

Workers' Compensation Advisory Council
Oct. 9, 2013
Minutes

Members present

Walter Frederickson
Elaine Garry
Russell Hess
Jason George for Glen Johnson
Shar Knutson
David Olson
Susan Olson
Ed Reynoso
Robert Ryan
Dawn Soleta
Gary Thaden

Nonvoting members present

Rep. Andrea Kieffer
Rep. Tim Mahoney

Members excused

Sen. John Pederson

Members absent

Robert Lux
Sen. Dan Sparks

DLI staff members present

Sandy Barnes
Kate Berger
Debbie Caswell
Deputy Commissioner Kris Eiden
Ralph Hapness
Mike Hill
Wendy Legge
Karen Kask-Meinke
Chris Leifeld
Phil Moosbrugger
Commissioner Ken Peterson
John Rajkowski
Lisa Wichterman
Christine Wojdyla

Visitors present

Craig Anderson, MWCIA
Danielle Bird, SFM
Eva Cordes, MCIT
Buzz Cummins, WCRA
Eric Dick, MN Medical Association
James Heer, WCRA
Meg Kasting, SFM
Mary Krinkie, MN Hospital Association
Tammy Lohman, MN Department of Commerce
Kristin Loncorich, MN Hospital Association
Brian Martinson, MN Senate
Micki Mathiesen, SFM
Lisa McLeod-Lofquist, Attorney at Law
Laura Mundt, Mayo Clinic
Trevor Oliver, MN House
Tim O'Malley, OAH
Gerry Parzino, USW
Deb Sundquist, Aafedt, Forde, MDLA WC
Phil Vigliaturo, MN Department of Commerce
Phil Villaume, Attorney at Law

The meeting of the Workers' Compensation Advisory Council (WCAC) was called to order by Commissioner Ken Peterson at 9:22 a.m. Roll was called and a quorum was present.

Elaine Garry moved to approve the agenda as presented. Gary Thaden seconded the motion. All voted in favor and the motion carried.

Thaden moved to approve the minutes for the June 19, 2013 meeting. Robert Ryan seconded the motion. All voted in favor and the motion carried.

Commissioner Peterson pointed out the *Minnesota Workers' Compensation System Report, 2011* in members' packets. He noted claims are down 48 percent since 1997 and the total cost to the system is \$1.28 per \$100 of payroll. That is the second-lowest point DLI has had since 1997. The lowest point was \$1.24 in 2010. There were fewer injuries and a higher percentage of the cases were disputed. The largest growth in costs is due to medical claims, which rose 111 percent from 1997 to 2010, while indemnity benefits rose 40 percent. He encouraged members to look at the report and let him or Deputy Kris Eiden know if they would like the Department of Labor and Industry (DLI) to present an overview at the next meeting.

Buzz Cummins, president of the Workers' Compensation Reinsurance Association (WCRA), was introduced. He announced he is retiring and introduced James Herr as his successor and noted Herr has been the WCRA's actuary for the past six years.

V. Agenda items

a. Rate Oversight Commission duties

i. MWCIA calculation of workers' compensation pure premiums

Commissioner Peterson referred members to a handout in their meeting packets about the WCAC's responsibilities under Minnesota Statutes § 79.55 as the Rate Oversight Commission. He noted the Rate Oversight Commission duties of the WCAC are outlined by this statute and require that it review the pure premium rate provided by the Minnesota Workers' Compensation Insurers' Association (MWCIA). WCAC may send a report to the Department of Commerce commissioner if it finds the MWCIA determination is incomplete or otherwise conflicts with the statute. Craig Anderson was introduced to give an overview of the MWCIA determination.

Anderson noted the Jan. 1, 2013, Minnesota Ratemaking Report contains workers' compensation average indicated pure premium base rates that are derived from insurers' Minnesota-only experience. The report is available on the MWCIA website to members and members can request a hard copy. The full report contains all the rates and the rating values.

Anderson stated the 2014 pure premium rate reflects a decrease of 2.0 percent from the Jan. 1, 2013, base rate level. This change was based on a review of the latest insurance company financial experience, policy-years 2010 and 2011, and calendar accident-years 2011 and 2012. MWCIA looks at paid claims, plus specific case reserves that are associated with those claims.

Anderson noted the base rate level has decreased nine of the past 10 years. The pure premium level is more than 22 percent below its level prior to the start of competitive rating in January 1984. More importantly, the overall pure premium level continues to be fairly stable. The modest changes during the past 10 years amount to about -14.5 percent and that is about a 1.6 percent decrease annually.

Anderson explained medical costs are the major cost driver in Minnesota workers' compensation and represent more than 60 percent of the workers' compensation claim dollars in Minnesota and 65 percent of the case reserves. The average cost of a Minnesota workers' compensation lost-time medical case has increased 85 percent faster than the medical consumer price index (CPI) in the past 20 years, about 7.5 percent a year. Anderson indicated MWCIA expects this rate to slow.

Shar Knutson asked if Anderson sees changes because of people going back to work and because there have been lower employment rates as a result of the recession for the past few years. Anderson responded that one of the things you would expect if there was a recession would be fewer injuries. The National Council on Compensation Insurance has seen those same results on a national level. It is hard to put your finger specifically on what is causing this. Minnesota's drop in frequency has occurred throughout the 1990s and into the early 2000s as well, so it has been fairly consistent.

Garry asked Anderson if MWCIA compares Minnesota to other states. Anderson said it stays away from that intentionally and that those comparisons are done by the Workers Compensation Research Institute (WCRI). It is their job to be a barometer of where these base foundational rates are going. Commissioner Peterson indicated DLI would try to get some comparisons with other states.

ii. Minnesota Department of Commerce actuarial discussion

Phil Vigliaturo, a property casualty actuary at the Minnesota Department of Commerce, was introduced to provide feedback about whether the pure premium base rate report MWCIA provided meets the standard of being not excessive, inadequate or unfairly discriminatory. Vigliaturo stated it was his opinion the MWCIA has met that standard.

Vigliaturo noted the type of data collected, the methodology for setting the overall rate using two policy- and calendar-accident years, and the way MWCIA separates the medical and indemnity losses – which provides a more homogenous subset and, therefore, more stable subset of data on which to base its projections – are standard methods used by most ratemaking bureaus, are credible procedures and are reasonable.

Commissioner Peterson noted WCAC could submit a report to the commissioner of the Department of Commerce regarding the MWCIA report by Dec. 1 if it believed the report was incomplete or the rates were inconsistent with Minnesota law. He asked members to let him know if there are any concerns about the pure premium rates.

b. Old Amish exemption request

Phil Villaume, Lisa McLeod-Lofquist and three members of Amish Community came forward to discuss a request for an exemption from the mandatory workers' compensation coverage.

Villaume stated his firm has represented the Old Order Amish of Minnesota (Amish) since 1988. That began with the landmark decision before the Minnesota Supreme Court, State v. Hershberger, that he said was precedent-setting for religious freedom under the Minnesota Constitution. They are requesting the Amish be exempted from workers'

compensation requirements. He noted they had appeared before WCAC approximately a year-and-a-half ago. At that time, WCAC had numerous concerns, questions and issues about the propriety of the exemption and asked that additional research be done and information provided to WCAC members. Villaume stated they have done that in the document, *Responses to Issues for Religious Exemption Under Minnesota Workers' Compensation Law* contained in the handout provided to members.

Villaume provided background and said there are 30 Amish church districts in Minnesota with an average of 18 families in each district. Of the 18 families, there are approximately 40 workers a church district or 1,200 workers throughout the state. There are approximately 3,000 Amish men, women and children in the state of Minnesota. The central tenet belief of the Amish is they live as a religious group separate and apart from the modern way of life. The primary tenet is the Amish do not rely on government intervention. Villaume stated that what they are asking today is consistent with what is being done in five other states – Kentucky, Missouri, Ohio, Pennsylvania and Wisconsin.

According to Villaume, if an Amish worker were injured on the job, instead of relying on the government and workers' compensation, the Amish would rely on their own resources and their internal system of cooperation to take care of the individual who was hurt. The statistics indicate the rate of injury in the Amish church districts is approximately 1 percent annually or 12 injuries statewide each year. Among the church districts, there is approximately one injury in each district annually. They have a fund set up for past, present and future medical expenses. If the expenses are excessive, the Amish apply to the National Order of the Amish and they supplement any other payments that would be necessary. Villaume introduced three elders of the Amish – Dan Gingrich, Nolan Gingrich and Raymond Yoder – to answer any questions.

Garry noted the employer as well as the employee signs the proposed form for the exemption. She asked what would happen if an Amish individual went to work for a non-Amish employer. Yoder responded that if the employer were not Amish, he would have to provide workers' compensation coverage for the Amish person. Peterson clarified that the exemption they are looking for goes to the employer as opposed to the employee. McLeod-Lofquist noted that would be an extremely rare circumstance; the Amish do not seek outside employment. Further, according to McLeod-Lofquist, the employee would never seek reimbursement.

Thaden noted there is an extremely remote possibility that if you hire an individual who is a sole proprietor to do construction work, that person would be exempt under our law from having workers' compensation. If they were hurt, you could be liable under your homeowner's insurance. The possibility exists that an Amish member could leave the order and collect on your homeowner's insurance. McLeod-Lofquist responded that this would be extremely rare and suggested if there is a concern, language could be built into the statute to provide a waiver of liability for an individual for this situation.

Commissioner Peterson asked if an Amish individual were injured and then left the order, would the Amish provide medical care. The Amish responded they would pay bills for what happened while the person was still with them; after he or she left, no further care would be provided.

McLeod-Lofquist said the circumstance where an individual is injured and then leaves the order would be very rare. She requested WCAC not discount the entire proposal based on that, because she thinks there is a resolution for it.

Susan Olson said it would be unconstitutional to put in a statutory waiver that would cover people who have not been born yet or are not part of the deal. In contract law and anti-trust law, there are federal and state laws saying you cannot, for example, make an agreement not to hire the other person's employee unless that employee is a part of the deal. So you cannot put a statute into place that says we are going to waive the rights of this person who is not a part of this discussion. Olson also noted the documents provided by the Amish state that if somebody leaves the order, those future continuing medical expenses are not covered. It could be a catastrophic injury with lifetime benefits that someone else would have to pick up because the order is not paying for it.

Deputy Commissioner Eiden clarified that the issue is if the injury occurred while the person was part of the sect, but ongoing treatment is required that would create new bills after the person leaves the sect, would the new bills that relate to the old injury be covered? The Amish said they would not pay bills generated after an individual left the sect. Garry asked if that has happened in the five other states where they have that exemption and the Amish replied not that they know of.

Jason George asked about Amish-owned construction companies and whether they bid on any commercial work outside of the community. The Amish responded, "no"; they do not advertise and their jobs come from word of mouth. McLeod-Lofquist said there are a few construction companies and they are in the process of determining whether they want to continue under that legal umbrella because they have been advised they should protect themselves from liability.

Commissioner Peterson asked if they are considering not doing any outside work for nonAmish people. McLeod-Lofquist said that what she is saying is right now is there is at least one group of Amish individuals who have an L.L.C. and they are in the process of determining whether they are going to keep the entity in place. Commissioner Peterson asked if someone asked them to fix a shed, would they do that work for a nonAmish employer. The Amish responded they would.

George asked for an opinion about some language that says if an Amish firm bids on a commercial construction project it would be required to carry workers' compensation insurance because otherwise that is unfair competition when others are required by law to pay those costs. McLeod-Lofquist said they would not be able to bid on a job like that because they would be required to have a construction license and cannot get one without proof of workers' compensation insurance.

Ed Reynoso noted he has expressed concerns in the past and continues to have concerns. He expressed concern about the competitive advantage the Amish have for work outside of the community and that if somebody leaves their sect they no longer have benefits. If the Amish do not cover them anymore, who is going to cover that? He questioned whether the taxpayers in Minnesota will have to pick up that slack.

Reynoso moved to vote to reject the Amish proposal. There was no second to the motion. The motion died for lack of a second.

McLeod-Lofquist addressed the piece about the competitive advantage. She said there is no financial advantage because the Amish pay those injury costs and those costs end up being higher than workers' compensation premiums.

Walter Frederickson said the exorbitant cost of one catastrophic injury would bankrupt the sect. He asked if the sect goes away and starts a new sect or do they encourage this person to leave the sect? He thought the Amish would want to pay workers' compensation to protect their sect against bankruptcy. Yoder responded if you understood everything you would realize as far as trying to persuade the person to leave so they do not have to pay it, that would never happen.

Villaume asked the Amish to give the WCAC examples of the 1 percent injuries they have experienced during the past few years. Yoder responded they had one broken wrist and, last fall, one person got knocked off a ladder and he is back to work again. Villaume asked if there have been any catastrophic injuries and Yoder responded not in their area, but the potential is there. If a person was not able to work for the rest of their life, the sect would take care of him or her and the family.

Rep. Mahoney commented the Amish do great work and they take care of their own. He is "on the fence." He asked what percentage of their work is nonAmish. If you do a million dollars of construction billing, how much, statewide, is work they do for the Amish and how much is nonAmish work? Yoder said that varies from year to year, but roughly it is 40 percent Amish, 60 percent nonAmish. Dan Gingrich said it would be about 15 percent Amish and 85 percent nonAmish for him.

Mahoney noted a decision will be made based on the information provided and asked what the total cost to the Amish Community statewide is for the workers' compensation piece. He understands they pay according to the ability of the workers. If total payroll is \$1 million and it is \$1.28 per \$100 of payroll, that gives us a dollar figure. Then the other piece is, who takes care of the person in the very rare event that someone leaves the order? As he understands it, they typically leave between the ages of 15 and 25, versus 45 to 55.

Yoder responded the Amish have a Social Security exemption. Someone who left would no longer have that exemption and he would have to start paying Social Security and get insurance. He did not think they have a competitive advantage because when they pay their bills, if somebody has a hospital bill it gets brought in front of the church, they say how much the bill is and members can pay how much they want to pay. If they do not get enough together to pay for the bill, six months later they might announce there is so much to pay on this bill and everybody pays free-will again. There is no fund; they pay for bills as they arise.

Rep. Mahoney asked the commissioner whether there are other groups or individuals that are exempted from paying workers' compensation insurance payments in Minnesota or states other than the five states in which the Amish have an exemption. Commissioner Peterson said there are

21 exemptions in Minnesota law, including children working for parents, owners of small businesses where the employees are covered and the family is not covered. None of the exemptions are based on constitutional protections as this would be.

Rep. Mahoney cautioned that an exemption for the Amish must be drafted very narrowly so it does not create a loophole for others. McLeod-Lofquist said they have done significant research about the different exemptions that individuals or groups in other states have sought. There is enough room to fashion a tight exemption based on what other states have done. However, she noted there are states that have not allowed an exemption.

Robert Ryan asked whether in any of the other states that have the exemption in their law, has somebody found a way to draft the law so securely that other groups cannot get in. Russell Hess asked McLeod-Lofquist to explain the dynamics and the background about who would qualify under this for a religious exemption. McLeod-Lofquist responded the proposed language in the application is based on a standard that is applied in the courts as a test to determine whether a sect is a recognized religious sect, with a two- or three-prong test. She asked that if WCAC is going to vote today, if the inclination is to vote against it, that the Amish be allowed to provide additional information and come back to WCAC again because they would prefer that to an outright "no."

Thaden noted the draft says the sect has to have been in existence at all times since 1951, so that shows it has to be a longstanding and continuously existing organization. He indicated he was not convinced the Amish have a competitive advantage in workers' compensation because he has seen some of the hospital bills before they are discounted. He asked whether the Amish have objections to certain types of modern medical practice, such as mechanical ventilators or anything else modernistic, needed for care. Gingrich noted he has a pacemaker. Yoder stated they use a generator or solar power for the power they need, so the person gets the medical care they need. Thaden said his concern is about the actual individual who gets hurt and what happens to them. He noted that in Wisconsin they have to sign a form similar to what the Amish have put together, but there is also the allowance for somebody who has been injured to go to the commissioner and request a hearing. He did not know if that is allowed for somebody we were talking about earlier who would get injured, still need medical care and leaves the community. He questioned whether that person could then request a hearing before the commissioner or the department to continue the care in some way and the provision of the care by the Amish Community. Wisconsin allows for something like that and he thought if Minnesota allows this, they need to provide for that type of situation.

McLeod-Lofquist said they would have an interest in not imposing that burden on the council or the workers' compensation system. Language could be fashioned to provide for a hearing, but she does not necessarily know what the proper forum would be. Because this is a dual application and comes from the employee and the employer, the employee recognizes what rights they are waiving at the time they sign the application. If they later choose to leave, in the same way that we make a decision about what we are going to risk and what we are not going to risk, they say "I am waiving this right and I know what I am doing." McLeod-Lofquist indicated there is probably room for a hearing.

Thaden said he understood the reluctance but he added that sometimes employees do something because an employer asked them to do it. The ability to address issues later under a new situation when they may have felt coerced in the past or under some type of duress should be part of anything they fashion.

Hess asked if there a way to have the concerns of WCAC addressed and for the Amish to come back.

Commissioner Peters noted there are a variety of options. The council could vote it all down now, could vote in favor of the exemption or it could ask the Amish to come back and look at other language that was discussed.

George moved that WCAC, in spirit, approve the exemption subject to the Amish working out language with representatives from DLI and bringing it back to WCAC for final approval. Hess seconded the motion.

Discussion occurred. Thaden said he would rather have DLI staff members work with the community and see if they could fashion some solution in light of what we have talked about without passing a motion to approve. He would vote against the motion.

George withdrew his motion.

Reynoso moved to reject the Amish proposal. Susan Olson seconded the motion.

Discussion occurred. Thaden said he would vote against rejecting the proposal because there is a possibility WCAC could come to some resolution. He recommended department staff members talk to the community to see if they can come to some resolution. He may support a similar motion closer to the beginning of the session, but not right now. Rep. Mahoney also asked that DLI staff members be given time to come up with tighter language for this proposal. He indicated he does not believe this issue is going to go away, so unless the council addresses it and gets it tighter, he is worried about holes in the law.

Garry noted this proposal is important to the Amish Community, so we should take the time to vet the issue. Dawn Soleta concurred and noted it was very challenging for WCAC members to consider the detailed information and make a decision today.

Reynoso withdrew his motion.

Hearing no other motions, Commissioner Peterson stated DLI staff members will work with the community's lawyers, as well as the Amish, and come back to WCAC at the next meeting with proposed language.

David Olson moved to adjourn at 10:56 a.m. Knutson seconded the motion. All voted in favor and the motion carried.

Respectfully submitted,

Debbie Caswell

Debbie Caswell, Executive Secretary