

August 2009

WORKERS' COMPENSATION INJURIES STUDY - BACKGROUND MEMORANDUM

INTRODUCTION

House Concurrent Resolution No. 3008 (2009) ([Appendix A](#)) provides for the Legislative Management study of workers' compensation laws in this state and other states with respect to prior injuries, preexisting conditions, and degenerative conditions.

In addition to this study, the committee is charged with performing the following statutory duties and with receiving the following reports:

- Review workers' compensation claims that are brought to the committee by injured employees for the purpose of determining whether changes should be made to the laws relating to workers' compensation (North Dakota Century Code (NDCC) Section 54-35-22);
- Receive a report from the director of Workforce Safety and Insurance (WSI), the chairman of the WSI Board of Directors, and a representative of the firm conducting the performance evaluation regarding the biennial performance evaluation of WSI and select elements for inclusion in the performance evaluation (NDCC Section 65-02-30);
- Receive a biennial report from WSI regarding compiled data relating to safety grants issued under NDCC Chapter 65-03 (Section 65-03-05);
- Receive an annual report from WSI which includes reports on pilot programs to assess alternative methods of providing rehabilitation services (NDCC Section 65-05.1-06.3); and
- Receive a report from WSI before August 1, 2010, on the results of its study of postretirement benefits available to an individual whose disability benefits end at the time of Social Security retirement eligibility (2009 S.L., ch. 613, § 1).

LEGISLATIVE BACKGROUND

Legislative History

House Concurrent Resolution No. 3008 was introduced by Representatives George J. Keiser and Francis J. Wald and Senator Jerry Klein. The legislative history indicates WSI supported the resolution and that the resolution was introduced in response to a recommendation of the 2008 WSI performance evaluation report. Recommendation 6.6 of the report, which was rated as a high priority, provides:

In our work, BDMP observed that the North Dakota statute is more conservative than most other jurisdictions as it relates to prior injuries, pre-existing or degenerative conditions, triggers and aggravations and impairment rating percentages. BDMP recommends that a study

group formed of all the stakeholder groups be brought together to review how other jurisdictions' statutes handle these important Workers' Compensation issues. Suggested sources of information for this study group include:

- Edward M. Welch, Workers' Compensation Center Michigan State University, *Oregon Major Contributing Cause Study*, <http://www.cbs.state.or.us/wcd/administration/finalmcc.pdf>, (Oct, 2000)
- Clayton, Ann, *Inventory of Workers' Compensation Laws - Beta Version, March 2007*, Workers' Compensation Research Institute, Cambridge, MA : Only available to members of WCRI and/or IAIABC.

Performance Evaluation

Under NDCC Section 65-02-30, in the spring of 2008 the State Auditor contracted with Berry, Dunn, McNeil & Parker (BDMP) to conduct a performance evaluation of nine specified components of WSI. The overall objective of the evaluation was to determine whether WSI was providing quality service in an efficient and cost-effective manner and to provide recommendations for improvement.

The performance evaluation considered the following nine elements as specified by the State Auditor:

1. Safety grants;
2. WSI Board of Directors;
3. Performance measures maintained by WSI;
4. Effectiveness of fraud expenditures;
5. Prior performance evaluation recommendations;
6. Claims;
7. Change in financial condition of WSI;
8. Policyholder services; and
9. Legal and the administrative hearing process.

The BDMP evaluation team included specialists in workers' compensation, actuarial practices, accounting, board governance, and business operations. Each of the nine elements was evaluated by one or more members of the BDMP team who led the factfinding portion for their assigned elements. At the conclusion of these evaluations, the entire BDMP team collaborated to analyze the element data and to develop recommendations. Berry, Dunn, McNeil & Parker identified 46 recommendations for improvement as a result of the evaluation.

The BDMP *2008 Performance Evaluation Report*, dated October 8, 2008, was presented to the Legislative Audit and Fiscal Review Committee on

October 20, 2008. The complete report is available on the State Auditor's website at www.nd.gov/auditor/reports/WSI_PE_08.pdf. The Executive Summary portion of the report addressing the element of "claims" provided:

BDMP independently evaluated a random and objective sample of 250 claims, including denied claims, claims referred to Independent Medical Exams (IME's), and claims for people with degenerative conditions. In our work we found no evidence of inappropriate claims handling processes or of decisions inconsistent with State law or WSI claim policies. The claims handling displayed in the files we evaluated was appropriate.

We identified impacts on claims processing related to a change in philosophy that occurred during 2006-2007 in which adjusters were encouraged to investigate all new claims for prior injuries or pre-existing conditions more thoroughly. Multiple factors, including the change in philosophy and practices to incentivize prompt claim submission did result in increased rates of denied claims. However, none of the claims evaluated were denied inappropriately based on state law, administrative code, and WSI claim policies.

Our recommendations with respect to claims include:

- Revising the WSI Claim Procedure Manual to standardize "best practices" and train claims adjusters on new practices
- Implementing the Injury Management pilot program across all 7 claim units
- Enhancing WSI's knowledge of industry best practices through attendance at appropriate industry conferences
- Reviewing the North Dakota Statute in relation to other jurisdictions

In our work, BDMP observed that the North Dakota Statute is more conservative than most other jurisdictions with respect to treatment for specific conditions. Bringing together North Dakota stakeholder groups to study and consider how other states handle such conditions and choosing what is appropriate for the State of North Dakota, will be beneficial to the employers, injured workers, and WSI.

The complete portion of the performance evaluation report addressing Element 6--claims, including BDMP's conclusions and recommendations and WSI's responses to these recommendations, is attached as [Appendix B](#).

PREVIOUS INTERIM ACTIVITIES

During the previous three interims, there have been numerous workers' compensation-related

studies and several workers' compensation-related reports.

2007-08 Interim

- Study workers' compensation claims that are brought to the committee by injured employees for the purpose of determining whether changes should be made to the laws relating to workers' compensation (NDCC Section 54-35-22; Workers' Compensation Review Committee);
- Receive an annual report from the director of WSI and the chairman of the WSI Board of Directors (NDCC Section 65-02-03.3; Legislative Audit and Fiscal Review Committee);
- Receive a report from the director of WSI, the chairman of the WSI Board of Directors, and the auditor regarding the biennial performance audit of the organization (NDCC Section 65-02-30; Legislative Audit and Fiscal Review Committee);
- Receive periodic reports from WSI and the Risk Management Division of the Office of Management and Budget on the success of a single workers' compensation account for state entities covered by NDCC Chapter 32-12.2 (NDCC Section 65-04-03.1; Budget Section);
- Review a report from WSI on recommendations based on a safety audit of Roughrider Industries work programs and a performance audit of the modified workers' compensation coverage program (NDCC Section 65-06.2-09; Industry, Business, and Labor Committee);
- Receive quarterly reports from WSI on the agency's status of implementing the performance audit recommendations of the State Auditor (2003 S.L., ch. 47, § 5; Budget Section); and
- Review WSI premiums, benefits, and accountability and transparency methods and the results of consultant reviews of claims review, human resources, and management areas (Legislative Council directive; Industry, Business, and Labor Committee).

2005-06 Interim

- Study the costs and benefits of adopting a comprehensive healthy North Dakota and workplace wellness program in collaboration with the State Department of Health, health insurers and other third-party payers, WSI, interested nonprofit health-related agencies, and others who have an interest in establishing accident and disease prevention programs (Section 20 of 2005 Senate Bill No. 2004; Budget Committee on Human Services);
- Receive an annual report from the director of WSI and the chairman of the WSI Board of Directors (NDCC Section 65-02-03.3;

Legislative Audit and Fiscal Review Committee);

- Receive a biennial report from WSI on all revenues deposited into and expenditures from the building maintenance account of the WSI fund (NDCC Section 65-02-05.1; Budget Section);
- Receive a report from the director of WSI, the chairman of the WSI Board of Directors, and the auditor regarding the biennial performance audit of WSI (NDCC Section 65-02-30; Legislative Audit and Fiscal Review Committee);
- Receive periodic reports from WSI and the Risk Management Division of the Office of Management and Budget on the success of a single workers' compensation account for state entities covered by NDCC Chapter 32-12.2 (NDCC Section 65-04-03.1; Budget Section);
- Review a report from WSI on recommendations based on a safety audit of Roughrider Industries work programs and a performance audit of the modified workers' compensation coverage program (NDCC Section 65-06.2-09; Industry, Business, and Labor Committee); and
- Study workers' compensation claims that are brought to the committee by injured employees for the purpose of determining whether changes should be made to the laws relating to workers' compensation (NDCC Section 54-35-22; Workers' Compensation Review Committee).

2003-04 Interim

- Review the 2004 rate increase proposed by WSI and projections for future rate adjustments (Legislative Council directive; Commerce Committee); and
- Receive an annual report from the director of the Workers Compensation Bureau and the chairman of the Workers Compensation Board of Directors (NDCC Section 65-02-03.3; Legislative Audit and Fiscal Review Committee).

RECENT LEGISLATION

During the previous three legislative sessions, the following legislation has been enacted addressing WSI benefits.

2009

House Bill No. 1061 redefined the term "artificial member" as it applies to workers' compensation law providing the term includes a device that is a substitute for a natural part, organ, limb, or other part of the body, including a prescriptive device that is an aid for a natural part, organ, limb, or other part of the body, if the damage to the prescriptive device is accompanied by an injury to the body.

House Bill No. 1062 provided in the case of an injured employee receiving a vocational rehabilitation

award, WSI may grant up to an additional 20 weeks of benefits to be used as a rehabilitation extension allowance; in the case of an injured employee who is required to return to the local or statewide job pool or who is unable to return to employment with adequate earnings, WSI may grant an additional award; and WSI shall implement a system of pilot programs to allow WSI to address alternative methods of providing rehabilitation services, including an annual report to the Workers' Compensation Review Committee and WSI data collection regarding the status of claims that have received rehabilitation services.

House Bill No. 1063 expanded workers' compensation coverage by providing that during the 60 days immediately following an injury, if WSI accrues a medical expense or makes a payment for a medical expense for which WSI later determines was for a noncompensable injury, the injured employee is not liable for the medical expense unless WSI had made an earlier determination of noncompensability or unless the medical provider or injured employee should have reasonably known the medical expense was for a noncompensable injury.

House Bill No. 1064, for purposes of workers' compensation temporary total or permanent total disability, shortened the attempt-to-work period from 12 months to 3 months, and the bill also modified the supplementary benefits provision, also known as the cost-of-living adjustment, by providing recipients of temporary total disability benefits may qualify for supplementary benefits and by shortening from seven years to three years the period of time after which an injured employee may qualify for supplementary benefits.

House Bill No. 1073, as part of the bill that enacted the Uniform Emergency Volunteer Health Practitioners Act, amended the workers' compensation law to use consistent language and to clarify a volunteer health practitioner under the uniform law is eligible for workers' compensation benefits under the volunteer firefighter, emergency or disaster volunteer, community emergency response team member law.

House Bill No. 1101 increased the workers' compensation dependency allowance for a child from \$10 to \$15 per week per child; revised the calculation of the amount of preacceptance disability benefits, basing the benefit on the regular weekly disability benefit amount instead of the minimum weekly disability benefit amount; increased the maximum allowed partial disability, temporary total disability, or permanent total disability benefit from 110 percent to 125 percent of the state's average weekly wage; expanded the benefits an injured employee may receive for an aggravation to include costs of travel and other personal reimbursement for seeking and obtaining medical care for the aggravated work injury; increased the weekly compensation allowance for a death claim, including increasing the maximum total death benefits, including supplementary benefits, paid on any one claim from \$250,000 to \$300,000,

increasing from \$10 to \$15 the per child weekly compensation for a death claim, and increasing the additional death benefit payments from \$1,200 to \$2,500 for a surviving spouse and \$400 to \$800 per dependent child; and increased the maximum burial expense payment from \$6,500 to \$10,000.

House Bill No. 1455 created a new type of surviving spouse benefit for a qualified spouse of an injured employee who had been receiving permanent total disability benefits or additional benefits payable for at least 10 years if the surviving spouse was married to the injured employee for at least 10 years and had been providing home health care services for the injured employee.

House Bill No. 1561 provided that if WSI does not give an injured employee's treating doctor's opinion controlling weight, WSI shall establish that the treating doctor's opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with other substantial evidence in the injured employee's record based on specified factors.

2007

House Bill No. 1038 increased the workers' compensation benefits available to catastrophically injured employees for adaptations to real estate, for specially equipped motor vehicles, and vehicle adaptations; created an alternative calculation for additional benefits payable applicable to employees injured before August 1, 1995, who were determined to be permanently and totally disabled after July 30, 1995; expanded the qualification for death benefits for catastrophically injured employees; expanded who may qualify for a student loan under the educational revolving loan fund; and shortened the time requirements to be eligible for supplementary benefits for employees injured after December 31, 2005.

House Bill No. 1140 provided for an inflation adjustment for injured employees receiving long-term temporary partial disability benefits.

House Bill No. 1411 allowed WSI to provide benefits for adaptations to real estate, specially equipped motor vehicles, or vehicle adaptations for injured employees who are not catastrophically injured.

Senate Bill No. 2042 provided that under the presumption of compensability for full-time paid firefighters and law enforcement officers, if a medical

examination produces a false positive result for a condition covered under the presumption, the condition is a compensable injury.

Senate Bill No. 2294 changed the injured employee's burden of proof in reopening a claim that was presumed closed from having to prove the work injury was the sole cause of the current symptoms to having to prove the work injury was the primary cause of the current symptoms.

Senate Bill No. 2389 clarified that 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 to wage loss and changes the permanent impairment award schedule from a calculation based on a period of weeks to a schedule that uses a corresponding multiplier.

2005

House Bill No. 1120, for purposes of workers' compensation, clarified and modified how the average weekly wage is determined and modified who is a child or sibling for purposes of determining eligibility of benefits; expanded the workers' compensation scholarship fund; authorized the organization to disclose certain medical information to the employer; and clarified WSI may release to a health care provider the Social Security number of an employee filing a claim for benefits.

House Bill No. 1171 modified the definition of "permanent total disability;" provided a definition of "temporary total disability;" modified the options for rehabilitation services; modified the required elements of a vocational consultant's report; and modified rehabilitation awards.

House Bill No. 1410, as part of a bill that addressed bloodborne pathogens and other reportable diseases, modified the workers' compensation definition of "compensable injury" and updated cross-references.

House Bill No. 1506 modified the method of calculating the nondependency payments in certain cases of death of an injured employee. This bill had a retroactive application to November 29, 2004.

Senate Bill No. 2351 modified the formula for determining the additional benefit payable to certain claimants who have been presumed retired.

ATTACH:2