

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

WORKERS' COMPENSATION REVIEW COMMITTEE

Wednesday, August 1, 2012
Strom Center for Entrepreneurship and Innovation
Dickinson, North Dakota

Representative Gary R. Sukut, Chairman, called the meeting to order at 9:00 a.m.

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

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 March 14, 2012, meeting be approved as distributed.

CLAIM REVIEW

Case Summary

Mr. Luke Kenner, injured employee, Dickinson, applied and was approved to have the committee review his claim. Chairman Sukut called on Mr. Kenner and Mr. Chuck Kocher, Workforce Safety and Insurance, to present the claim for committee review.

Mr. Kocher summarized Mr. Kenner's claim history. Mr. Kocher explained that Mr. Kenner filed an application for workers' compensation benefits for a workplace injury to his lumbar spine which occurred on November 29, 2007. He said Workforce Safety and Insurance (WSI) accepted and awarded benefits. Mr. Kenner received several chiropractic treatments and on December 19, 2007, was released to work with no restrictions.

Mr. Kocher said Mr. Kenner filed an application for workers' compensation benefits on May 4, 2010, for another injury to his lumbar spine. On the date of this injury, he said, Mr. Kenner was seen by an advanced practice registered nurse in Dickinson. Mr. Kenner was diagnosed with a thoracic spine strain and was released to work with restrictions. On May 6, 2010, Mr. Kenner was seen by a physical therapist, and he participated in several physical therapy treatments with limited long-term success. He said the advanced practice registered nurse on June 7, 2010, diagnosed Mr. Kenner with lumbar/low back pain with intermittent mild numbness and tingling of the right leg and foot. He continued receiving physical therapy treatment. He said on June 11, 2010, WSI accepted the claim for a thoracic and lumbar spine sprain/strain and paid the associated medical expenses.

Mr. Kocher said on June 24, 2010, Mr. Kenner was seen by Gregory Peterson, M.D., a physician in Bismarck. Dr. Peterson diagnosed Mr. Kenner with discogenic pain with possible disc protrusion and

suggested lumbar spine x-rays, lumbar spine magnetic resonance imaging (MRI) on closed scanner, and followup. Dr. Peterson did not have any specific treatment or work ability recommendations at that time.

Mr. Kocher said on June 30, 2010, Dr. Peterson saw Mr. Kenner again and reviewed the x-rays and MRI. Dr. Peterson clarified the consultation was a consultation relationship and Dr. Peterson was not Mr. Kenner's treating physician. Dr. Peterson is a consulting physician at WSI, and he wanted to make sure Mr. Kenner understood this and there was no conflict of interest. Dr. Peterson reported Mr. Kenner has degenerative disc disease at L5-S1 and low-grade spondylolisthesis and facet joint osteoarthritis with mild disc bulging.

Mr. Kocher said on June 16, 2011, Dr. Peterson spoke to Mr. Kenner on the telephone and said he would provide a report that indicates Dr. Peterson felt there was no medical contraindication to chiropractic treatment and that chiropractic treatment would be a reasonable alternative for treatment of Mr. Kenner's lumbar spine condition. Additionally, Dr. Peterson agreed to contact the Occupational Health Clinic in Dickinson to help identify a replacement primary provider for Mr. Kenner's lumbar spine problems.

Mr. Kocher reported that on June 29, 2011, Mr. Kenner was referred to Jeffrey Askew, D.C., Bismarck, for review of his chiropractic treatment. Dr. Askew diagnosed Mr. Kenner with:

1. Nonallopathic lesions/segmental dysfunction, cervical spine region, neck pain not related to WSI claim.
2. Low back pain related to WSI claim.

Dr. Askew opined that the lower back problems were no longer directly related to work and his neck problems never were related to his work injury.

Mr. Kocher said that on October 2, 2011, a WSI medical consultant, Terry Wolf, M.D., conducted a records review and opined the current medical treatment was not related to the May 4, 2010, work injury. He determined the June 30, 2010, MRI findings were not related to the May 4, 2010, injury.

Mr. Kocher said on November 15, 2011, WSI issued a notice of decision denying any further liability and no further workers' compensation benefits would be payable on this claim after June 17, 2010. Mr. Kenner made a timely request for reconsideration, and on February 7, 2012, WSI issued an order

supporting its decision. Mr. Kenner did not appeal this decision, and it became final.

In response to a question from Representative Keiser, Mr. Kenner said the summary may be accurate, but it is not complete.

In response to a question from Senator Schneider, Mr. Kocher said it is his understanding Mr. Kenner may take issue with the findings of Dr. Askew because he was a consulting medical provider for WSI. Mr. Kocher said although both Dr. Peterson and Dr. Askew are consulting medical providers for WSI, neither of them consulted with WSI on Mr. Kenner's claim.

Issues for Review

Chairman Sukut called on Mr. Kenner to further summarize his claim and address the issues he would like the committee to consider.

Mr. Kenner said he did not have any issues with his treatment for his 2007 work-related back injury. However, he said, the record does not reflect clearly an April 2010 work injury to his back which he did not immediately report to WSI or his employer. He said at that time he injured his back while at work, and he treated with his chiropractor. He said WSI ultimately denied this claim because he did not seek medical treatment with his employer's designated medical provider. He said he takes issue with this denial because his employer did not inform him ahead of time of the designated medical provider requirement.

Mr. Kenner said the third injury to his back at work occurred May 4, 2010. It was at the time he filed this claim that he filed for and was denied for the April 2010 injury.

Mr. Kenner said approximately two weeks or three weeks following the May 2010 injury, he experienced worsening of the condition, including leg numbness. He said at this time he contacted the designated medical provider to request a referral to a chiropractor and was told the numbness was likely not related to the work injury. He said he consulted with his Dickinson chiropractor, who was not the employer's designated medical provider, and this chiropractor told him the designated medical provider likely will not provide a referral for chiropractic treatment. Mr. Kenner said his chiropractor determined his pelvis was out of alignment and his neck was out of alignment and that the neck pain was directly related to his work injury to his back. His chiropractor also told him that although it is possible his back and neck problems were related to his 2007 work injury, it would be impossible to prove.

Mr. Kenner said that when he did ultimately receive a referral to Dr. Askew--his employer's chiropractor--he was told the neck pain was likely a latent condition caused by playing hockey. Mr. Kenner said the last time he played hockey was early 2005, and if WSI can claim a latent injury, then they can pretty much make any claim they want and avoid liability anytime it wants.

Mr. Kenner said he struggled to have WSI cover an MRI. At one point, his employer actually said it would pay for the MRI, just to ensure Mr. Kenner got the treatment he deserved.

Mr. Kenner said he is concerned that two of the doctors he saw work for WSI, and this seems like an improper conflict of interest.

Mr. Kenner listed the following treatments he has received for his back and neck injuries:

- Acupuncture;
- Physical therapy;
- Chiropractic; and
- Massage therapy.

Mr. Kenner said his surgical options may include conventional surgery, vertebrate fusion, tubal laser surgery, or the AccuraScope procedure. Additionally, he said, future treatment options may include steroid injection, discography, spinal nerve root block, and spinal nerve stimulator implantation. He said if an injury is covered by private insurance, it has more treatment options than allowed under WSI.

Mr. Kenner said he takes issue with the designated medical provider program. He said that unlike a typical preferred provider provision under private health insurance which designates the preferred network of providers, the WSI program actually identifies an individual. In his case, he said, he was limited to the advanced practice registered nurse in Dickinson for his primary care for his work injury.

Mr. Kenner listed the following suggested changes to the state's workers' compensation system:

- Patient positive executive with veto power to accept claims;
- Transparency on cost of services;
- Mandatory coverage of second opinion of choice;
- Mandatory coverage to see a physician - No referral needed;
- Direct access to your claims adjuster;
- Workforce Safety and Insurance subject to the authority of the courts; and
- Capitalistic system:

Permit private insurance to compete for rates - Learn from South Dakota; and

Make medical providers compete for care services - Eliminate injury monopolies.

Mr. Kenner said he also takes issue with his employer's designated medical provider's medical records. He said the medical records from June 17, 2010, misrepresent his injury. He said in the private sector, if he did not like the provider or did not trust the provider he could have changed providers, but this is not allowed under North Dakota's workers' compensation system.

In response to a question from Senator Nodland, Mr. Kenner said he told his claims analyst of his problems with the designated medical provider, but there was confusion over his ability to see a different provider. He said his employer did not tell him of the

designated medical provider, so he should have been able to see a different provider.

Mr. Kocher said although Mr. Kenner was ultimately referred to Dr. Peterson in Bismarck, and did receive an MRI in Bismarck, he understands Mr. Kenner was frustrated to have to travel to Bismarck to receive services that were available in Dickinson.

In response to a question from Senator Nodland, Mr. Kenner said he thinks that WSI followed the law in handling his case, except for being required to use his employer's designated medical provider.

In response to a question from Representative Keiser, Mr. Kenner said he underwent surgery in April 2012, and after he reaches full recovery, he will be able to do a full regimen of physical therapy. He said although he has changed jobs and is no longer a mechanic, he still experiences terrible pain. He said he is concerned the statute of limitations will run, and he will no longer be able to claim this back injury is from his work injuries.

Mr. Kenner said the federal Health Care Bill of Rights may be in conflict with the WSI designated medical provider program. He said his initial research indicates under federal law a patient has the ability to choose a provider.

Senator Schneider said as a workers' compensation attorney, he knows it is common for injured employees to not appeal decisions. Mr. Kenner said he was a bit confused about the appeal process. He said the advice he was receiving was that the appeal would be time-consuming and likely would not be successful, and he decided he could not wait any longer to get the medical treatment he needed.

Mr. Kocher said when Mr. Kenner requested reconsideration of the November 15, 2011, decision, and WSI upheld that decision on February 7, 2012, Mr. Kenner stopped pursuing the appeal process. He said he was in contact with Mr. Kenner at that time and clarified he could further appeal the decision of WSI.

In response to a question from Senator Wardner, Mr. Kocher said an injured employee can request to see the medical billing portions of the employee's WSI file.

Mr. Kenner said the whole process seems to be like a game. He said the injured employee is forced to play a game and does not know the rules. He said it is to WSI's benefit to keep the injured employee as ignorant as possible. It seems unreasonable and unfair, he said, to expect the injured employee to study and be fluent in the state's workers' compensation law.

Senator Wardner said it seems important for the employer to keep the employees informed. Mr. Kenner said an employer who has chosen to participate in the designated medical provider program should be required to inform the employees and the employees should have to sign a document affirming they were so notified.

The committee received a copy of the law allowing for the preferred medical provider program--North Dakota Century Code Sections 65-05-28.1 and 65-05-28.2, a copy of the WSI web page that addressed the designated medical provider program, and a designated medical provider program brochure ([Appendix B](#)).

Mr. Kenner distributed a copy ([Appendix C](#)) of the request for appeal document he provided his claims analyst on November 30, 2011.

Workforce Safety and Insurance

Chairman Sukut called on Mr. Timothy Wahlin, Workforce Safety and Insurance, to comment on the issues raised by Mr. Kenner. Mr. Wahlin reviewed the law defining "compensable injury." He said he understands Mr. Kenner does not agree with the providers' medical opinions, but one of the roles of a medical provider is to determine whether an injury is work-related. He said the state's workers' compensation system is designed so the employee has the burden to prove entitlement to benefits. However, he said, the WSI decisions are appealable.

Mr. Wahlin reviewed the WSI designated medical provider program. He said the program allows an employer to designate a medical provider and thereby allows the employer to establish a relationship and communication with that medical provider.

In response to a question from Senator Wardner, Mr. Wahlin said although WSI does not play a role in the employer selecting a designated medical provider, WSI does inform employers of the right to participate in the program. He said during the first 30 days following an injury, an injured employee is required to use the services of the preferred medical provider.

In response to a question from Representative Amerman, Mr. Kenner said in his situation, the employer selected an advanced practice registered nurse to act as the preferred medical provider. Mr. Wahlin said he thinks in Mr. Kenner's situation, Medcenter One was identified as the preferred medical provider. Mr. Kenner disagreed, saying he had asked to be treated at Medcenter One's Occupational Health facility in Bismarck, but WSI informed him he was allowed only to use the services of Medcenter One's Occupational Health in Dickinson.

In response to a question from Senator Schneider, Mr. Wahlin said under Section 65-05-28.2, the use of an opinion of an outside provider is limited in WSI's determinations. He said he would expect the opinion would not be considered until a claim reached a hearing stage. He said he expects this provision was included in the law to put teeth in the law--incentivize use of the preferred medical provider.

Senator Schneider said he can see why under the preferred medical provider program, WSI would not want to pay for an outside opinion, but he questions the wisdom of not allowing WSI to consider the outside opinion in making medical determinations.

Mr. Wahlin said nationwide, North Dakota is considered to be an employee choice state for

workers' compensation because an employee has the choice to opt-out of the program after 30 days.

In response to a question from Representative Amerman, asking how an employee would know they have the choice to opt-out of an employer's designated medical provider after 30 days, Mr. Wahlin said WSI does take efforts to educate employers of the terms of the programs.

In response to a question from Senator Nodland, Mr. Wahlin said as it relates to enforcement of the designated medical provider provisions, WSI typically only becomes aware of issues if WSI denies a claim.

Mr. Kenner said that although on paper the designated medical provider program may look valuable as an attempt to help develop a relationship between an employer and medical provider, thereby minimizing unsafe working conditions, in reality he does not think the program works. He said in his case, he is the only back injury he is aware of at his place of employment. Instead, he said, it seems like propaganda to justify the financial benefits to the employer.

RECEIPT OF REPORTS

Chairman Sukut called on Mr. Barry Schumacher, Workforce Safety and Insurance, to present the biennial report ([Appendix D](#)) regarding compiled data relating to safety grants issued under Chapter 65-03, a report of WSI's recommendations based on the biennial safety review of Roughrider Industries' work programs, and a biennial performance review of the program of modified workers' compensation coverage by WSI.

In response to a question from Representative Keiser, Mr. Schumacher said neither of the safety training and education program (STEP) grant programs has a matching requirement for receipt of funds.

In response to a question from Senator Nodland, Mr. Schumacher said employers in the construction sector and health care sector make up almost half of the ergonomic initiative program (ERGO) grants.

Representative Keiser said over the years some of the safety grant programs have been very successful, such as the grant Medcenter One received for "people turners" which resulted in a decrease in back injuries by certified nurse assistants (CNAs). Mr. Schumacher said as a condition of receipt of a safety grant, an employer must submit a case study in order to help other employers benefit from what is learned regarding the effectiveness of the safety steps taken.

In response to a question from Senator Nodland, Mr. Schumacher said the HELP grant program and the WIRC grant program were hazard mitigation programs.

Senator Wardner said an example of a safety measure in the oilfield has been the implementation of robotic deckhands. Mr. Schumacher said as the oil industry has automated, lives have been saved and injuries have been prevented.

Representative Keiser said he is concerned the safety programs have moved from outcome-based discounts that were based on decreasing injuries or that were based on being in the top quartile of safety. He said WSI has stopped this approach and has moved to a process-based program. He said he would like additional information on WSI's safety programs.

COMMITTEE WORK

Chairman Sukut called on Mr. Michael Gallagher, Chairman, Workforce Safety and Insurance Board of Directors, to comment ([Appendix E](#)) on the status of WSI and board activities.

In response to a question from Representative Amerman regarding whether it might be valuable to statutorily require the board membership include a representative from the oilfield, Mr. Gallagher said although the current statutory approach allows the Governor to select members from a slate of nominees and therefore could make an affirmative effort to include representation of the oil industry, the idea may warrant further consideration.

In response to a question from Senator Wardner, Mr. Gallagher said the allowed parameters of the reserve fund are established in statute.

In response to a question from Representative Keiser, Mr. Gallagher said WSI tracks injury trends. He said the nature of the work in the oilfield is that the injuries are typically more severe and the injured employees are younger than the typical injured employee.

In response to a question from Representative Sukut, Mr. Gallagher said the feedback the board typically hears from employers is in support of the premium rates. He said it is not unusual for employees to have questions regarding the claim process.

Chairman Sukut called on Mr. Bryan Klipfel, Executive Director and CEO, Workforce Safety and Insurance, for comments ([Appendix F](#)) regarding the status of WSI.

In response to a question from Representative Keiser, Mr. Klipfel said if the state's average weekly wage were to decrease, WSI would not decrease the WSI state average weekly wage figure.

In response to a question from Senator Schneider, Mr. Klipfel said if an injured employee's notepad entry contains an entry that was placed in the wrong claimant's file, WSI will move that entry to the correct claimant's file. He said under WSI's proposed new policy, there will be no reason to "delete" a notepad entry, only "move" an entry if it were made in the wrong claimant's file.

Representative Amerman raised a WSI concern brought to his attention by his local city government. He said due to some recent policy changes, two of the city employees need to complete burdensome paperwork each and every time their job duties change. He said this may be from day to day or from hour to hour. Mr. Schumacher said if an employee

has a job that covers multiple employment classes, WSI seeks to charge a premium commensurate with the risk exposure. However, Mr. Schumacher said he will visit with Representative Amerman regarding this particular issue because it does not seem necessary for employers to document this in such a cumbersome manner.

Chairman Sukut called on Dr. Harvey Hanel, Pharmacy Director, Workforce Safety and Insurance, to present information ([Appendix G](#)) regarding the status of WSI's activities relating to pain management medication use.

In response to a question from Senator Nodland, Dr. Hanel said when he recently attended the National Rx Drug Abuse Summit, the issue of street sale of opioids was discussed. He said Florida is part of what is referred to as the oxy highway, which is the path the drugs take across the country. In Florida, he said, steps have been taken to address the street sales of opioids, including use of the state's prescription drug monitoring program.

In response to a question from Senator Nodland, Dr. Hanel said in North Dakota there have been very limited conversations with the North Dakota Medical Association and State Board of Medical Examiners; however, he said, the State Board of Medical Examiners is working on creating provider guidelines that address opioids.

In response to a question from Representative Sukut, Mr. Klipfel said WSI would likely support legislation to address opioid issues, but WSI does not plan to sponsor this legislation in 2013.

Representative Keiser said the interim Health Care Reform Review Committee has also been tracking this issue during the interim. He said the State Board of Pharmacy, North Dakota Medical Association, and State Board of Medical Examiners have asked that the Legislative Assembly not mandate use of the prescription drug monitoring program. However, he said, it appears that only 30 percent of the state's doctors are voluntarily using the program.

Representative Keiser said the State Board of Medical Examiners is considering administrative rules addressing the prescription of opioids. He said the board is aware the Legislative Assembly is watching. Additionally, he said, the medical community has reported that it needs the services provided by the pain specialists and does not want the Legislative Assembly or anyone else to shut them down.

Chairman Sukut called on Mr. Wahlin to present data ([Appendix H](#)) relating to permanent partial impairment (PPI) payouts at different levels of impairment.

In response to a question from Senator Schneider, Mr. Wahlin said with the transition from the Fifth Edition to the Sixth Edition of the *American Medical Association's Guides to Evaluation of Permanent Partial Impairment* (guides), WSI anticipates there will be a 2 to 3 percent shift in whole body impairment. He said the Fifth Edition of the guides provided for a

2 to 3 percent higher whole body impairment rating than the Sixth Edition of the guides.

In response to a question from Representative Keiser, Mr. Wahlin said because North Dakota's PPI benefit is unique to North Dakota, it is nearly impossible to compare North Dakota's PPI coverage to the PPI coverage of other states. For example, he said, North Dakota is unique in providing PPI benefits through a one-time payment, whereas most other states make a reoccurring payment for a specified period of time.

Chairman Sukut called on Mr. Schumacher to make a presentation ([Appendix I](#)) of WSI's coverage of volunteers and emergency volunteers.

COMMITTEE DISCUSSION

Representative Keiser said he would support a bill draft to study whether the designated medical provider program is doing what it was intended to do. He said there would be value to looking at whether a medical system, such as Medcenter One, provides the injured employees with the appropriate services. He said he also takes issue with an advanced practice registered nurse being designated as the primary medical provider.

Senator Nodland said it seems like the employer and the employee should be better educated under the designated medical provider program. He said at first blush, it seems like the law may put too heavy of a burden on the employee. He said if a study is performed, the employee's burden should be considered.

Senator Schneider said Senator Nodland and Representative Keiser make excellent points. He said it would be an easy statutory change to require employers to inform employees if there is a designated medical provider program.

Senator Schneider said he supports a bill draft that would require an employer to take affirmative steps to notify employees if the employer is participating in the preferred medical provider program.

Representative Keiser said in addition to a bill draft requiring an employer to notify employees, he thinks there would be value to pursuing a study of the preferred medical provider program to consider the quality of the services, cost-benefit analysis, and provider qualifications.

It was moved by Representative Keiser, seconded by Senator Schneider, and carried on a voice vote that Committee Counsel be requested to prepare two bill drafts—one providing for employer notification to employees if participating in the preferred medical provider program and one providing for a Legislative Management study of the preferred medical provider program.

Representative Keiser said he would support a bill draft that requires transparency so that if a medical provider has a relationship with WSI, that relationship is required to be disclosed to a patient who is an injured employee.

It was moved by Representative Keiser, seconded by Senator Schneider, and carried on a voice vote that Committee Counsel be requested to prepare a bill draft providing for a medical provider to disclose to a patient who is an injured employee any relationship that provider has with WSI.

The committee members discussed the issues raised by the injured employee as part of the first claim review. Representative Keiser said he struggles with the scenario of when an employee is injured as a college student, is evaluated based on the job the employee was performing at the time of the injury, and there is no consideration of the student's chosen field of study or potential. He said it bothers him that the law does not address this situation.

Senator Schneider said he has similar concerns as those raised by Representative Keiser. Additionally, he said, he is troubled that had the injured employee experienced an additional one-eighth inch amputation to her finger, she would have qualified for PPI. He said it seems like an arbitrary distinction.

Representative Sukut said the first claim review raised the concern of whether the state's workers' compensation system would adequately address a law student who is injured as an employee at a fast food business.

Senator Schneider questioned whether other states might address the issue of PPI and prospective wage loss.

Representative Keiser said the issue of prospective wage loss is very difficult to underwrite,

and he would not support such a change in the state's law at this point.

Senator Schneider said he was involved in a case in which a dispute arose over the amount of whole body impairment, i.e., the injured employee claimed 25 percent whole body impairment and WSI claimed 15 percent whole body impairment. He said the "super doc" who was assigned to review the claim determined zero percent whole body impairment and that determination was presumptive. He thinks a medical provider who is called upon to make a determination in such a situation should not be able to find more than the injured employee's claimed whole body impairment and no lower than WSI's claimed whole body impairment. He said he will work with Committee Counsel to prepare a bill draft for the next meeting.

Chairman Sukut discussed the possibility of the next meeting being conducted so committee members have the option of participating telephonically.

No further business appearing, Chairman Sukut adjourned the meeting at 2:50 p.m.

Jennifer S. N. Clark
Committee Counsel

ATTACH:9