although WSI's actuarial staff has not yet opined on this matter, he assumes it will take four years or five years before there is adequate data to determine what whole body impairment threshold level is appropriate under the new addition.

Mr. Wahlin said even if the partial amputation of Ms. Platz's finger were to have qualified her under the PPI amputation schedule, the PPI benefit would have been limited to approximately \$6,000 to \$7,000. Ms. Platz said this amount would not adequately compensate her for the impact of this injury.

Representative Keiser questioned whether the current process of evaluation for PPI adequately addresses loss of function. Additionally, he questioned whether perhaps vocational rehabilitation should have become involved in Ms. Platz's claim to address the loss of function and the impact on her ability to use a keyboard.

Representative Keiser said in listening to the issues and concerns raised by Ms. Platz, it seems as though she is seeking more of a disability benefit than a PPI benefit. Another example of how the system is imperfect is the situation in which a student, such as a law student, is injured while working as a dishwasher to put the student through school, but then the workers' compensation disability benefits are based on the employee's earnings as a dishwasher, without even considering that the employee was working to become a lawyer.

Representative Amerman said he would like to receive additional information regarding WSI's PPI payouts at the different levels.

Chairman Sukut requested that committee members continue to think about the issues addressed at the meeting and said these issues may be addressed at future committee meetings.

No further business appearing, Chairman Sukut adjourned the meeting at 2:00 p.m.

Jennifer S. N. Clark
Committee Counsel

ATTACH:4