

**Workers' Compensation Advisory Council**  
**Sept. 14, 2016 – meeting minutes**

**Members attended**

Jason Bartlett  
Walter Fredrickson  
Elaine Garry  
Glen Johnson  
Brad Lehto  
Douglas Loon  
Steven Pardoe  
Steven Pettersen  
Mark Stenglein

**Nonvoting members attended**

Representative Tim Mahoney

**DLI staff members attended**

Commissioner Ken Peterson  
Assistant Commissioner Chris Leifeld  
Sandy Barnes  
Kate Berger  
David Berry  
Sonya Herr  
Deb Jevne  
Ethan Landy  
Karen Kask-Meinke  
Mark McCrea  
Pat Munkel-Olson  
David Musielewicz  
Angelina Nguyen  
Donna Olson  
John Rajkowski  
Jessica Stimac  
Jeanne Vogel  
Lisa Wichterman  
Wendy Willson-Legge  
Laura Zajac

**Visitors attended**

JoAnne Aiken – MNASCA-TCO  
Scott Brener – SFM  
Dawn Carlson – Almeida PA  
Gary Carlson – LMC  
Joel Carlson – MAJ  
Lynn Carroll – WCRA  
Amanda Cox – Mayo Clinic  
Auntara De – MWCIA  
Eric Dick – MMA  
Debra Driver – Metropolitan Council  
Jim Froeber – Department of Administration  
Timothy Jung – Lind Jensen Sullivan  
James Heer – WCRA  
Erin Huppert – Allina  
Craig Johnson – MNPTA  
Jeff Lindquist – Pustorino Law  
James McClean – Health Partners  
Patricia Milun – WCCA  
Brandon Miller – MWCIA  
Phil Moosbrugger – Department of Commerce  
Deb Norsten – SFMIC  
Kim Olson – CorVel  
Tom Poul – MNASCA/TCO  
Joe Rieder – MCIT  
Dean Salita – MNAJ  
Joe Schindler – MHA  
Lise Schmidt – WCCA  
Mike Scully – Sieben Carey  
Mike Strong – SEMIC  
Peter Tritz – LMC  
Joe Twomey – MDLA  
Phil Vigliaturo – Department of Commerce  
John Watros – Meadowbrook  
Gary Westman – Department of Administration  
Cam Winton – Minnesota Chamber of Commerce  
Christine Zimmer – Winthrop Weinstine

**I. Call to order and roll call**

Commissioner Ken Peterson called the meeting to order at 9:45 a.m.

Roll call was taken and a quorum was present.

## **II. Approval of the agenda**

Commissioner Peterson asked for the approval of the agenda. Elaine Garry moved to approve the agenda and Walter Fredrickson seconded. All voted in favor and the agenda was approved.

## **III. Approval of minutes**

The commissioner asked for approval of the minutes from the WCAC meetings of Feb. 24 and April 4, 2016. A motion was made to approve, the motion seconded and the motion carried to approve the minutes from Feb. 24 and April 4, 2016.

Commissioner Peterson introduced two new alternates to the group: Mark Stenglein, alternate for Robert Lux; and Steve Pardoe, alternate for Bobbi Pearson. They both represent employers for the WCAC and have full voting rights for this group. In addition, Steve Pettersen – who is not new to the group – is the alternate today in place of Gary Thaden.

## **IV. Agenda items**

### ***a. Legislative proposal***

#### **DNR – Volunteers for Nonprofit Organizations' Workers' Compensation Exemption**

The commissioner introduced the first item on the agenda. Bob Meier, assistant commissioner, Department of Natural Resources (DNR), addressed the group.

Meier explained that, last year, the DNR Parks and Trails Division stopped providing some maintenance services to 23 state park ski trails because of low use and to save costs. There were several volunteer organizations that approached DNR and asked that they provide the grooming and maintenance services for the trails. DNR has approved this new procedure with the understanding that the volunteer organizations take on the insurance liability, including workers' compensation coverage. Those organizations agreed to this proposal, but there is a statute, Minnesota Statutes § 84.089, subd. 3, that deals with volunteers and required DNR to treat them as state employees and, therefore, provide the volunteers with insurance and workers' compensation liability coverage.

Last year, the Legislature asked DNR to work with the Department of Labor and Industry (DLI) and the WCAC to develop a report to submit to the Legislature with recommendations about how to clarify the state's liability to provide or exempt coverage of workers' compensation for volunteer organizations. Meier indicated DNR will have a draft report later this year and will provide it to the WCAC for its approval prior to submission to the Legislature.

If DNR determines legislation is needed, it will propose to amend Minnesota Statutes § 84.089 to clarify this exemption of workers' compensation coverage for volunteer organizations.

Rep. Tim Mahoney asked Meier what the estimated cost for the volunteer organizations would be to cover volunteers with this insurance. Meier said this is something that needs to be negotiated with the volunteer organizations. The Parks and Trails Council has an umbrella policy

and, if this can get clarified, it will help get that insurance to these organizations. There are three or four areas of the state, mostly in northwestern Minnesota, that this will affect.

Mahoney had some concerns that businesses will end up picking up the cost of any workers' compensation payments made by these organizations. The organizations' premiums will come in at a very low rate, but if a volunteer does get seriously hurt, the cost will be passed on. This cost will get passed on to the business community's rates. Mahoney would like to see more information regarding these costs before making any decisions about supporting the legislation.

Meier responded he will gather information from other volunteer organizations that are assuming this liability. In addition, as part of any contract between the DNR and volunteer organizations, there will be safety training for the volunteers to prevent injuries.

Garry asked if there are other state departments that have volunteers to perform some duties. Meier said the Minnesota Department of Transportation has contracts with volunteer organizations, for example the Adopt-a-Highway campaign. Glen Johnson added that his volunteer organization does highway clean-up but the volunteers are not considered any type of employee and, therefore, the volunteer organization does not have liability insurance on the volunteers. The commissioner said after more information is gathered, it will be brought back to WCAC to ask for a recommendation.

***b. Legislative proposal***

**Agreement between Ambulatory Surgical Centers (ASC) and Insurers**

The commissioner introduced Scott Brener, SFM, and Tom Poul, Messerli and Kramer, representing the ASCs.

The commissioner explained the two parties have made an agreement that he would brief the council on. He would ask for a vote from WCAC at a later meeting and then send it as a package to the next legislative session, hopefully, with a similar agreement about outpatient payments.

Brener said the payor community has come to terms with the ASC community and they have reached an agreement about the fee schedule that has been in negotiations for some time. He explained that in the workers' compensation arena in Minnesota there are three systems: inpatient pay, outpatient pay and ambulatory surgical center pay. All have traditionally been paid at the usual and customary percentage, primarily at 85 percent if you are a large hospital or 100 percent if you are deemed a small hospital. As a result of the usual and customary format, the price escalation moves rapidly under the usual and customary scenario as opposed to the traditional fee schedule. The vast majority of health payments are conducted within a fee schedule. Workers' compensation is operated within the usual and customary format.

Providers and insurers have debated the adoption of a fee schedule in Minnesota for more than 10 years. They were successful in reaching agreement with the hospitals on inpatient payments and eliminating payment delays. That bill passed two sessions ago and went into effect in January 2016. The outpatient piece is still not in agreement. The third piece of this issue is the ASC payments. The ASC payment system today is by the usual and customary method. The two parties have come to an agreement to adopt the Ambulatory Surgery Centers Payment System

(ASCPS), which is the system used by Medicare. They have agreed on a rate of 320 percent of Medicare. Within that 320 percent, the parties will be adopting a multiple procedure rule reduction that basically states that if there is more than one procedure taking place within a particular health care scenario, in the ASCs settings then payments are further reduced downward to 50 percent of that price point.

The commissioner pointed out to the members that their handouts today include an overview of this proposal, with legislative language.

Poul, representing the Minnesota Ambulatory Surgery Center Association (MNASCA), told WCAC that his organization supports this newly negotiated agreement with the insurers.

The commissioner reiterated the agreement will be brought back to WCAC at a future meeting for approval. He also pointed out that there is a \$3.8 million estimated savings to the system that will occur as a result of this agreement.

Johnson asked about multiple surgeries for one injury and what the primary charge would be. Brener asked Mike Strong, SFM, and Joanne Aiken, MNASCA (who does billing for four surgery centers of the Twin City Orthopedic Center), to come to the table to answer any specific questions. Mahoney asked for an example of a surgical procedure not covered under ASCPS. Strong explained some of the procedures typically seen are those that traditionally were only performed in an inpatient or hospital setting. Right now, those are carved out from Medicare in the ASC realm, so they would not get reimbursed. Under this proposal, as long as those services are deemed eligible, they would be reimbursed under this agreement. Because they are not fee scheduled under the current ASC methodology and because of the way they treat certain services, they would be reimbursed at 75 percent of the usual and customary rate with all subsequent procedures being reduced at 50 percent.

Mahoney asked the commissioner about the proposed legislation, specifically subd. 5 that refers to a study that will be done by DLI. The commissioner said his department will look at the numbers, the costs and patient satisfaction. He also said this is basically a way to bring down the costs and decrease the case disputes. The providers are taking a lower cost in exchange for fewer disputes. The question to ask of the study will be if the parties are basically getting what they anticipated out of this new agreement. Commissioner Peterson said the department study of the inpatient payment system is due Jan. 15, 2018, as indicated in the statute.

Doug Loon asked if this agreement is the same as that which was worked out earlier this year. Brener replied this agreement was framed in March 2016, but the language was finalized this past summer. Loon also asked if bill disputes are being managed more efficiently as a result of this proposal on the table. Brener explained the time period is shortened in this process, so it will force disputes to settle more quickly. In addition, he said adopting a fee schedule provides a lot of certainty to a price point that does not exist when you are working in a usual and customary environment. Strong said from the SFM prospective, they have not seen anything go to dispute for the inpatient fees in the past six months.

The commissioner pointed out there are a number of other insurers that provide these services to a greater or lesser degree and there have been some issues from hospitals; Lisa Wichterman,

DLI, has been addressing those concerns. Loon asked about a time line and if there was anything related to outpatient for this year. The commissioner said for the outpatient component, the two parties will have to sit down and come to an agreement. DLI will be working with them in the next several months. The parties have met and talked and do have some workable ideas that will be brought here before the legislative session, possibly December or January. The commissioner also pointed out the Legislature has given the department rulemaking authority and the department can proceed with rules if an agreement is not reached.

*c. Supreme Court Ekdahl and Hartwig decisions – public retirement*

Commissioner Peterson introduced Laura Zajac, DLI general counsel, and explained this presentation will be a primer about the issue and no decisions need to be made now. Zajac explained the legal consequences of the *Ekdahl/Hartwig* decisions.

The *Ekdahl/Hartwig* decisions were issued by the Minnesota Supreme Court in summer 2014. The decisions interpreted and defined a phrase found in the workers' compensation statutes, Minnesota Statutes § 176.101, subd. 4. This provision allows a payor to offset or reduce an employee's permanent total disability (PTD) benefits by his or her "old age and survivor insurance benefits." The Supreme Court defined that phrase to mean only employees' Social Security retirement benefits. In the *Ekdahl/Hartwig* cases, the disputes arose because payors alleged they could also reduce the employees' PTD benefits by other public retirement benefits. Ms. Hartwig was receiving Public Employees Retirement Association of Minnesota (PERA) retirement benefits and Mr. Ekdahl was receiving Teachers Retirement Association (TRA) retirement benefits. The Supreme Court held that the employees were entitled to collect their full PTD benefits and their PERA or TRA pensions, because the offset for "old age and survivor insurance benefits" applies only to Social Security retirement benefits.

The problem with this holding by the Supreme Court is this was contrary to decisions from the Workers' Compensation Court of Appeals (WCCA) dating back to 1981. WCCA had a more expansive view of what this offset meant and permitted many types of public pensions to be offset. Payors, DLI and other government entities had been following WCCA case law for more than 30 years and allowing the reduction of PTD benefits by public pensions received by employees, which include PERA, TRA, Minnesota State Retirement System (MSRS) and others. Note that these decisions do not apply to private pensions because there was never any understanding private pensions could be offset. This issue relates only to public employees' retirement pensions.

Zajac explained it is important to note that this offset is only available after the workers' compensation payors have paid \$25,000 in PTD benefits. Payors can also reduce an employee's PTD benefits by the amount of disability benefits an employee receives. It is important to distinguish public retirement benefits from public disability benefits because the statute reads differently for each type. The decisions did not impact the offset of public disability benefits.

Zajac gave an overview of the Special Compensation Fund and supplementary benefits. The supplementary benefit rate is 65 percent of the statewide average weekly wage in any given year. It is not specific to each employee; rather, it is a set rate for all employees and provides a payment minimum or floor for workers who have received offsets. For example, if a worker

receives a PTD benefit and the benefits are reduced by an available offset, supplementary benefits bring the worker back up to the floor.

The distinguishable feature of supplementary benefits is that although they are still paid to the employee by the employer/insurer, they are reimbursed by the Special Compensation Fund. The payor pays ongoing weekly supplementary benefits to the employee and then (usually on an annual basis) submits claims to the Special Compensation Fund to get that money back. This is different from permanent total disability benefits, for which the payor has the ultimate financial responsibility.

Supplementary benefits only apply to employees who were injured before Oct. 1, 1995. If a worker was injured before that date, he or she is eligible for supplementary benefits into the future. Zajac provided a hypothetical example of pre-*Ekdahl* and under-*Ekdahl* scenarios where an employee's PTD benefits had been offset fully by his or her PERA retirement benefits.

The commissioner said, in reference to the pre-*Ekdahl* example, the employer is not spending any money on this individual right now. Their payments have been completely reimbursed by the Special Compensation Fund, which gets its money from assessments.

In the under-*Ekdahl* scenario, the offset of PERA retirement benefits is not allowed. Because the offset is not allowed, the employee is now going to receive his or her full PTD benefits in addition to his or her pension. No supplementary benefits are paid to the employee or reimbursed to the employer. Zajac noted that there are other complicating factors she did not bring into this hypothetical case and that this example is not a real injured worker's case.

Another difference between these two scenarios is the assessments, according to Zajac. Assessments are paid on PTD benefits, but not supplementary benefits. The Special Compensation Fund is funded by cost-based assessments. The method of assessment varies between insurers and self-insured employers. Insurers pay assessments to the fund as a percentage of their premium. They pass that on to their clients by way of a premium surcharge. Self-insured employers pay Special Compensation Fund assessments as a percentage of the indemnity benefits they are paying to employees. In 2016, the Special Compensation Fund total assessment is \$80 million. Self-insured employers are assessed at a rate of 19.3 percent of indemnity benefits paid. For insurers, the premium surcharge rate is lower, at 7.07 percent. That money is used to reimburse supplementary benefit claims that come in, reimburse second-injury fund claims and pay uninsured claims, although the Special Compensation Fund has a right of recovery against employers that are uninsured. Lastly, the Special Compensation Fund provides funding to the workers' compensation system, DLI, the Office of Administrative Hearings, the Department of Commerce for fraud investigations and WCCA.

Zajac explained that in the example of where the hypothetical employee used to be receiving supplementary benefits pre-*Ekdahl*, the payor did not owe any assessments on those benefits. Now that the employee is being paid PTD benefits under-*Ekdahl*, the payor is responsible for assessments on those benefits at a rate of about 19 percent. The payor's financial obligations have increased from zero (because they were getting their money back from the Special Compensation Fund) to the cost of the permanent total disability benefit plus assessments on those benefits. The takeaway is that some employees are going to be entitled to increased PTD

benefits as a result of the *Ekdahl/Hartwig* decisions. They also result in a shift from financial obligations of the Special Compensation Fund to increased financial obligations of the payors.

There are some key issues that have become problematic with the Supreme Court decisions, Zajac said. The first is the employee underpayments. After reviewing the decisions and the related case law, the department's analysis is the decisions are retroactive, meaning they apply to all dates of injury and to benefits paid before the decisions were issued. Employees whose PTD benefits were improperly reduced by the amount of their public pensions are owed additional benefits in many scenarios. There are exceptions – for example, a case may have already been litigated or there may have been an agreement between the parties. For instance, if there was an unappealed order from the Office of Administrative Hearings already deciding this issue about which offsets could be taken, the *Ekdahl/Hartwig* decisions would not apply to that employee.

The next issue of concern is the past benefits that were reimbursed by the Special Compensation Fund. The fund was following WCCA decisions for the past 30 years, so it reimbursed payors that had been taking offsets for these public pensions. Under *Ekdahl/Hartwig*, the supplementary benefits were not owed because the employee should have been receiving higher rates of PTD benefits. We now face the situation where the Special Compensation Fund has overpaid money for a significant number of years. As a steward of public funds, the Special Compensation Fund has a fiduciary responsibility to collect the amounts it overpaid. Most public employers are self-insured, so they pay assessments on the amount of benefits paid to employees. Now these assessments will be owed on PTD benefits, but they were not owed on the supplementary benefits they had been paying before.

Commissioner Peterson said some payors have fully implemented the decisions, having paid employees additional benefits and, in some cases, repaying the Special Compensation Fund. Other payors have raised legal defenses, asserting they are not obligated to comply with the decisions and arguing the decisions are not retroactive or have limited retroactivity. That leaves the next steps – litigation or a legislative solution. Litigation is the least efficient because it means case-by-case resolution and delays getting payment to employees. However, it is the path we are heading toward if we do not have legislative solutions to these issues raised.

Garry asked why the department determined this court decision was retroactive and why there is some disagreement about this matter. Zajac said the department's position that the decision is retroactive stems from a few things. First, there is language in the decision; the court said that since 1953, when the law was enacted, the court had "consistently construed the offset provision to refer to federal Social Security benefits." The Supreme Court views the holdings as consistent with its prior decisions. Also, the department looked at related case law. Generally, court decisions are retroactive. To not be retroactive, you have to fall into very specific categories that are not met in this case. But this is also where the dispute comes in, as payors are arguing that the exceptions to retroactivity are met here. There is case law that once a court has applied a new rule of law to the cases before it, it is error to say it is not retroactive. In this case, the employees had dates of injury 2005, 2004 and 2010, so the Supreme Court has already applied the rule to employees with prior dates of injury. Zajac pointed out other payors have different positions.

Pardoe said it looks as if an employee would get PTD benefits greater than his or her average weekly wage. The commissioner said that individual is now getting his or her pension, plus their

workers' compensation wage benefit. Pardoe said his concern is a PTD injury case could be pursued because there is now a monetary benefit and a surplus that was not there previously. The commissioner said putting an individual into PTD is always controversial and the decision is not made lightly.

The commissioner emphasized this issue is far from a decision now, but he wanted to put this before WCAC to get the group thinking about the issue and possibly coming up with some solutions.

*d. Rate Oversight Commission duties*

- i. MWCIA calculation of workers' compensation pure premium, Minnesota Statutes § 79.55

Commissioner Peterson introduced Brandon Miller and Auntara De, Minnesota Workers Compensation Insurance Association (MWCIA). Miller explained MWCIA is a nonprofit organization responsible for setting pure premium advisory rates for the insurance industry in Minnesota. MWCIA files a ratemaking report every year with the Minnesota Department of Commerce. De, from MWCIA's actuarial department, spoke about the 2017 ratemaking report that was filed recently. Of significance was the reduction of 12.1 percent on the advisory pure premium rates for 2017. De explained the annual ratemaking report was made available to MWCIA's membership in early August, in compliance with Minnesota Statutes §§ 79.55 and 79.61, as well as related regulations. Carriers are urged to review the law before applying any ratemaking report to determine their own compensation rates. The ratemaking report primarily contains the pure premium base level. This rate provides the foundation for insurance pricing for the bottom line premiums workers' compensation insurers can quote and price in the Minnesota workers' compensation marketplace. De pointed out the pure premiums reflect the costs adjusted by ratings, but do not include several components, including additional increases in payments or reserves still in the system after 14 years, changes in claim payment patterns between the time MWCIA collects the data and the time the new rates are in effect, and Minnesota premium taxes, company operating expenses or claim adjustment expenses. In addition, insurance carrier rates include provisions for class rate deviations, contract or program adjustments, investment income discounts, WCRA premiums, and catastrophe and terrorism surcharges. All of these components can be substantial. Carriers adjust the pure premiums with several components that are not related to individual employer claims, including Special Compensation Fund assessments, premium discounts and dividends.

The handout shows the 2017 pure premium decrease is the eighth decrease in the past 10 years and right now that level is 32 percent lower than before going into a competitive pricing environment in 1983. De pointed out some reasons for such a large decrease include the benefit reforms from the 1990s, the expansion of competitive pricing, the increase of cost incentives for workplace safety and early injury management, and return-to-work programs. Working together, all of those changes have helped drive the decrease. She said the FAQ handout explains some of these issues in more detail.

The commissioner emphasized the costs to employers is much less expensive and the workplaces are much safer than they used to be. In turn, workers are safer than they used to be. Some of the efforts on reducing medical costs are assisting in this cost decrease also.

*ii. Remarks about the 2017 MWCIA rate-filing report*

Commissioner Peterson introduced Phil Vigliaturo, Minnesota Department of Commerce. By statute, WCAC is required to have a report about the MWCIA rate-filing report.

Vigliaturo said his comments will be about the MWCIA ratemaking process rather than the competitiveness of the Minnesota market or what carriers actually do with the information. He indicated MWCIA uses methodologies similar to organizations that provide these services in other states for workers' compensation. In summary, all key decisions are made by the actuarial committee. MWCIA actuaries work with consultants, bring recommendations to MWCIA's actuarial committee and their recommendation is to either accept it or alter it. That recommendation goes to the board of directors for approval. Vigliaturo concluded by saying this process is very stable and validates the ratemaking report.

The commissioner asked for any other questions or topics of discussion. No other questions or topics were brought up for discussion. The next meeting scheduled for WCAC is Oct. 12, 2016.

**V. Adjournment**

Loon moved to adjourn the meeting and Brad Lehto seconded. The motion carried and the meeting adjourned at 11:40 a.m.

Respectfully submitted,  
*Patricia Rutz*  
Executive Secretary