

## NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

**WORKERS' COMPENSATION REVIEW COMMITTEE**

Wednesday, June 22, 2016

Room 110, North Dakota State College of Science, 1305 19th Avenue North  
Fargo, North Dakota

Senator Nicole Poolman, Chairman, called the meeting to order at 9:30 a.m.

**Members present:** Senators Nicole Poolman, Ralph Kilzer, George Sinner; Representatives Bill Amerman, George Keiser, Dan Ruby

**Others present:** Senator Tyler Axness, Fargo, member of the Legislative Management  
See [Appendix A](#) for additional persons present.

**It was moved by Representative Keiser, seconded by Senator Sinner, and carried on a voice vote that the minutes of the September 16, 2015, meeting be approved as distributed.**

Chairman Poolman called on Mr. Joe Schreiner, Southeast Manager, TrainND, who welcomed the committee to the North Dakota State College of Science - Fargo campus. He thanked the committee for using the facility for its meeting and summarized the services offered by TrainND Southeast to help business and industry with workforce needs. He provided committee members with a TrainND Southeast Training Catalog and a North Dakota State College of Science brochure, which are on file at the Legislative Council.

**CLAIM REVIEW**

The committee scheduled two workers' compensation claims brought to the committee by injured employees for the purpose of determining whether changes should be made to the laws relating to workers' compensation as provided for under North Dakota Century Code Section 54-35-22. For each of the claim reviews, the committee received a summary by Mr. Chuck Kocher, Workforce Safety and Insurance, of the injured employee's claim; a presentation by the injured employee of the claim and issues; a response by Mr. Timothy Wahlin, Workforce Safety and Insurance; and comments by interested persons regarding the issues raised by the injured employee.

**Ms. Tammy S. Kivley****Claim Summary**

Chairman Poolman called on Mr. Kocher to provide a summary of Ms. Tammy S. Kivley's workers' compensation claim. He stated:

- Ms. Kivley injured her knee on September 9, 2009, in the course of working as an environmental service worker at a hospital. She was unable to return to work at that time.
- On September 22, 2009, Workforce Safety and Insurance (WSI) accepted the claim and awarded medical and wage loss benefits.
- On December 1, 2009, Ms. Kivley returned to work.
- On November 16, 2010, Ms. Kivley reapplied for wage loss benefits due to ongoing problems with her injured knee.
- On December 2, 2010, WSI accepted the reapplication and awarded wage loss benefits.
- Upon reaching maximum medical improvement, WSI developed a vocational rehabilitation plan. On February 24, 2015, WSI sent Ms. Kivley a notice of intention to discontinue/reduce benefits on April 23, 2015, as her vocational rehabilitation plan had been approved. The vocational rehabilitation plan indicated she has transferable skills to return to work as a receptionist, information clerk, customer service representative, bill and account collector, parking lot attendant, and greeter.
- The WSI order indicated Ms. Kivley's transferable skills should allow her to compete in gainful employment at a wage greater than her preinjury weekly wage, and therefore she was not entitled to partial disability benefits.

- On April 20, 2015, Ms. Kivley requested the assistance of the WSI Decision Review Office. On July 28, 2015, the Decision Review Office issued its certificate of completion without any recommended change.
- Ms. Kivley did not request an administrative hearing and WSI's order became final.

In response to a question from Representative Ruby regarding the 4-year delay between the injury and vocational rehabilitation, Mr. Kocher said typically, WSI tries to move as quickly as possible, but in this case, Ms. Kivley's medical condition was such that she had not reached maximum medical improvement for a longer period of time.

In response to a question from Representative Keiser, Mr. Kocher said Ms. Kivley did not receive any formal rehabilitative training. He referenced the Rehabilitation Hierarchy Options ([Appendix B](#)) and explained the vocational rehabilitation assessment indicated option F was appropriate, as Ms. Kivley could access employment in the statewide labor market without additional training.

In response to a question from Senator Sinner, Mr. Kocher said he does not think WSI used an independent medical examination in this claim. He said the vocational rehabilitation plan takes into account an injured employee's previous work experience.

Senator Sinner said he is concerned WSI's vocational rehabilitation plans may not adequately consider an injured employee's mental and physical abilities.

### **Injured Employee's Issues**

Chairman Poolman called on Ms. Kivley to review her claim and discuss the issues related to her claim. She explained how she had attempted to return to work. She said when she first returned to work in 2009, although she had her physician's authorization to return to "light work," it is likely her work activities were too strenuous on her injured knee. She said in November 2010 her physician told her she needed to stay off her leg and she was not able to return to work.

Ms. Kivley said her medical treatment required knee surgery, but she experienced problems due to an allergic reaction to the nickel in the metal implants used. She said although additional knee surgeries may be appropriate, she is leery of undergoing another surgery due to the problems she had with the first surgery.

In response to a question from Senator Sinner, Ms. Kivley said at the time of her injury, she was earning approximately \$10.62 per hour as well as benefits such as health insurance. She said since her injury she had applied for several jobs, but when she attends the interviews she finds her physical limitations preclude her from performing the necessary job requirements.

Ms. Kivley said she is not working or receiving WSI wage loss benefits at this time. However, she said, she is receiving Social Security disability benefits and Medicaid benefits.

In response to a question from Representative Keiser regarding what changes in the law she would like, Ms. Kivley said she thinks her surgery was rushed and she would have liked more time to ensure preparatory tests were thorough. Additionally, she said, the vocational rehabilitation assessment should have been more recent and should have reflected her abilities at the time the claim for wage loss was closed.

Ms. Kivley said if the vocational rehabilitation assessment had been more recent, it would have reflected her decreasing ability to lift. She said when the assessment was done in 2014, she could lift 50 pounds, whereas today she is unable to lift that much. The system, she said, needs to recognize the continuing evolution of injuries.

In response to a question from Representative Amerman, Ms. Kivley said she does not feel she had input in the vocational rehabilitation plan design, but instead the completed plan was presented to her. She said at the time of presenting the plan, WSI should have made sure it was still accurate and that her medical condition had not deteriorated further. She said she felt the process was rushed.

In response to a question from Chairman Poolman, Ms. Kivley said there should be more collaboration between the injured employee and WSI in preparing vocational rehabilitation reports.

In response to a question from Senator Sinner, Ms. Kivley said during the vocational rehabilitation process she asked questions of her physician and WSI claims analyst, both in person and via telephone, but she feels WSI did not respond to her questions.

In response to a question from Representative Ruby, Ms. Kivley said for the first 4 years following her injury, vocational rehabilitation was not addressed because she was receiving ongoing medical treatments.

In response to a question from Senator Kilzer, Ms. Kivley said she underwent formal allergy testing, and her positive tests included sulfur and nickel allergies. She said with the nickel in her knee implants, she experienced ongoing swelling and occasional fluid buildup. She said her knee has never given out on her, but she has had to catch herself on occasion to prevent falling due to weakness in the knee. She said since her injury, she is no longer able to run or jump.

### **WSI Response**

Chairman Poolman called on Mr. Wahlin to respond to the issues raised by Ms. Kivley. He said, to date, WSI has paid approximately \$80,000 on Ms. Kivley's claim.

Mr. Wahlin reviewed Section 65-05.1-01, the workers' compensation vocational rehabilitation law. He said the most successful vocational rehabilitation is when the injured employee is able to return to preinjury employment. He said although Ms. Kivley was not able to return to her previous employment, the vocational rehabilitation assessment indicated she could perform jobs that paid as much or more than her preinjury employment.

Mr. Wahlin said the vocational rehabilitation assessment includes a functional capacity test performed by a physical therapist. He said before a vocational rehabilitation plan is finalized, WSI checks with medical providers to make sure the proposed jobs are appropriate for the injured employee. In the case of Ms. Kivley, he said, in late 2014 her physician agreed the proposed jobs were appropriate for Ms. Kivley's physical abilities.

In response to a question from Chairman Poolman, Mr. Wahlin said the vocational rehabilitation plan process includes an assessment interview with the injured employee.

In response to a question from Senator Sinner, Mr. Wahlin said when an injured employee contacts WSI, the goal is to reply within 24 hours. He said each claim has an electronic notepad field in which contacts are recorded. He said notepad entries are audited by WSI through supervisors and internal audits. Additionally, he said, employee performance evaluations address timeliness of performance and failure to perform may result in termination.

In response to a question from Representative Amerman, Mr. Wahlin said the statutory vocational rehabilitation hierarchy is followed and in Ms. Kivley's case, option F was the first viable option. He said the vocational rehabilitation report reflects this analysis. In practice, he said, option E, employability in the local labor market, is seldom used because of the difficulties associated in monitoring local labor markets.

### **Comments**

Chairman Poolman called on Mr. Troy Loberg, injured employee, to comment regarding the issues raised by Ms. Kivley. He said he was injured at work in 2010 and faced issues similar to those raised by Ms. Kivley, including being released to his preinjury employer with work limitations, going through WSI's vocational rehabilitation, and experiencing problems with WSI returning his calls.

In response to a question from Senator Sinner, Mr. Loberg said he feels WSI is harassing him by assigning a private investigator to monitor him.

Chairman Poolman called on Mr. Todd Bachmeier, injured employee, to comment regarding the issues raised by Ms. Kivley. He said he has experienced some issues similar to those raised by Ms. Kivley, including experiencing problems with WSI returning his calls. He distributed a letter from WSI that he claimed was false documentation and reflects errors in the material in his WSI claim file. A copy of the letter is on file at the Legislative Council.

### **Committee Discussion**

Representative Keiser said he is concerned Mr. Loberg and Mr. Bachmeier did not go through the Workers' Compensation Review Committee application procedure, which includes signing an authorization for WSI to discuss their claims. He said without this authorization, WSI is not able to reply to the issues raised by these injured employees.

Representative Keiser said Ms. Kivley's claim review raises several issues, including whether the system adequately addresses deteriorating medical conditions and whether the system adequately addresses return-to-work opportunities. He said the vocational rehabilitation process must be timely, and if the injured employee's medical record is still open, the process must consider this. As it relates to return-to-work opportunities, he said, there may be an opportunity to improve vocational rehabilitation training incentive programs that incentivize employers to hire injured employees who are returning to the workforce following an injury.

Senator Sinner said he is concerned WSI's responses to injured employees is not timely. He said an electronic management system should be implemented to record all contacts.

Mr. Wahlin said when communications come into WSI, they are physically recorded. Although there is call recording capability, he said, not all call recordings are saved and become part of the claim file.

### **Mr. Lee A. Falk**

#### **Claim Summary**

Chairman Poolman called on Mr. Kocher to provide a summary of Mr. Falk's workers' compensation claim. He stated:

- Mr. Falk injured his shoulder on December 20, 2013, in the course of working as a material handler. He received treatment for the injury and was able to return to work.
- WSI accepted liability and paid the associated medical expenses and wage loss benefits.
- On July 16, 2014, Mr. Falk underwent shoulder surgery to address his workplace injury. Workforce Safety and Insurance paid medical expenses and wage loss benefits.
- On December 29, 2014, Mr. Falk underwent a functional capacity evaluation as part of the vocational rehabilitation process. The functional capacity test provided Mr. Falk should not do a lot of overhead work, not lift over 50 pounds, not push or pull over 100 pounds, and not reach above shoulder level.
- On May 28, 2015, the vocational consultant's report was completed, providing Mr. Falk was qualified to pursue employment in the following fields: operating engineer and other construction equipment operator (heavy equipment operator), heavy and tractor-trailer truck driver, light truck or delivery service driver and bus driver, and transit and intercity driver.
- The WSI order indicated Mr. Falk's transferable skills should allow him to compete in gainful employment at 90 percent of his preinjury weekly wage, and therefore he was not entitled to partial disability benefits.
- On August 17, 2015, WSI issued an order denying further disability and rehabilitation benefits.
- On August 31, 2015, Mr. Falk appealed WSI's order and requested the services of the WSI Decision Review Office.
- On September 11, 2015, the WSI Decision Review Office issued a certificate of completion, indicating no recommended change to the order.

#### **Injured Employee's Issues**

Chairman Poolman called on Mr. Falk to review his claim and discuss the issues related to his claim. Mr. Falk explained how his injury occurred and his experience with vocational rehabilitation. He said although the physical therapy treatment initially helped, it was not enough of an improvement for him to return to his preinjury job. He said his employer terminated his employment the same day he underwent an MRI.

Mr. Falk discussed the catch-22 he faced when his treatment included narcotic pain medication and his employer had a zero tolerance policy. He said this situation prevented him from working.

Mr. Falk said he is disappointed in the vocational rehabilitation report indicating he can return to his previous types of employment, as in reality, an employer will not hire him with his limitations. Instead, he said, WSI should have provided training to allow him to pursue a less physical line of work.

Mr. Falk said he is concerned that his job site was not as safe as it could have been and this contributed to his workplace injury.

In response to a question from Representative Ruby, Mr. Falk said the vocational rehabilitation report did not authorize him to return to his identical preinjury employment, but to very similar jobs. However, he said, even these lighter jobs require physical activity that precludes him from being hired. He said a safety director will not accept "just use your other arm" as a reasonable limitation.

In response to a question from Senator Sinner, Mr. Falk said WSI apparently accepted his activities as a good faith job search. He said he put his resume online at Job Service North Dakota and with employment agencies. Additionally, he said, he took a computer class in 2015 and WSI accepted this activity as a job search. He said he is receiving Social Security disability benefits, and although this is not a long-term solution for him, it helps him pay his bills for the short term. During the Social Security disability application process, he said, he lived off credit, and this was not acceptable in the long term.

Senator Kilzer reviewed the details of Mr. Falk's injury and surgery.

In response to a question from Chairman Poolman regarding what he might like changed in the law, Mr. Falk said there seems to be a disconnect with employers between the activities of safety managers and management, resulting in unsafe workplaces. Additionally, he said, due to the low incidence of fraud by employees, it seems offensive for employers to vilify employees.

Representative Ruby said employers should want safe workplaces, both to keep employees safe as well as to keep workers' compensation premiums low.

In response to a question from Representative Ruby, Mr. Falk said he is concerned there may have been age discrimination on the part of WSI and its unwillingness to provide vocational education to train him for a new career. He said at age 60, perhaps WSI does not think it is practical for him to enter a new field.

In response to a question from Senator Sinner, Mr. Falk said WSI did not have funding available to assist him to pay for his computer training.

### **WSI Response**

Chairman Poolman called on Mr. Wahlin to respond to the issues raised by Mr. Falk. He said to date, WSI has paid approximately \$65,000 on Mr. Falk's claim.

In response to a question from Senator Sinner, Mr. Wahlin said the good faith job search requirement of five daily contacts is not statutory, but sets a standard that, if met by the injured worker, the injured worker will not be at risk of compliance issues.

In response to a question from Senator Axness, Mr. Wahlin said WSI previously contracted with a third-party to provide vocational rehabilitation services, but this has since been brought in-house.

In response to a question from Representative Amerman, Mr. Wahlin said WSI established the five contact job search standard in response to requests from employees for a minimum standard. He said a "contact" includes a newspaper job search and an internet job search. He said once an injured worker reaches maximum medical improvement, the injured worker's job is to find a job.

In response to a question from Representative Keiser, Mr. Falk said in essence his employer fired him because he was on narcotic pain medication and because he needed to go to so many medical appointments.

Mr. Wahlin said if an injured worker is unable to return to work, this is a compensable injury. He said in Mr. Falk's case, the catch-22 was on the employer's side, as the employer did not want the employee off work, but had a zero tolerance policy.

### **Comments**

Senator Sinner distributed an email ([Appendix C](#)) from Ms. Megan Estes, outlining her concerns with WSI. He said Ms. Estes has concerns related to job search requirements. Mr. Wahlin said without a signed authorization to release information, he is not at liberty to discuss a case.

### **Committee Discussion**

Representative Keiser said in this case both WSI and the employer played roles in Mr. Falk's situation.

In response to a question from Representative Ruby, Mr. Wahlin said the standard for Social Security disability is different from WSI's standards. He said if an injured worker received Social Security disability benefits, it does impact the amount of WSI benefits.

Representative Keiser requested WSI provide information at a future meeting regarding its practices related to narcotic treatment. He said if a physician prescribes pain medication and an employer has a zero tolerance policy, the employee should not be penalized.

Senator Sinner said with the rise in opioid use he would like to know whether some of these addicts are injured workers.

## SAFETY GRANT REPORT

Chairman Poolman called on Mr. Bryan Klipfel, Executive Director and CEO, Workforce Safety and Insurance, to provide the report ([Appendix D](#)) on whether there is an industry interest in using safety programs under Section 65-03-04 to provide grants to an industry association to provide alcohol server training to address workplace safety and public safety for employees of bars and restaurants that serve alcohol.

Mr. Klipfel also provided a brief update of WSI's activities. He said this fiscal year, there have been approximately 21,200 claims filed, which is a decrease of approximately 5,000 from last year. He said there are approximately 4,500 workers' compensation claims active with WSI.

In response to a question from Senator Sinner, Mr. Klipfel said WSI does not have a private investigation line item in its budget. However, he said, he will provide the committee with information regarding the amount spent for private investigation last biennium and so far this biennium. He said he will provide information regarding the number of claims WSI assigns private investigation services.

In response to a question from Representative Keiser, Mr. Klipfel said with the decline in oil prices, there has been a decrease in the number of employers in the state. However, he said, the premium WSI collects reflects this decrease. He said the fund is doing well, the experience rating is appropriate to address risk, WSI is taking steps to focus on how best to collect premiums from employers leaving the state, and there will be a premium refund this year. He said he will provide the committee with additional data regarding WSI premiums.

In response to a question from Representative Keiser, Mr. Klipfel said WSI expects its 2017 legislative package will include an attempt to address the volatility that can accompany the increase in employers moving into and out of the state by authorizing WSI to front-end load some premium payments.

No further business appearing, Chairman Poolman adjourned the meeting at 12:40 p.m.

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Jennifer S. N. Clark  
Counsel

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