

Workers' Compensation Advisory Council
Sept. 14, 2011
Minutes

Members

Glen Johnson
Rep. Andrea Kieffer
Shar Knutson
Robert Lux
Ryan Holmes
David Olson
Susan Olson

Absent members

Mike Bredeck
Wayne Ellefson
Sen. Ken Kelash
Sen. Ted Lillie
Rep. Tim Mahoney
Ed Reynoso
Elizabeth Shogren
Gary Thaden

Visitors/DLI staff members

Ann Marie O'Neill
Brad Lehto
Brett Krumhardt
Buzz Cummins

Visitors/DLI staff members

Carla Ferrucci
Carol Pankow
Charlie Feenstra
Dan Wolfe
Danielle Bird
Dawn Carson
David Berry
David Brown
Dee Torgerson
Donna Olson
Doug Brown
Gary Hall, assist. commissioner
Greg Schmidt
Jason George
Jeremy Estenson
Jessica Stimac
Joel Carls
John Rajkowski
Karen Kask-Meinke
Karen Ryba
Kathryn Berg
Kathy Hanson

Visitors/DLI staff members

Ken Peterson, commissioner
Laura Zajac
Lesley Hinz
Lisa Wichterman
Lori Rowe
Lorna Leathudah
Lisa Wichterman
Matt Marquis
Mark McCrea
Meg Kasting
Mike Hill
Mike Scully
Nancy Larson
Pamela McLaughlin, rec. sec.
Phil Moosbrugger
Ray Bohn
Stacy Kohlhoker
Tim O'Malley
Tom Hesse
Tom Mottaz
Wendy Legge

Opening

The meeting was called to order by Commissioner Ken Peterson at 9:40 a.m. Commissioner Peterson welcomed the council members and thanked visitors for attending. A roll call was conducted; however, a quorum was **not** present.

Due to a lack of quorum, the minutes of the June 8, 2011, meeting were not approved. The June 8 WCAC meeting minutes are tabled for approval on Oct. 12, 2011.

Due to a lack of quorum, the Sept. 14 agenda was not approved. The Sept. 14 WCAC agenda is tabled for approval on Oct. 12, 2011.

Announcements

Commissioner Peterson stated today's meeting will proceed with presentations and discussions. Caucus rooms available: Chisago and Goodhue.

- **New case review – DLI Office of General Counsel, Laura Zajac** presented updates about two workers’ compensation cases.
 - *Troyer vs. Vertlu Management Company/Kok & Lundberg Funeral Homes, and State Auto Insurance Company.* The state of Minnesota Supreme Court opinion was filed Aug. 17, 2011. The Minnesota Supreme Court held that a hospital may charge an insurer for surgical implants because the hospital is the health care provider actually furnishing the implants to the employee in their final, usable form under Minn. R. 5221.0700, subp. 2A (2009). Additionally, the court held that a compensation judge does not have the authority under Minn. Stat. § 176.136, subd. 1b(b) (2010) to determine a reasonable value for the implants, but is limited to determining the lower of: 1) 85 percent of the hospital’s usual and customary charge; or 2) 85 percent of the prevailing charge for the implants.
 - *Schatz v. Interfaith Care Center and New Hampshire Insurance Company/Chartis*, filed June 16, 2011. The WCCA reversed and found that Minn. Stat. § 176.136, subd. 1b(d) (2008), which limits an employer’s liability for out-of-state medical treatment to the amount a health care provider would receive under the workers’ compensation laws of its home state, is unambiguous and does not conflict with Minn. Stat. § 176.135. The WCCA applied the statute despite a finding that the employee would be personally liable for the difference between the out-of-state providers’ usual and customary charges and the amount of the employer’s liability under Minn. Stat. § 176.136, subd 1b(d).

- **Ombudsman service announcement – Phil Moosbrugger:** In response to a 2009 legislative auditor’s report (of the Office of Legislative Auditors – OLA), Phil Moosbrugger has been designated to lead DLI’s Office of Workers’ Compensation Ombudsman beginning Sept. 1, 2011. Assistant Commissioner Gary Hall stated the OLA recommended the ombudsman report to someone outside of the Workers’ Compensation Division. The ombudsman is a separate office within DLI and the position reports directly to Deputy Commissioner Kris Eiden, who provided assistance in developing the program. The ombudsman will address issues many employees and employers face within the workers’ compensation system. The agency believes it is important to assist and empower injured workers and small businesses (which often do not have human resources personnel available) in navigating the workers’ compensation system. The ombudsman also advances the cause of fairness and consistency by proposing legislation and rule changes that might improve the system. The ombudsman will provide advice and information to help injured workers protect and understand their rights and to pursue a claim, contact claims adjusters to resolve a dispute, provide assistance to prepare for settlement negotiations or mediation, and make appropriate referrals to other entities and agencies (compliance, alternative dispute-resolution, private professional referral agencies, etc.). Services to small businesses would include instruction about how to report a claim and direction to resources to resolve issues, to obtain workers’ compensation insurance coverage, and to provide information about workers’ compensation requirements and the employer’s responsibilities under Minnesota law. A Web page with complete information about the ombudsman services at www.dli.mn.gov/WC/Ombudsman.asp. Contact the ombudsman at (651) 284-5013 or dli.ombudsman@state.mn.us.

Discussion

- It was asked whether the services outlined for the ombudsman were previously handled within DLI. Phil responded that information assistance is offered, but only to a certain degree. The ombudsman program is intended to augment services that already exist and to offer more in-depth assistance.

- It was asked how the Office of Workers' Compensation Ombudsman will maintain the integrity of a referral. A referral could be made to a bar association or to qualified rehabilitation consultant (QRC) resource listings. Commissioner Peterson stated DLI is forbidden by law to refer specific individuals for services to injured workers or small business owners.
- Commissioner Peterson stated the program will be reviewed in six months. The amount of interest will determine the appropriate response for further direction of the program.
- **OAH status of case management system – Assistant Chief Judge Tim O'Malley:** \$600,000 was appropriated during the most recent legislative session from the Special Compensation Fund (SCF) to the Office of Administrative Hearings (OAH) to implement a new case management and electronic filing system. All aspects of the new program have received positive feedback. The Office of Enterprise Technology (OET) and the Department of Administration initially had concerns about uniformity and compatibility, but after review, both agencies were impressed with the outline and became enthusiastic supporters of the program. The Department of Administration has recommended software could be purchased from state contract vendors. A request for proposal (RFP) of system requirements was submitted, but the Department of Administration has recommended the program needs may be met by state contract vendors. We are waiting to hear from them about how to proceed. Representatives from business and labor will be invited to review proposals and possibly be able to sit in vendor presentations. The first phase is to encumber funds for hardware/software product costs; OAH will keep a detailed record of all monies spent. The next phase will be to create a professional/technical contract to ensure ongoing program compatibility with OAH, the Bar, the Court of Appeals, DLI, etc.
- **Homeopathic providers – Kathryn Berg, Minnesota Natural Health Legal Reform Project:** The Natural Health Legal Reform Project (LRP) is a volunteer consumer-based organization that has initiated natural health providers and massage therapy legalization in Minnesota.
 - In 2008, a workers' compensation bill provision was included that prohibits the payment of services rendered to injured workers by unlicensed health care providers in Minnesota. *See Minn. Stat. § 176.135, subd. 1b.* LRP would like to see this bill repealed. This change was brought about by the Minnesota Department of Labor and Industry as a "reform"; however, there was and is no evidence of abuse to spur reform and no reason to change the system.
 - Natural health definition – Natural health encompasses the use of a variety of modalities that augment the body's natural healing abilities. It does not cure disease. Frequently, natural health products cannot be patented because the properties are found in nature. Natural health aims to heal the person, not cure the disease. It is not a disease management system.
 - LRP history – LRP was founded in 1997 in response to an unprecedented number of actions against natural health practitioners (no claims of harm, rather investigative research). In 2000, the Minnesota Legislature passed the Health Care Freedom of Access Bill, § 146A. Part of the bill includes an Office of Complimentary and Alternative Practices, where consumers of such services have a place to complain, since there isn't a licensing board for them to complain to. This office is funded through the Minnesota Department of Health's budget. Current regulation of licensed practitioners makes it nearly impossible for them to hire or refer to § 146A practitioners. Some hospitals may have exemptions, and chiropractors may have more latitude to refer natural health services, than a medical doctor.
 - The Minnesota Legislature proposed the provision be repealed in 2009 and 2010, which was vetoed both years by the governor. Minn. Stat. § 214, Subd. 2, Criteria for Regulation, "... declares that no regulation shall be imposed upon any occupation unless required for the

- safety and well being of the citizens of the state.” Specific outlines in evaluating occupation regulation are further described. No injuries were found in 12 years in Minnesota.
- The FDA has refused to conduct studies about safety of natural health modalities. Minnesota specifically chose not to license natural health providers because of the low risk factor. Natural health is the fastest growing segment of health care in the industry. Minn. Stat. § 146A requires practitioners to give their clients a bill of rights, which includes training background/qualifications. A couple of years ago, DLI discussed a pilot project using more effective medical doctors, which recognizes some professionals are more effective than others, which is true in any modality. It’s up to the insurance companies to mandate qualifications, not the state. The state has already decided natural health modalities are safe and is not necessary to mandate qualifications.
 - No scope of practice – Concerns have been raised that there is no scope of practice for unlicensed practitioners. Minn. Stat. § 146A is a safe harbor law, which requires practitioners stay within the harbor of safe practices. They are not allowed to engage in unsafe practices, such as drugs and surgery. Minn. Stat. § 146A practitioners have been, and continue to be, covered by fraud laws. Research about incidences of insurance fraud show no information or evidence of fraud by natural practitioners.
 - Minnesota worker’ compensation and natural health
 - The Ultimate Wellness Center (UWC) in Minnesota was established by the owner of Becker Furniture World. UWC has developed protocols for helping heal injuries – particularly back injuries. Cases showed lost days of work and costs were reduced after treatment at UWC.
 - Starkey Labs is one of Minnesota’s best employers; it makes hearing aid devices. Fifteen years ago, most of their workers’ compensation claims were for carpal tunnel syndrome (CTS) injuries. Roling professionals were brought on-site to treat employees for CTS. The roling sessions have reduced CTS significantly. The company has gone from \$150,000 a month in workers’ compensation claims to \$58,000 a year. Starkey Labs pays \$80,000 a year for the two on-site rolfers. The workers’ compensation expenses are half the national benchmark for light, electronic assembly. Starkey’s mod rate is 55 and most companies cannot get lower than 70. It is estimated the company has saved \$10 to \$20 million for an \$80,000 a year investment. In 2010, DLI established the Governor’s Award for Innovation in Workers’ Compensation. Starkey Labs was one of the three or four companies to win this award.
 - The Minnesota Vikings uses roling to treat their athletes.
 - CPT codes are used to code services for payment and send to insurance companies. Many of the statistics that are found in western medicine are sourced from CPT codes, which do not reflect any natural health modalities. CPT codes are owned by the American Medical Association (AMA) and earn \$140 million annually from people using those codes. Since there are no codes for natural health, no statistics can be garnered about effectiveness and practitioners cannot get paid from insurance or workers’ compensation. ABC codes were developed with a grant from the federal government. ABC codes are more complete and accurate about most modalities and include natural health and western medicine codes. ABC codes are charged in 15-minute increments and CPT codes are charged in 30-minute increments. Implementing ABC codes would reduce costs in Minnesota. (*See handouts: “We Support the Repeal of 2008 Language in the Worker’s Comp Law” and MNHLRP meeting with Larry Miller, VP Human Resources Starkey Labs, Dec. 15, 2009.”*)
 - This presentation is available on LRP’s website at www.mnhlrp.org.

Discussion

- It was asked whether the examples given during one session to relieve pain was long-term. For details, go to Starkey Labs’ website.
- Assistant Commissioner Gary Hall: Minn. Stat. §146A states licensed staff members can refer a client/patient to a natural practitioner. Kathryn responded that what is legal may not be approved of by the medical board, which has the impact of law. The medical board can and has pulled medical licenses for referring clients/patients to natural practitioners.
- Minnesota Rules 5221.0700, subp. 3, is an exemption that refers payment to a licensed provider for ancillary workers, not for the treatment itself. Because of laws governing the medical board, unlicensed practitioners are not hired as a result. Diane Miller is an attorney with the National Health Freedom Coalition who could be contacted for further details.
- **Attorney fee review – Michael Scully, Minnesota Association of Justice:** The topic of discussion is to propose an increase in attorney’s fees pursuant to Minn. Stat. § 176.081. No proposals have been prepared; today is an opportunity for early discussion of a business proposition.
 - Fee history – The Legislature established attorney’s fees in 1992 (pre-dating the WCAC), with changes in 1995. The 1981 Legislature established attorneys representing injured workers could be paid 25 percent on the first \$4,000 of any recovery, 20 percent on the next \$20,000 with a cap of \$5,000. Changes in 1983 legislation became effective in 1984: payments were continued to be paid at 25 percent on the first \$4,000, 20 percent on the next \$27,500, capped at \$6,500. In 1992, that cap was increased to \$13,000: 25 percent on the first \$4,000, 20 percent thereafter, with a maximum of \$60,000 of recovery. Subsequent to the 1992 legislation, in 1995, the \$13,000 cap was a permissible fee for all legal services for the same injury. Significant cases from 1999 and 2003 continue, but the fee remains limited to \$13,000. Payments for fees beyond the \$13,000 are filed for approval by a Workers’ Compensation Judge, at OAH for hearing, and with the employee, employers and insurers, which takes time. There is no presumptive increase for petitioner’s attorneys since 1992.
 - How a petitioner’s attorney fees are paid – When an injured worker comes to an attorney, a retainer agreement is signed by both parties. This retainer agreement is pursuant to Minn. Stat. § 176.081. No upfront costs are expected of the injured worker. The attorneys pay upfront costs, as well as interest on those costs to the bank, which are nonreimbursable costs. These costs are carried over until resolution. Costs include requests for medical records, case file records from DLI, depositions of employees, doctors and other parties during litigation, independent medical examinations and undocumented copying costs. In representing injured workers, many calls are taken. Consultation fees are not chargeable. Payment is received when a recovery of benefits is made or the case is resolved.
 - A chart, *Common Minnesota Workers’ Compensation Benefit Adjustments*, was distributed to WCAC members, describing benefit adjustments from Oct. 1, 1992 through 2011, based on information from DLI’s website.

Statewide average weekly wage	Supplemental benefit rate	Maximum compensation rate
Increase of 95.21%	Increase of 94.98%	Increase of 76.36%

- The goal is to provide adequate, competent representation and to be zealous advocates to injured workers. We don’t want to discourage competent attorneys from representing injured workers; we want to maintain the integrity of attorneys to protect them. We want to keep

attorneys practicing workers' compensation and to encourage younger attorneys to practice workers' compensation. It's hard to continue doing business with no increase in revenue/salary for the past 20 years.

Discussion

- The Minnesota Association of Justice members would like to return to WCAC meetings to continue the discussion and answer questions, to work together to develop common ground and to move forward with a proposal. It was asked what can be made with excess fees? Michael Scully responded it varies, depending upon the size of the case and the number of hours worked.

Conclusion

Commissioner Peterson announced the next WCAC meeting will be Oct. 12, 2011. Members were asked to forward agenda topics for discussion.

Adjournment

Ryan Holmes made a motion to adjourn at 11:20 a.m., seconded by David Olson. All voted in favor and the motion to adjourn passed on a voice vote.

Respectfully submitted,

Pamela McLaughlin

Pamela McLaughlin, executive assistant