

Workers' Compensation Advisory Council

December 9, 2015 – Meeting Minutes

Members Attended

Gary Thaden
Jason Bartlett
Walter Fredrickson
Glen Johnson
Douglas Loon
Bill McCarthy
Bobbi Pearson
Ed Reynoso
Robert Ryan

Non-Voting Members Attended

Representative Tim Mahoney

DLI Staff

Commissioner Ken Peterson
Sandy Barnes
Kate Berger
David Berry
Michael Haire
Ralph Hapness
Mike Hill
Karen Kask-Meinke
Ethan Landy
Chris Leifeld
David Musielewicz
Donna Olson
John Rajkowski
Alexis Russell
Jessica Stimac
Jenny Vogel
Lisa Wichterman

Visitors

Craig Anderson – MWCIA
Bill Blazer – MCC
Scott Bremer – SFMIC
Dawn Carlson – Almeida PA
Rachel Cornell - DEED
Brad Delger – MDLA
Amy Dellwo – DHS
Eric Dick – MMA
Karen Ebert - MCIT
Susan Gigiere – MAPS
Britt Graupner - DHS
Craig Gustafson - DEED
Shep Harris – MSIG/MCIT
James Heer – WCRA
Liz Houlding – Administration
Erin Huppert - Allina
Suzanna Kennedy – Stinson Leonard
Brad Lehto - AFL-CIO
James McClean – Health Partners
Patricia Milun, Judge WCCA
Phil Moosebrugger, Commerce
Kristen Ohlsen – MDLA
Elizabeth Owen – DHS
Tammy Pust – Judge OAH
Dean Salita - MNAJ
Matt Scherer - Administration
Joe Schindler – MHA
Lise Schmidt, WCCA
Shawn Stricker - SFMA
Michael Vaughn – DEED
Gary Westman – Administration

I. Call to Order and Roll Call

Commissioner Ken Peterson called the meeting to order at 9:40 a.m.

Roll Call was taken and a quorum was present.

III. Approval of the Agenda

Bill McCarthy moved to approve the agenda and Gary Thaden seconded the motion. All voted in favor and the agenda was approved.

IV. Approval of Minutes

Thaden asked that a correction be made to the minutes from the October 14, 2015 meeting. A correction was made to reflect that on page 3, Item c.(i) "Mr. Anderson provided the WCAC members and visitors with a copy of *Executive Summary* of the Ratemaking Report ..." The correction was noted and the minutes were approved.

V. Agenda Items

The commissioner explained that there are items on the agenda that may result in legislation. One item that should be voted on today and others the council will discuss and vote on possibly at the January or February 2016 meeting. In addition, the council will be discussing the Outpatient Prospective Payment System and will vote on a proposal at a future meeting, possibly in February.

- a. Legislative Proposal
Workers' Compensation Court of Appeals

The commissioner introduced Chief Judge Patricia Milun and Lise Schmidt of the Workers' Compensation Court of Appeals (WCCA). Also present and willing to address the WCAC proposal were Brad Delger of the Minnesota Defense Lawyers Association and Dean Salita of the Minnesota Association for Justice. The commissioner explained that Judge Milun and Ms. Schmidt presented the proposal to the council at the October 14, 2015 WCAC meeting.

Chief Judge Milun explained that her proposal clarifies the duties of the WCCA. She believes these changes will reduce litigation because the WCCA has seen an increase in the number of petitions for excess fees. The first part of Judge Milun's proposal addresses Minnesota Statute § 176.081, subd. 1(d), where an employee in a workers' compensation matter is successfully represented by an attorney, the commissioner or compensation judge may award fees. Judge Milun proposed striking "*or Workers' Compensation Court of Appeals on cases before the court*" from the statute because it is unnecessary and confusing.

The second part of Judge Milun's proposal concerns Minn. Stat. § 176.081, subd 3, clarifying the court's role in reviewing attorney fees under this subdivision, awarded by the commissioner or compensation judge. A review is limited to the review of the

existing fee that has already been ordered by the commissioner or the compensation judge.

In Minn. Stat. §176.471, subd. 3, Judge Milun proposes to remove the requirement of a cost bond for appeals. She believes that just as the other appeal courts have deemed, the WCCA does not need this cost bond except perhaps in the most unusual circumstance. In § 176.511, subd. 2, Judge Milun asks that the language 'on appeal' be struck and replaced with 'on cases before the court.' This change is needed to reflect the court's current attorney fee guidelines providing for taxation of fees upon evidence of a successful appeal or petition to vacate. The time for taxing disbursements is changed to 10 days from 5 days to make it more consistent with the joint workers' compensation litigation procedures at the department and Office of Administrative Hearings (OAH). To file a formal objection to taxation or allowance the opposing party now has 10 working days from the date of service.

Judge Milun explained that the changes to Minn. Stat. §176.511, subd. 3 have had the most questions and concerns. Under 176.511, subd 3, the WCCA has the discretion to award a reasonable attorney fee when the employee prevails in a case before the court. The court may award attorney fees in its decision on appeal which the court has done on most occasions. The new proposal clarifies that the court has discretion to award fees on a successful petition to vacate and there is no need to repeat the word 'workers compensation court of appeals' in that paragraph so 'on appeal' is stricken as the court's discretion is not limited to appeals but is also inclusive of the other petitions and motions that may come before the court. The new subdivision 3 provides for a presumed reasonable attorney fee of \$3,000 without a hearing or argument, or \$3,500 for cases that involve oral argument. Judge Milun believes that this predictable presumptive fee approach will eliminate unnecessary litigation. The court is not a fact finder but can review and has jurisdiction to review these cases on a case by case basis on the merits of the complexity and the knowledge and the time that was spent in pursuit of the successful appeal. Judge Milun again stated that the court is seeking clarification with a predictable presumptive rate to guide the bar and the practitioners with an understanding of how the court will go forward on these with the hope of reducing litigation.

The commissioner then introduced Brad Delger from the Minnesota Defense Lawyers Association (MDLA) and Dean Salita with the Minnesota Association for Justice (MAJ). Mr. Delger indicated that the MDLA does not take issue with most of the proposed changes. Mr. Delger said there has always been a set fee for the attorney fees awarded at the Minnesota Workers' Compensation Court of Appeals. The Chief Judge changes it periodically depending upon when it needs to be adjusted. The current fee has been in place since 2011 so the MDLA acknowledges that it is probably time and reasonable to increase that fee. The exact amount of that increase is debated and there are some that would like to see the fee higher. The biggest concern that MDLA has is with the provision in this statute is to allow for excess fees. Mr. Delger indicated that his concern is with allowing parties to ask for additional fees on appeal outside of just the set fee. It may create another layer of potential litigation in workers' compensation and appeals. He stated that the WCCA is generally not a finder of fact, and they are not set up for that

function. Because the Supreme Court has said that you cannot limit fees, there has to be an opportunity to go beyond that, at least at the OAH level.

Thaden asked Mr. Delger his opinion on the annual adjustment of fees. Mr. Delger responded that the MDLA has concerns with putting any of this into statute and believes it will create problems. In the past it has always worked out that if it needs to be adjusted, it was done.

Dean Salita then spoke representing the Minnesota Association for Justice. He indicated that MAJ is not coming to the WCAC and asking for this increase. The Minnesota Supreme Court has said that courts are entitled to determine attorneys' fees, they can't be capped and they can't be limited. He explained that if he loses a case, he would have to request from the trial level a copy of the transcript, pay for the transcript, read the transcript after 3 or 6 hour hearing, which takes at least 2 hours to read through and make notes. He said that Judge Milun and some of the court staff came to him and asked the amount of time it takes, MAJ contacted their entire bar, took a survey, and asked for hourly rates and time spent on an appeal. Mr. Salita said it takes anywhere from 8 - 15 hours to request a transcript, review it, and then write the brief. So his best estimate was, on average, it costs \$3,000 to \$5,000 to make an appeal.

Thaden asked a question concerning attorneys outside the Twin Cities and having to travel to St. Paul for the hearings. He asked if the appeals court travels to greater Minnesota. The Judge indicated that the court did not travel and did not have the budgetary means to do so.

The commissioner said that this issue will be set aside for now and will be discussed and decided at the next WCAC meeting on January 13, 2016.

b. Legislative Proposal

Workers' Compensation Reinsurance Association – James Heer

Mr. Heer explained that his organization is not a state agency, but designed by statute to insure the availability of workers' compensation reinsurance for all the insurers and self-insurers in the state. The WCRA board consists of four insurer members, two self-insurer members, two employer members, two employee members, a public member and two members designated by law.

The first part of Mr. Heer's proposal is to remove the annual automatic indexing of retentions and have the Board determine retention levels, subject to the DLI Commissioner's approval. WCRA members prefer a static retention for a period of time, rather than small annual change. This is straightforward and is a more standard practice in the reinsurance industry.

The second part of his proposal is adding a \$5 Million 'jumbo' retention level, which meets the risk management levels for WCRA's largest members and is also standard practice in reinsurance. The larger WCRA member organizations have asked for this additional option. The super retention currently in place is \$2 Million and currently over

half of their membership today is picking that \$2 million retention. This new proposal would provide another option for the larger members of the organization.

Mr. Heer explained that injured workers will not be impacted; that members of the WCRA may see a slightly larger rate increase but the benefit will be simplicity and reduced administrative effort. These two proposals have broad support from various groups. The proposed change would not take effect until 2018 if approved by the WCAC and passed by the legislature.

Thaden asked the question of which members of the Board approved the vote and did it include the one public member and the two employee member representatives. Mr. Heer indicated that there was a unanimous vote by the Board. Thaden asked if by increasing the retention level, does that decrease the future liabilities of the members and mean that members have to carry fewer assets. Mr. Heer said it may affect how much risk the WCRA does take on. Essentially the WCRA will assume a little more risk in those interim years before that retention rate changes.

Douglas Loon asked about the current makeup of the Board and how does the WCRA insure that the Board can act and not come to a deadlock. Mr. Heer answered that there is nothing to prevent a difference of opinion on the Board. Historically the Board has supported proposals reflecting the best interests of the membership. The members' duties are to represent the membership, not only their company. Also, for any decisions they make, six Board members are with companies that would be directly affected by their vote.

Glen Johnson asked Mr. Heer about the stricken language in the proposed legislation that included a "rounding" factor. Since this language is stricken, will the WCRA continue to have a rounded number or will it just be a number? Mr. Heer answered that the intention would be to pick rounded numbers. When the Board increases it, it will be rounded numbers. Their intent is to make it easier for the members.

Representative Tim Mahoney asked how often the Board members change. What is the members' tenure? Do the employers change often or do their members just change? Mr. Heer answered that the first 11 members of the Board have three year terms. The insurers and self-insurers have a nominating committee that has representatives of insurer members that select the Board members. The chair and vice chair have been on the Board for several years so the continuity of the Board is an important factor here. Terms of the members are staggered so they overlap. The employee and employer members are direct appointees of the commissioner. There is no nominating committee. The final two members from the State of Minnesota are appointed by statute.

Rep. Mahoney commented that he understands that the WCRA needs to be able to respond quickly and be more flexible to make decisions in a more time sensitive manner. He said that taking it away from a rate structure or anchor might cause greater swings depending on who is making the decisions. He indicated that the structure is there so there would not be a cost swing one way or the other.

At the end of the discussion, Commissioner Peterson indicated there is some language changes that still need to be worked out and he will seek out as many WCAC members as possible to understand their views. The council will vote at the next meeting on the proposal

c. Legislative Proposal
Housekeeping Change to Minnesota Statute 176.571

The commissioner explained that this matter is a minor change. The change is needed because at one time there was a Department of Employee Relations (DOER) and that department ran the state's workers' compensation system. In 2008, DOER was merged with the Department of Finance and formed the Minnesota Management and Budget (MMB) department. At the same time, the state claims function for workers' compensation insurance was not sent to MMB but rather the Department of Administration. Matt Scherer of the Department of Administration spoke to the WCAC regarding making this change which is more a clerical correction to the statute, striking 'management and budget' and replacing with 'administration' which is consistent with the rest of the language in this section. Mr. Scherer indicated that MMB is supportive of this correction to the statute.

Reynoso moved to approve the change, Thaden seconded the motion. All voted in favor of the motion.

d. Minnesota Supreme Court Sumner Decision – Office of Administrative Hearings (OAH)
Chief Judge Tammy Pust

Chief Judge Pust explained that the Sumner decision basically changed the way intervenors are treated at (OAH). Intervenors are entities that have provided a benefit to the injured worker, mostly medical benefits, who seek reimbursement. In addition, state agencies often intervene and seek reimbursement for medical assistance, unemployment compensation or other benefits provided injured workers while they waited for resolution of their workers compensation claim. Historically, intervenors were called upon by OAH only if needed and OAH did not require intervenors to attend the proceedings. It was on an as-needed basis only. The Sumner decision now requires that all intervenors attend the proceedings. Judge Pust issued a standing order and developed a different process that intervenors must adhere to. One, for anything other than a hearing (such as a pre-hearing, settlement conference, administrative conference), the intervenor must appear at the proceeding. The statute allows intervenors to appear by telephone, in person or by video conference. Taking advantage of that statute in her Standing Order, Judge Pust ordered that for pre-hearings or administrative conferences or settlement conferences, the intervenors must appear in person just as the statute and the Sumner decision requires or can attend via telephone if the intervenor completes a specific form and sends in the notification to OAH. For hearings, however, intervenors must file a Notice of Election and indicate their choice to appear by telephone. The intervenors are then required to call into a state conference call number. This seems to have streamlined the process.

Judge Pust indicated that since she issued the standing order, she has met with the defense bar, with the injured workers side of the bar, and with lawyers who represent intervenors to ask how it is this working, what questions they have, and changes they see needed. So far, no legislation has been proposed from any of the parties. The one exception has been the request from state agencies that would like to be exempted from the statute. The state agencies argument is that they are using public dollars coming to proceedings or filing paperwork for proceedings that may not be necessary. They would like to be exempted from this requirement. Judge Pust indicated that some of the agencies had already spoken to the WCAC concerning this matter.

McCarthy asked Judge Pust if there is legislation coming to correct the problem. Judge Pust answered that OAH does have a proposal, but have not yet met with the commissioner. It's very minor – all it really says so far is that intervenors don't have to file and serve on all the other intervenors, which is what they must do now. She indicated that the proposal will streamline the process and ask that intervenors only have to serve the injured worker, the employer and the insurer. The attorneys representing intervenors do not think it's fair that the statute says that if they fail to show up, their claim is extinguished. If an injured worker or employer does not show up for a hearing, they are not extinguished. Overall, what the intervenors want to see is OAH standardize the process at OAH so that all of the 22 judges at OAH are doing things the same way.

Thaden asked for a copy of Judge Pust's standing order and the commissioner said his office will send out the order to all members.

Representative Mahoney made a comment regarding the state agencies' response that they do not need to appear at the proceedings. He indicated that state agencies should not be exempt from attending if the other intervenors are required to attend. Judge Pust responded that the state agencies' claim is that they are using public money so they should be exempt. The other intervenors can make the argument that it is a waste of time and they really do not need to attend, but they cannot say they are using public money like the state agencies.

Thaden commented that he sits on a health plan board of trustees and this organization often intervenes in order to collect their money because they have already paid the injured worker for medical bills. He said that if private intervenors show up to collect their money, the agencies should also show up to collect the public dollars. He suggested that the court maybe use a minimum dollar amount to determine the requirement to appear. Judge Pust has discussed developing a minimum dollar amount that would determine whether the intervenor has to appear. The concern is that the medical and other bills accumulate over the course of the case (cases can go on for months) so the amounts will be constantly changing.

The commissioner indicated that he'll take a look at the Judge's standing order and possibly bring back for legislation at a future WCAC meeting.

- e. Review of Hospital Outpatient Prospective Payment System Methodology (OPPS) - Eric Anderson of Optum

Eric Anderson presented a brief overview of a payment system based on Medicare payment systems for hospital outpatient and ambulatory surgery center (ASC) care.

Anderson explained that Medicare's payment system is designed to reduce the impact of charges increasing faster than costs. The 'cost' used here is the hospital's cost of providing the service Medicare uses costs to determine the percentage paid. When the percentage is dropping over time, it means charges are increasing faster than costs. The Medicare system is basically saying that they are taking the 'charges' out of the equation. Medicare's outpatient system has multiple systems and sometimes they can overlap. Medicare is attempting to move from a transaction based system to a bundle model.

ASC payments are generally lower than hospital outpatient payments. The ASCs dispute the percentages. Also, because ASC payments may include more bundling than some hospital services, their payments are lower. Medicare uses a payment calculation for OPSS that uses relative weights based on the cost of providing the service.

The commissioner said the issue is complex and requires study by the parties. Representatives of ASCs, hospitals, and insurers are at the beginning stages of negotiations. An agreement would have to be reached and approved by the WCAC before the beginning of the legislative session in March. Commissioner Peterson said he will keep the WCAC informed.

VI. Other Business – The commissioner proposed that the WCAC meet on January 13, 2016 to discuss and address some of the issues considered today.

VII. Frederickson made a motion to adjourn the meeting, Loon seconded, and the motion carried. The meeting was adjourned.

Respectfully submitted,

Patty Rutz

Executive Secretary