

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Thursday, October 5, 2017
Harvest Room, State Capitol
Bismarck, North Dakota

Senator Jonathan Casper, Chairman, called the meeting to order at 10:00 a.m.

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

Others present: See [Appendix A](#)

Chairman Casper called on the Legislative Council staff to review the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management](#) and the memorandum entitled [Workers' Compensation Review Committee Background Memorandum](#).

REPORTS AND STUDY

Chairman Casper called on the Legislative Council staff to review the committee's charge to receive reports and the study charge. The Legislative Council staff said the committee is charged with receiving the following reports:

- A report from the Director of Workforce Safety and Insurance (WSI), the Chairman of the WSI Board of Directors, and the audit firm regarding the quadrennial performance evaluation of WSI and the committee shall select up to four elements for inclusion in the performance evaluation (North Dakota Century Code Section 65-02-30);
- A status report on WSI's current rehabilitation services pilot programs (Section 65-05.1-06.3);
- A biennial report from WSI regarding compiled data relating to safety grants issued under Chapter 65-03 (Section 65-03-05); and
- A report from WSI on recommendations based on the biennial safety review of Roughrider Industries work programs and the biennial performance review of the program of modified workers' compensation coverage by WSI (Section 65-06.2-09).

BACKGROUND

Chairman Casper called on Mr. Bryan Klipfel, Executive Director, Workforce Safety and Insurance, for testimony ([Appendix B](#)) regarding an overview ([Appendix C](#)) of WSI and WSI trends and initiatives.

In response to a question from Representative Ruby, Mr. Klipfel said WSI considers both the injured worker and the employer as customers.

In response to a question from Senator Burckhard, Mr. Klipfel said WSI is a special fund agency funded solely by employer premiums. He said employer premiums collected go into the fund, from which payouts for wage loss, injured workers, medical claims, and safety programs are made. He said the fund balance is about \$1.8 billion. He said a good rate of return allocates more money into the fund. When the fund grows, he said, premium dividends are allocated to employers.

In response to a question from Senator Burkhard, Mr. Klipfel said a possible reason for the lack of attorneys willing to accept cases for claims against WSI could be because WSI provides injured workers a thorough and good safety net. He said claims adjusters do a great job evaluating and reviewing claims, and if a claim is denied, an injured worker may go through the Decision Review Office. He said the Decision Review Office is a separate and independent office at WSI responsible for taking a second look at claims to determine whether WSI made an error regarding a decision on an injured worker's claim. After the Decision Review Office makes a decision, he said, a private attorney is paid \$500 to review the decision.

In response to a question from Representative Ruby, Mr. Klipfel said the number of claims filed could be decreasing because the number of hazardous employment opportunities in western North Dakota also has decreased since oil production has declined over the past years.

In response to a question from Representative Keiser, Mr. Klipfel said WSI has \$8 million for its information technology projects this biennium. He said he will provide the committee with more information on the information technology conversion matter.

In response to a question from Representative Boschee, Mr. Klipfel said there are 408,000 workers covered by employer premiums.

In response to a question from Representative Keiser, Mr. Klipfel said WSI is aware of the inverse trend between injured worker satisfaction and employer satisfaction. He said WSI has been working on enhancing customer experience since February 2016 with hopes of elevating both those aspects of the performance metrics.

In response to a question from Representative Boschee, Mr. Klipfel said WSI is required to issue premium dividends if the level of financial reserves plus available surplus determined as of June 30 of any year is above 140 percent of the actuarially established discounted reserve. He said the percentage of delinquent premiums is 2 percent, which is around \$10 million.

In response to a question from Representative Boschee, Mr. Klipfel said North Dakota has a monopolistic workers' compensation system, similar to Ohio, Wyoming, and Washington. He said North Dakota does not have private workers' compensation carriers or workers' compensation self-insurance. He said WSI provides coverage to all employers. He said many of the former monopolistic workers' compensation states, such as West Virginia and Nevada, now have private workers' compensation carriers because the funds had negative balances.

2017 LEGISLATION

Chairman Casper called on Ms. Jodi Bjornson, Chief Counsel, Workforce Safety and Insurance, for testimony ([Appendix D](#)) regarding 2017 legislation relating to the state's workers' compensation system.

In response to a question from Senator Oban, Ms. Bjornson said for fiscal year 2017, \$132,000 was expended for attorneys reviewing decisions made by the Decision Review Office, which equates to around 600 attorney reviews.

In response to a question from Representative Keiser, Ms. Bjornson said the intent must be willful to constitute the crime of workers' compensation claim fraud.

In response to a question from from Chairman Casper, Ms. Bjornson said WSI will join a lawsuit with an injured worker against a third party if the third party has some fault in the injuries caused to the injured worker.

In response to a question from Representative Ruby, Ms. Bjornson said state law permits an employer's account to be credited in an amount consistent with the overpayment of an employer's current experience rating. She said she will provide the committee with more information on this matter.

In response to a question from Representative Keiser, Ms. Bjornson said for an employer to be deemed to have willfully precluded an injured worker from filing a claim and securing benefits, there must be some sinister intent behind the employer's conduct to satisfy the willful intent element of the offense.

PERFORMANCE EVALUATION

Chairman Casper called on Mr. Ronald I. Tolstad, Jr., Operations Manager and Technical Specialist, State Auditor's office, for testimony ([Appendix E](#)) regarding an overview of the quadrennial WSI performance evaluation, the status of the 2018 performance evaluation, and elements included in the 2018 performance evaluation.

In response to a question from Representative Keiser, Mr. Tolstad said consultants bring a high level of expertise, and it would be beneficial to have them audit the performance evaluation in lieu of an agency self-audit. He said a level of outside expertise is required to determine whether the performance evaluation recommendations have been implemented.

In response to a question from Representative Keiser, Mr. Tolstad said he will provide the committee with additional information regarding the breakdown of the prior performance evaluation followup, what the recommendation was, how WSI addressed the recommendations, and the current status.

Chairman Casper called on Mr. Tim Wahlin, Chief of Injury Services, Workforce Safety and Insurance, for testimony ([Appendix F](#)) regarding the status of the most recent WSI performance evaluation and proposed elements for inclusion in the 2018 WSI performance evaluation.

In response to a question from Chairman Casper, Mr. Wahlin said exploring the costs and benefits associated with WSI becoming a regulated entity by the Insurance Department would provide the facts needed to determine whether a regulatory transition is a move in the right direction.

Representative Ruby said statutory reforms occurred a few years ago relating to opioid reporting requirements. He said selecting WSI's historical management of prescribed opioids, including rates and usage as one of the elements for inclusion into the performance evaluation would provide useful data into the success of previously enacted legislation on the matter.

In response to a question from Representative Boschee, Mr. Wahlin said workers' compensation is exclusively within state control and has no federal regulatory oversight. He said a federal regulatory mechanism of workers' compensation is very unlikely to be implemented.

In response to a question from Chairman Casper, Mr. Wahlin said psychological conditions are compensable if there is not a pre-existing condition and it is determined with reasonable medical certainty that unusual stress is at least 50 percent of the cause of the injury or disease as compared with all other contributing causes combined. He said unusual stress is statutorily defined as stress greater than the highest level of stress normally experienced or anticipated in that position or line of work. He said the laws related to compensable psychological conditions are narrowly tailored and authorizes benefits only when at least a 50 percent causal connection exists between the claimant's physical injury and mental or psychological condition. He said generally posttraumatic stress disorder is not a compensable condition under the North Dakota workers' compensation system.

In response to a question from Representative Boschee, Mr. Wahlin said the inclusion of posttraumatic stress disorder as an element in the 2014 performance evaluation was a broader exploration of compensability of posttraumatic stress disorder over a nonspecific employment group.

It was moved by Representative Keiser, seconded by Senator Burckhard, and carried on a voice vote that the committee vote on each of the three suggested elements separately.

It was moved by Representative Ruby, seconded by Representative Keiser and carried on a roll call vote that reviewing WSI's historical management of prescribed opioids, including rates and usage, be selected as an element for inclusion in the WSI performance evaluation. Senators Casper, Burckhard, and Oban and Representatives Boschee, Keiser, and Ruby voted "aye." No negative votes were cast.

Representative Boschee said gathering information through the performance evaluation on whether WSI should be regulated by the Insurance Department would aid the Legislative Assembly significantly in making more informed decisions.

It was moved by Representative Boschee, seconded by Senator Oban, and failed on a roll call vote that exploring the benefits and costs associated with requiring WSI to become regulated by the Insurance Department be selected as an element for inclusion in the WSI performance evaluation. Senator Oban and Representative Boschee voted "aye." Senators Casper and Burckhard and Representatives Keiser and Ruby voted "nay."

Representative Keiser said he would be more supportive of evaluating whether posttraumatic stress disorder should be compensable if the evaluation included all injured workers in North Dakota, regardless of profession.

Senator Oban said the committee may need to evaluate on a broader scale whether mental health should be viewed in the same light as physical health. She said injured workers should not be left out of workers' compensation coverage simply because a mental injury is not as easily identifiable as a broken leg.

It was moved by Representative Boschee, seconded by Senator Oban, and failed on a roll call vote that evaluating the compensability of posttraumatic stress disorder for full-time firefighters and law enforcement officers be selected as an element for inclusion in the WSI performance evaluation. Senator Oban, and Representative Boschee voted "aye." Senators Casper and Burckhard and Representatives Keiser and Ruby voted "nay."

CLAIM REVIEW PROCESS

Chairman Casper called on the Legislative Council staff to review the procedure and application forms used by the Workers' Compensation Review Committee during the 2015-16 interim. The Legislative Council staff distributed a copy of the application packet ([Appendix G](#)) used during the 2015-16 interim and a copy of the letter ([Appendix H](#)) sent to injured workers who had received a final determination regarding a North Dakota workers' compensation claim within the allotted time. In reviewing the application procedure, he said the proposed application packet includes a cover letter explaining the application process and eligibility requirements, a copy of Section 54-35-22, a "Release of Information and Authorization" form, and a "Review Issue Summary" form.

It was moved by Representative Keiser, seconded by Representative Boschee, and carried on a voice vote that the committee continue to use the forms and process used during the previous interim.

It was moved by Representative Keiser, seconded by Senator Burckhard, and carried on a roll call vote that the committee send the application packet to claimants who have completed the Decision Review Office process during the last 12 months. Senators Casper, Burckhard, and Oban and Representatives Boschee, Keiser, and Ruby voted "aye." No negative votes were cast.

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

Christopher S. Joseph
Counsel

ATTACH:8