

# WORKERS' COMPENSATION REVIEW COMMITTEE

North Dakota Century Code Section 54-35-22 established the Workers' Compensation Review Committee. The committee is directed to review workers' compensation claims brought to the committee and determine whether changes should be made to the workers' compensation laws. Section 54-35-22 provides for a six-member committee composed of two members of the Senate appointed by the Senate Majority Leader, one member of the Senate appointed by the Senate Minority Leader, two members of the House of Representatives appointed by the House Majority Leader, and one member of the House of Representatives appointed by the House Minority Leader. In addition to the statutory directive to review workers' compensation claims, the committee has been assigned five other statutory directives:

- Section 65-02-30 requires the committee select up to four elements to be included in the quadrennial performance evaluation of Workforce Safety and Insurance (WSI);
- Section 65-02-30 requires the committee to receive the performance evaluation report and review any actions taken resulting from the performance evaluation report;
- Section 65-03-05 requires WSI to report biennially regarding compiled data relating to safety grants issued under Chapter 65-03;
- Section 65-05.1-06.3 directs WSI include in an annual report to the committee status reports on WSI's current rehabilitation services pilot programs; and
- Section 65-06.2-09 requires WSI to report 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.

Committee members were Senators Jonathan Casper (Chairman), Randall A. Burckhard, and Erin Oban and Representatives Joshua A. Boschee, George Keiser, and Dan Ruby.

The committee submitted this report to the Legislative Management at the biennial meeting of the Legislative Management in November 2018. The Legislative Management accepted the report for submission to the 66th Legislative Assembly.

## CLAIM REVIEW General Background

Workers' compensation laws in North Dakota are found primarily in North Dakota Century Code Title 65. The administrative rules adopted by WSI are found in North Dakota Administrative Code Title 92. Section 12 of Article X of the Constitution of North Dakota specifically addresses the state's workers' compensation agency, providing for a constitutional continuing appropriation of the workers' compensation fund for the purpose of paying workers' compensation benefits.

Section 54-35-22 established the Workers' Compensation Review Committee effective August 1, 2005, and the law was originally set to expire August 1, 2007. The expiration clause was repealed in 2007. The law requires the committee to meet once each calendar quarter unless there is no claim to review. The committee operates according to the laws and procedures governing the operation of Legislative Management interim committees.

### Interim History

The following is a history of the committee's activities relating to claim reviews conducted under Section 54-35-22 and legislative recommendations made:

Interim	Claims Reviewed	Bills Recommended
2005-06	11	3
2007-08	15	9
2009-10	4	7
2011-12	2	4
2013-14	1	2
2015-16	7	1

### Claims Review Procedure

Based on the protocol and application packet used during the 2015-16 interim, the committee established a procedure and protocol for conducting its charge of reviewing claims. The revised application packet included 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.

To notify the public of the committee's activities and to solicit injured employees to submit claims for review, the committee published the application packet on the legislative branch website and mailed a copy of the application packet to injured employees who recently utilized the claim review services of WSI's Decision Review Office. The committee adopted the following procedure, which was used during previous interims to determine eligibility for a claim review and to prepare the injured employee for the committee meeting at which the claim is reviewed:

1. An injured employee submits to the Legislative Council office a complete "Release of Information and Authorization" form. In addition, the applicant submits a "Review Issue Summary" form on which the applicant may summarize the issues the applicant wants the committee to review.
2. Upon receipt of a completed application, the Legislative Council staff forwards a copy of the application information to an assigned ombudsman at WSI, who reviews the application to make a recommendation regarding whether:
  - a. The applicant is an injured employee or the survivor of an injured employee;
  - b. The workers' compensation claim was final; and
  - c. All of the administrative and judicial appeals are exhausted or the period for appeal had expired.
3. Following this review, the ombudsman contacts the Legislative Council staff to provide a recommendation regarding eligibility for review. Upon receipt of this recommendation, the Legislative Council staff contacts the committee chairman to make a determination of eligibility.
4. Upon a determination of eligibility, the Legislative Council staff contacts the injured employee and the ombudsman to begin the case preparation.
5. Regardless of whether the injured employee accepts the assistance of the ombudsman, the ombudsman prepares a summary of the case to present at the committee meeting.
6. At the injured employee's discretion, the ombudsman assists the applicant in organizing the issues for review.
7. The ombudsman prepares a case review packet and includes the packet in a binder of information prepared for each committee member, Legislative Council staff, and the WSI representative. Although the binders are distributed at each committee meeting, the binders remained the property of WSI and are returned at the completion of each committee meeting.
8. Before each committee meeting at which a claim was to be reviewed, the ombudsman meets with Legislative Council staff to review the case summary and workers' compensation issues to be raised.
9. Upon receipt of these workers' compensation issues, Legislative Council staff notifies a WSI representative of the identity of the injured employee who will be appearing before the committee for a case review, and, as appropriate, the basic issues to be raised by the injured employee.

The committee established the following committee meeting procedure, which was followed for the claims reviewed by the committee:

1. Committee members have an opportunity before and during the committee meeting to review the binder of claim review information and to review the injured employee's WSI electronic records.
2. An ombudsman from WSI summarizes the injured employee's case.
3. The injured employee presents the workers' compensation issues brought forward for review. At the discretion of the injured employee, the issues are presented by the injured employee, a representative of the injured employee, or both.
4. One or more representatives of WSI comment on the workers' compensation issues raised.
5. Committee members have an opportunity to discuss the issues raised.

Each claim reviewed is allocated a block of time during which the committee conducts the initial claim review. Following the initial review, the committee retains the authority to continue to discuss issues raised as part of the review. The committee may request additional information on specific issues and may review this information at a future meeting. During a committee meeting at which a claim is reviewed, a WSI representative is available to electronically access the injured employee's WSI records.

## **First Claim**

### **Issues for Review**

The injured employee reported on February 5, 2017, WSI denied the injured employee's request to reopen his 1974 claim because its medical consultant concluded there was no clear and convincing medical documentation or other

evidence indicating the injured employee's right knee or left ankle problems were primarily caused by the original work injury. The injured employee provided the following issues for consideration:

- The system does not adequately maintain documents and records in a broad, clear, and detailed manner.
- The injured employee did not understand the process fully, whereas WSI is very experienced and knowledgeable about the entire process, resulting in an unfair outcome.
- Workforce Safety and Insurance has access to legal counsel but the injured employee does not have access to legal counsel. There are so few attorneys in the state willing to represent injured employees that the injured employee would not have been able to find an attorney even if he had been able to afford one. The system should be designed to take care of the injured employee and do what is in the best interest for the injured employee.

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

The WSI representative reviewed Sections 65-05-01 and 65-05-35(1)(2), which provide the claimant bears the burden of proving any entitlements to benefits and a claim for benefits is presumed closed if WSI has not paid any benefit or received a demand for payment of any benefit for 4 years. If a claim is dormant for an extended period of time without treatment, the claim becomes difficult to assess. If a claim is dormant for 4 years or more, the claim is presumed closed. Clear and convincing evidence the work injury is the primary cause of the current symptoms is required to reopen a claim presumed closed due to dormancy. There was no diagnosis for the injured employee's right knee or left ankle in 1974, and it was difficult to establish by clear and convincing evidence the injured employee's 1974 work-related injury was the primary cause of his current right knee and left ankle problems. Workforce Safety and Insurance seeks objective medical evidence supporting whether a work-related injury is a compensable injury. According to the WSI representative, in the injured employee's situation, the medical consultant found no evidence a diagnosis of degenerative arthritis resulting from the injured employee's 1974 work-related injury.

### **Committee Considerations**

Committee members considered the following issues raised by the injured employee:

- Whether significantly better means are being used to document work-related accidents and injuries compared to how those reports were documented in the 1970s.
- Multiple injured employees have raised the issue of inability to access legal representation.
- Workforce Safety and Insurance's acceptance of witness statements as corroborating evidence of a work-related injury.

## **Second Claim**

### **Issues for Review**

The injured employee reported an administrative law judge affirmed a WSI order relating to compensability. The injured employee did not appeal the decision to district court and the order became final. The injured employee provided the following issues for consideration:

- A better method or mechanism is needed for reimbursing attorneys who take claims against WSI.
- Injured employees choose not to pursue appeals of WSI decisions because of the difficulty of finding legal representation and a perception exists it is unlikely WSI decisions will be overturned on appeal.
- Workforce Safety and Insurance's doctors do not have the injured employee's interests at the forefront because the doctors work for WSI.

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

The Workforce Safety and Insurance representative reviewed Section 65-01-02, which 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." In addition, 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.

The Workforce Safety and Insurance representative reported 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. The distinction is a clear delineation between what is covered by health insurance and what is related to an industrial incident. The Workforce Safety and Insurance representative concluded had WSI had been aware of the injured employee's pre-existing conditions in a timely manner, her claim would not had been accepted because documentation established her pre-existing conditions became symptomatic but had not worsened substantially.

## **Committee Considerations**

Committee members considered the following issues raised by the injured employee:

- Multiple injured employees have raised the issue of inability to access legal representation.
- Regarding attorney reimbursement for taking workers' compensation cases, Section 65-02-08 provides that if an injured worker has a successful claim or appeal, whether at the administrative law level or in court, WSI must pay the attorney. The actual amounts reimbursed are specified within the North Dakota Administrative Code and the amounts are reviewed and adjusted every other year.

## **Third Claim**

### **Issues for Review**

The injured employee reported her claim relating to carpal tunnel syndrome was denied because the WSI medical consultant determined there is no causal relationship between the diagnosis of carpometacarpal and the individual's work duties even though her physician said her injury was related to her work. The injured employee provided the following issues for consideration:

- Medical providers are frustrated with WSI's system.
- Since every employee is going to have some degree of degeneration, WSI should not be able to deny responsibility claiming a pre-existing condition.
- Workforce Safety and Insurance should not be able to conclude a physician's opinion is not objective medical evidence when the examining specialist is a specialist in the medical field.
- Workforce Safety and Insurance did not give weight to the opinion of the doctor who stated the condition was related to employment.

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

The WSI representative reviewed Section 65-01-02, which 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." The Workforce Safety and Insurance representative reported WSI will either write to the physician that objective medical evidence is needed or issue an order denying the claim for lack of objective medical evidence.

## **Committee Considerations**

Committee members considered the following issues raised by the injured employee:

- The treating physician should not be designated statutorily as the primary physician because the treating physician may not be an expert in a particular medical area.
- Section 65-05-08.3 addresses the factors WSI must consider when resolving conflicting medical opinions.
- The issues of pre-existing conditions and degenerative conditions are issues constituents commonly raise with legislators and which are especially relevant as the workforce ages.
- The system could be improved to facilitate better communication among various medical providers.

## **Fourth Claim**

### **Issues for Review**

The injured employee reported WSI issued an order indicating no permanent impairments benefits are payable in connection with the injured employee's work injuries because the percentage of whole body impairment did not meet the statutory requirement of 14 percent. The injured employee provided the following issues for consideration:

- Vocational rehabilitation plans should be designed in collaboration with the injured employee.
- Workforce Safety and Insurance is unwilling to provide vocational education to train an older worker for a new career.
- The system should be designed to take care of the injured employee and do what is right for the injured employee.
- Workforce Safety and Insurance should be transparent and helpful to injured employees.
- Workforce Safety and Insurance should have been more responsive to the injured employee when he contacted WSI with questions and concerns.

## **Workforce Safety and Insurance Response**

The Workforce Safety and Insurance representative reviewed Section 65-05-12.2, which governs permanent impairment and provides a permanent impairment is not intended to be a periodic payment and is not intended to reimburse the employee for specific expenses related to the injury or wage loss. Section 65-05-12.2 requires WSI to calculate the amount of the award by multiplying 35 percent of the average weekly wage in this state on the date of the impairment evaluation, rounded to the next highest dollar, by the permanent impairment multiplier specified in subsection 10. Under the schedule in Section 65-05-12.2(10) for a whole body impairment between 1 and 13 percent, the permanent impairment multiplier is 0.

## **Committee Considerations**

Committee members considered the following issues raised by the injured employee:

- Minnesota's permanent partial impairment evaluation system radically differs from North Dakota's system because Minnesota uses a different set of American Medical Association guides.
- Vocational rehabilitation plans may not consider adequately an injured employee's mental and physical abilities.
- Vocational rehabilitation may not address adequately deteriorating medical conditions and practical return-to-work opportunities.

## **Fifth Claim**

### **Issues for Review**

The injured employee reported WSI denied benefits for a twisted ankle because the employee had not proven a causal connection between the employment and the injury. The injured employee provided the following issue for consideration:

- Injuries occurring while on the job and while on the employer's premises should be covered and such claims should be approved.

## **Workforce Safety and Insurance Response**

The Workforce Safety and Insurance representative reviewed Section 65-01-02, which 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." The Workforce Safety and Insurance representative stated the key words of Section 65-01-02 are "arising out of and in the course of . . .", and an unexplained fall is not a compensable event.

The Workforce Safety and Insurance representative reported in 2012 the North Dakota Supreme Court said with respect to Section 65-01-02, the legislative intent was for claimant's to prove more than merely suffering an injury on work premises and during work hours to receive compensation for the injuries.

## **Committee Considerations**

Committee members considered the following issue raised by the injured employee:

- When injuries occur during working hours and on the employer's premises but do not arise out of and in the course of hazardous employment, the injured employee can explore other avenues outside workers compensation, such as an employer's insurance company.

## **Sixth Claim**

### **Issues for Review**

The injured employee reported WSI ended benefits for the employee after a return to work and indicated later back pain is not compensable because there was no evidence that pain was related to the work injury. The injured employee provided the following issues for consideration:

- Workforce Safety and Insurance should focus on the treatment of injured employees, not benefits.
- The administrative hearing was problematic. The administrative law judge did not consider the pain experienced by the injured employee and did not take notes of the pain his work injury was causing.
- More attorneys should be available to represent injured workers. The system does not recognize an injured employee's needs for legal representation. The injured employee needs an attorney to pursue any issues the injured employee may have with WSI. Without an attorney, the injured employee is unable to receive fair treatment.
- The system does not compensate injured employees adequately for the significant loss of motion and ongoing pain resulting from injuries.

## **Workforce Safety and Insurance Response**

The Workforce Safety and Insurance representative summarized Section 65-05-01, which provides the claimant bears the burden of proving any entitlements to benefits. The entire system is based on the premise to receive benefits, the injured worker must prove entitlement to those benefits.

The Workforce Safety and Insurance representative reported six or seven attorneys in the state handle workers' compensation law cases. Those attorneys represent injured workers at hearings. The Workforce Safety and Insurance representative concluded an attorney shortage within the scope of workers' compensation law does not appear to exist in North Dakota.

## **Committee Considerations**

Committee members considered the following issues raised by the injured employee:

- Inability of an injured employee to access legal representation is a reoccurring issue.
- In a civil claim, the plaintiff has the burden of proof, much like the injured employee has the burden to qualify for workers' compensation benefits. If in the future, evidence is discovered linking the injured employee's injury or pain to the workplace, WSI should exercise its continuing jurisdiction to reopen the claim.

## **Seventh Claim**

### **Issues for Review**

The injured employee reported WSI denied a permanent partial impairment award because the impairment rating was less than 14 percent. The injured employee provided the following issues for consideration:

- The Workforce Safety and Insurance claims process should be changed to provide a little more personal insight to a claimant so a claimant is aware that if the claimant decides to accept a decision by WSI and do not appeal the decision, no further or future ways of resolving or disputing it are available.
- Claimants should be provided instructional tools and service resources to better inform a claimant of their rights and enhance the claimant's awareness of the WSI claims process.

## **Workforce Safety and Insurance Response**

The Workforce Safety and Insurance representative reported WSI pays for three things--wage-loss benefits; medical benefits, including pharmacy; and permanent partial impairment benefits. The benefit is based upon the *Guides to the Evaluation of Permanent Impairment*, American Medical Association (6<sup>th</sup> edition). The payment is derived from permanent partial impairment, which is a standalone payment, and is unrelated to wage-loss or medical benefits. Because the permanent partial impairment rating system starts with awards beginning at 14 percent, this injured employee did not qualify due to a lower than the 14 percent threshold.

## **Committee Considerations**

Committee members considered the following issues raised by the injured employee:

- Workforce Safety and Insurance's responses to injured employees may not be timely.
- There may be methods through which the system could be improved to facilitate better communication among various medical providers.

## **Eighth Claim**

### **Issues for Review**

The injured employee reported the WSI medical consultant concluded work duties did not cause degenerative changes, and the injuries were consistent with a pre-existing condition. The injured employee provided the following issue for consideration:

- Workforce Safety and Insurance should not be able to deny responsibility claiming a pre-existing condition.

## **Workforce Safety and Insurance Response**

The Workforce Safety and Insurance representative stated the law provides WSI may not cover a pre-existing condition unless the workplace injury was a substantial contribution to the condition. The injured employee bears the burden of proving the injury is linked to work. Establishing the link is accomplished by reviewing medical opinions received from medical providers.

## **Committee Considerations**

Committee members considered the following issue raised by the injured employee:

- The system could be improved to facilitate better communication between the treating medical providers and WSI.

## Ninth Claim

### Issues for Review

The injured employee reported WSI denied benefits due to a pre-existing condition. The injured employee provided the following issues for consideration:

- Workforce Safety and Insurance should not be able to deny responsibility claiming a pre-existing condition.
- The system should be designed to take care of the injured employee and do what is right for the injured employee.
- Injured employees choose to not pursue appeals of WSI decisions because of the difficulty of finding and affording legal representation, and a perception exists it is unlikely WSI decisions will be overturned on appeal.

### Workforce Safety and Insurance Response

The Workforce Safety and Insurance representative summarized Section 65-01-02 which 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." 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. Workforce Safety and Insurance 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.

The Workforce Safety and Insurance representative reported in the early 1990s North Dakota experimented with paying attorneys representing claimants irrespective of whether the claimant ultimately lost or prevailed in the appeal. Under that system, WSI's case numbers increased substantially but better results were not achieved because everything was appealed, irrespective of the outcome. That system was amended to the current method as part of the 1995 reform.

### Committee Considerations

Committee members considered the following issues raised by the injured employee:

- The issues of pre-existing conditions and degenerative conditions are issues constituents commonly raise with legislators.
- The system could be improved to facilitate better communication between the treating medical providers and WSI.
- The inability of injured employees to find or afford legal representation is an issue raised regularly by injured employees.
- Inability of an injured employee to access legal representation is a recurring issue.

## Tenth Claim

### Issues for Review

The injured employee reported an administrative law judge had concluded the injured employee was entitled to travel-related expenses associated with treatment. After the injured employee entered an agreement to settle all claims, the injured worker contended the payment of the travel-related expenses should be in addition to the settlement amount. The injured employee provided the following issues for consideration:

- Workforce Safety and Insurance limited the information presented at the administrative hearing, failing to admit evidence that would have supported her position.
- Medical providers are frustrated with WSI's system.
- Decision Review Office is biased.
- Workforce Safety and Insurance's doctors do not have the injured employee's interests at the forefront because the doctors work for WSI.

### Workforce Safety and Insurance Response

The Workforce Safety and Insurance representative reviewed Section 65-05-25, which authorizes WSI to compromise to resolve a disputed claim with an employee and, to the extent a dispute arises, WSI is authorized statutorily to settle the dispute via payment.

### Committee Considerations

Committee members considered the following issue raised by the injured employee:

- Workforce Safety and Insurance's responses to injured employees may not be timely nor presented clearly or transparently enough.

## **Workforce Safety and Insurance Status Updates**

To keep apprised of current events at WSI, the committee received status updates on topics raised as part of the claim review process.

### **Vocational Rehabilitation**

In response to issues raised during the claim review process, the committee reviewed WSI's vocational rehabilitation system.

The committee received data regarding WSI's educational training program and the policy limiting vocational rehabilitation retraining to 104 weeks.

The committee was informed an injured employee can accept or decline retraining. If an injured employee declines retraining, WSI identifies a retained earnings capacity for the injured employee, which is wages paid times the number of hours released to return to work. If an injured employee enrolls in a retraining program, and the injured employee determines within the first 20 weeks the training is not a good fit, the injured employee may withdraw from the retraining program. Upon withdrawal, WSI assigns the injured employee the retained earnings capacity and pays the injured employee temporary partial disability for up to 182 weeks. A 2009 statutory change permits WSI to extend the 104 weeks of retraining to 124 weeks. When an injured employee is considered for a retraining program, WSI attempts to ensure the injured employee is college-ready and has the academic ability to be successful in the retraining program.

The committee also received testimony medical issues prevent an employee from continued participation in retraining. The missed days or weeks do not count against the employee's 124-week retraining period. The injured employee is placed on either a temporary total disability or temporary partial disability and paid the full disability benefit. Before admittance for retraining, WSI orders functional capacities testing done by an occupational or physical therapist to determine an injured employee's physical strength. The results are sent to the treating provider to verify the findings are an accurate reflection of the injured employee's physical capabilities. If the treating provider confirms the results are an accurate reflection of the injured employee's physical capabilities, WSI considers different retraining programs within the physical limitations of the injured worker. If the employee had cognitive issues, psychological tests are done to ensure the injured worker's success in a retraining program.

### **Legislative Package**

The committee received a status report on the implementation of 2017 legislation relating to workers' compensation. The legislation addressed injury services, general contractor liability, a penalty for a violation of a cease and desist order, medical marijuana, legal counsel for indigents access to WSI records, and injured employee attorney fees.

## **Recommendations**

The committee makes no recommendations with respect to changes to the workers' compensation laws.

## **REPORTS**

### **Safety Grants Report**

Pursuant to Section 65-03-05, the committee received the biennial report from WSI regarding compiled data relating to safety grants issued under Chapter 65-03. The report provided an overview of the safety training and education program, ergonomic initiative and ergonomic grant programs, learning management system, and the Occupational Safety and Health Administration Outreach 10-hour Online Training programs. The committee received data about each program, including continuing safety appropriation amount by biennium, beginning in 2005.

### **Modified Workers' Compensation Program**

#### **Performance Review and Roughrider Industries Safety Review**

Pursuant to Section 65-06.2-09, the committee inquired whether the modified workers' compensation program performance review and the Roughrider Industries safety review include any recommendations. Because the reviews do not make any recommendations for a change in either program, WSI was not required to make a report to the committee.

### **Rehabilitation Services Pilot Program Report**

Pursuant to Section 65-05.1-06.3, the committee received reports on WSI's system of pilot programs to allow WSI to assess alternative methods of providing rehabilitation services. The report indicated WSI is establishing a rehabilitation services program referred to as the injured worker assistance program. The program is designed to provide services necessary to assist an injured employee and the employee's family in the adjustments required due to the injury. The program offers both behavioral health and financial counseling services. The recovery process is not only medical recovery, but also is a time to recover the employee's ability to return to gainful employment and address the need for financial stability. The program allows:

- The injured employee or the employee's family to receive up to six sessions with a behavioral health professional contracted exclusively for this program by WSI. The sessions must be completed within 90 days from the date of the first visit.
- The injured employee or the employee's family to receive up to four sessions with a financial professional contracted for this program by WSI. The sessions must be completed within 60 days from the date of the first visit.
- Reimbursement for mileage according to state law.
- The sessions to be confidential, and the information is not shared with WSI unless the contractor believes the participant intends to harm self or others. The contractor is required to verify attendance to ensure appropriate payment.
- Voluntary participation in the sessions.

## **QUADRENNIAL PERFORMANCE EVALUATION**

### **Background**

Section 65-02-30 requires the Director of WSI to request the State Auditor to select a firm to complete a performance evaluation every 4 years of the functions and operations of WSI during that evaluation period. The firm's report must contain recommendations for departmental improvement or an explanation of why no recommendations are being made. The evaluation report and any action taken must be presented to the committee. The committee may select up to four elements to be evaluated in the performance evaluation and is required to inform the State Auditor of the selected items to be evaluated. The State Auditor is required to include the elements selected by the committee in the performance evaluation. The State Auditor also may select up to four elements to be evaluated.

At the beginning of the interim, in accordance with Section 65-02-30, the committee selected one element and the State Auditor selected two elements to be included in the performance evaluation. The State Auditor selected identifying and evaluating WSI's safety programs and performing followup work of specified recommendations from the 2014 report. The committee selected reviewing WSI's historical management of prescribed opioids, including rates and usage to be included in the performance evaluation.

### **Elements**

The State Auditor awarded the contract for the performance evaluation to Sedgwick Claims Management Services, Inc. (Sedgwick). The Workforce Safety and Insurance performance evaluation request for proposals (RFP) provided the following three elements be addressed:

1. Safety (risk management and loss control) programs.
  - a. Identify and compare North Dakota workplace injury, illness and fatality statistics to similar jurisdictions based on comparable industry sector and category of injury and illness.
  - b. Identify and evaluate WSI's safety programs.
  - c. Determine whether legislative intent is being fully accomplished.
  - d. Determine the utilization, and to the extent practical the effectiveness of the safety programs.
  - e. Recommend improvements to workplace safety for North Dakota workers and policyholders.
2. Prior performance evaluation followup.
  - a. Perform followup work of specified recommendations from the 2014 report entitled "Performance Evaluation of North Dakota Workforce Safety and Insurance" to determine if the recommendations have been implemented and to determine if further implementation is warranted.
3. Opioids.
  - a. Review WSI's historical management of prescribed opioids, including rates and usage.
  - b. Compare average daily morphine equivalents between North Dakota and other jurisdictions. This comparison is to include a review and recommendations of statutory or administrative rule requirements limiting the maximum daily morphine equivalents and specific situations which would allow the jurisdiction to override the maximum limits.
  - c. Research any limitations on specific opioid medications, whether by duration of action or by type.

## Performance Evaluation Recommendations

For the three elements of the performance evaluation, the report prepared by Sedgwick included recommendations identified by priority level, WSI's response to the recommendations, and Sedgwick's replies to WSI's responses. The material in this report is limited to the recommendations and does not include WSI's responses or Sedgwick's replies.

### Opioid Medications

**Recommendation 1.1: Medium Priority.** Sedgwick recommends examining if prescribing patterns in North Dakota show a prevalence of brand drug use, as opposed to generics, in the opioid category and make an attempt to switch to generics where possible.

**Recommendation 1.2: Medium Priority.** Sedgwick recommends the pharmacy benefits manager revise its threshold for tracking daily morphine equivalents and WSI periodically review and document the reasons for these results. This recommendation could inform WSI why successes are achieved which in turn can lead to greater success in the management of opioids with other still active cases. Workforce Safety and Insurance currently does not track all the reasons why injured workers drop off the listing but Sedgwick believes there is value in knowing why. Some reasons for this result can include:

- Good coordination of care between patient and provider.
- The desire of an injured worker to reduce opioid use because of the potential for addiction.
- Intervention by WSI or one of its business partners with a provider which leads to a reduction in opioid use.
- Death of the injured worker.

**Recommendation 1.3: High Priority.** Sedgwick recommends WSI draft legislation to be considered in the next biennium seeking to accomplish the following:

- Limit the duration of first opioid fills.
- Limit the first fills to short acting opioids with scientifically supported limits on maximum morphine equivalents.
- Limit daily morphine equivalents for chronic opioid use injured workers to scientifically supported guidelines throughout the treatment cycle unless one of the exceptions referenced above, e.g., active cancer patients, has been met.

This recommendation would allow WSI to develop administrative rules. The rules would be predicated on current science, which seems to suggest initial fills should be limited to 50 maximum morphine equivalents while patients requiring use for longer periods of time should not exceed a daily morphine equivalent of 90 milligrams. Providing WSI with administrative authority over time would allow the agency to respond to the evolving science regarding opioid use. Sedgwick recommends rules for first fills, rules for an upper limit on metformin endopeptidase, known as MMEs, and exceptions that may exist due to the severity or complexity of an injury or illness.

**Recommendation 1.4: Medium Priority.** Upon adoption of legislation as suggested in Recommendation 1.3, Sedgwick recommends revising the manner in which WSI's pharmacy benefits manager captures morphine equivalencies on its monthly benchmark report to align with that legislation. For instance, if the legislation establishes a 90 milligram MME, the benchmark used would be for daily morphine equivalents exceeding 90 milligrams rather than the current 120 milligrams.

### Safety (risk management and loss control) Programs Slip/Fall

**Recommendation 2.1: High Priority.** Claims were frequent in the 3 years of workers' compensation claims Sedgwick obtained, claims occurring during fiscal year 2015 through fiscal year 2017, each year valued as of 12 months. All the categories of slip/fall claims combined accounted for 19 percent of the claims and 32 percent of the total cost incurred. Given the high frequency and severity of slip, trip, fall claims, Sedgwick recommends adding an incentive component to the safety action menu program to raise awareness and mitigate the frequency and severity of this injury type.

**Recommendation 2.2: Medium Priority.** Sedgwick recommends encouraging more use of the learning management system by policyholders. Safety training is an effective tool for raising the awareness of employees and providing employees with knowledge on safe work practice and compliance issues. The learning management system is well suited to benefit both small and large employers but may provide more benefit for small to midsized employers that lack resources and personnel fluent in specific safety topics. The learning management system can fill that gap to provide high-quality safety training at no cost to the employer.

**Recommendation 2.3: Low Priority.** If the transitional return-to-work program is utilized in the future, Sedgwick recommends the program be managed by the return-to-work director in injury services, and these efforts closely coordinated with loss control in employer services. The return-to-work program has a solid working relationship with the medical and return-to-work communities. However, loss control safety consultants work with the policyholders on an individual level and would be able to identify when policyholders are having a difficult time accommodating modified duty. Safety consultants would be the ideal experts to conduct "onsite assessment of work spaces" to assist the employer in accommodating or even permanently modifying jobs to accommodate workers.

**Recommendation 2.4: High Priority.** Sedgwick recommends including a brief executive summary in detailed claims analysis and dashboard reports that are provided to policyholders listing risk improvement recommendations or areas of focus based on historical loss trends.

The detailed claims analysis report is the detailed, 22-plus-page, 5-year analysis that covers a single policyholder's trends in frequency and severity of claims by part of body, cause of injury, nature of injury, day of occurrence, month of occurrence, length of employment, time of day, and age of claimant. The dashboard report is a 3-page, 5-year history of a single policyholder's various annual measures, such as standard premium, gross payroll and number of employees, number of claims, number of loss time days, total cost incurred, experience rating, dividends and discounts, completed safety training courses and grant monies received.

If the safety consultant composed an executive summary for these reports which lists one, two, or three potential risk improvement recommendations or areas of focus based on the current data trends, this could help to set safety management program and safety action menu program goals that really could have an impact on that individual policyholder's loss experience. Specific WSI resources that are associated with these specific areas of focus should be recommended or offered.

As an example, an executive summary might consist of the following:

- "The severity of lifting claims has increased over the last 2 years. Workforce Safety and Insurance offers training in safe lifting techniques (name specific courses that are pertinent to their industry). There is also a grant program that covers ergonomic evaluations and interventions as well."
- "The number of falls from ladders has doubled in the last year. Consider our online ladder safety training course."

The benefit of assisting the policyholder on focusing and setting goals around specific trends also will encourage followup on these issues from year to year, particularly if claims still are occurring in these areas.

**Recommendation 2.5: Medium Priority.** Sedgwick recommends continuing promoting the safety incentive programs to nonparticipants. This recommendation includes:

- Considering targeting policyholders not currently active in the safety management program or a safety action menu program who personally have not been made aware of the safety programs within the last 3 years. Use a combination of claim frequency and claim severity to target employers.
- For the targeted employers, the local safety consultant would review the employer's detailed claims analysis or dashboard report and add an executive summary that lists one, two, or three potential risk improvement recommendations or areas of focus based on the current data trends. When the safety consultant reaches out to these targeted employers, the safety consultant would be able to provide targeted employees with this customized report based on their specific needs.

### **Prior Performance Evaluation Followup**

Prior recommendations from the 2014 Performance Evaluation which are the subject of this performance evaluation are summarized as follows:

- Prior Recommendation 1.4 - A review of whether WSI made attempts to locate North Dakota physicians who will serve as independent medical evaluators to improve the frequency of use of North Dakota physicians.
- Prior Recommendation 1.7 - A review of whether all independent medical evaluation-related claims procedures were reviewed with the claims staff, more specifically the claims supervisors to ensure the processes and procedures are being followed.
- Prior Recommendation 2.2 - A review of whether WSI developed a process in conjunction with its medical vendors to review atypical payment trends as a starting point for provider fraud investigation.

- Prior Recommendation 2.3 - A review of whether WSI developed techniques in data mining to detect fraud, notably as regards medical providers, given the lack of provider fraud detected not only in the performance evaluation period but before that period as well.
- Prior Recommendation 6.1 - A review of whether WSI worked with its new pharmacy benefits manager to reinstate its patient utilization review report.
- Prior Recommendation 6.2 - A review of whether WSI updated its process to include a form letter to the provider receiving an FL 423-1 letter. The letter would request the provider to identify a date when they believe the patient will be able to discontinue use of opioid treatment.
- Prior Recommendation 6.3 - A review of whether WSI drafted legislation to be considered in the next biennium to seek to accomplish that chronic opioid use cases can be more effectively managed.
- Prior Recommendation 6.4 - A review of provider profiling as regards to opioid prescribing patterns and higher cost/use cases.
- Prior Recommendation 6.5 - A review of WSI's formulary, specifically controls on long-acting opioids

**Recommendation 3.1: High Priority.** Sedgwick recommends WSI continue to take steps to identify North Dakota medical professionals WSI can add to its group of independent medical evaluation (IME) medical vendor/partners. Sedgwick also recommends WSI work closely with one or more IME provider groups to have them recruit and vet in-state physicians.

**Recommendation 3.2: Medium Priority.** Sedgwick continues to recommend supervisors review IME processes the same way as other claims management practices to assure processes and policies are being followed. The claims director also should have a role in the review process. Collectively, a sample of one IME process review/week by the claims director or supervisor can be accomplished without increasing workload in a significant way. The nine supervisors and a claims director, could conduct about five reviews per year per person. Review results should be reviewed quarterly to determine if additional training in this area should be accomplished to assure process compliance.

**Recommendation 3.3: High Priority.** Sedgwick recommends WSI invest in fraud detection training for staff which will support its ability to identify atypical payment and referral trends found in their data.

**Recommendation 3.4: Medium Priority.** Sedgwick recommends sending a letter requesting information from providers once an injured worker is prescribed a third fill. The information requested would be similar to the prior recommendation but would simply occur at a later time. Most injured workers will not receive more than two fills, so the intent of the letter would be to ask providers to address longer term treatment needs at a time when opioid use is being extended into the subacute treatment phase, but before the case reaches a chronic state.

**Recommendation 3.5: High Priority.** Assuming Recommendation 1.3 is adopted and Recommendation 1.4 is implemented, Sedgwick recommends the medical services and pharmacy director and injury services staff develop claims procedures designed to track how cases with maximum morphine equivalencies exceeding 90 milligrams are being managed.

The claims procedures should require claims staff make sure there is either an opioid reduction or weaning treatment plan in place or provide sound justification as to why no reduction should be considered. Claims staff should review such cases quarterly to evaluate progress.

Workforce Safety and Insurance has in place a program with a vendor partner to address cases in which opioid reduction or weaning should be more aggressively managed. With the objective of trying to reduce maximum morphine equivalencies to 90 milligrams or less, more referrals could occur.

### **Recommendations**

The committee makes no recommendations with respect to the performance evaluation report or the actions taken resulting from the performance evaluation report.