

Workers' Compensation Advisory Council (WCAC) Meeting Minutes
July 28, 2015
Kneip Conference Room 3
700 Governors Drive, Pierre, SD

Members Present: Chairman Matt Michels, Marcia Hultman, Jeff Haase, Connie Halverson, Kory Rawstern, Randy Stainbrook, Thomas Huegel

Members Absent: Guy Bender, Carol Hinderaker

Others Present: Tom Hart, James Marsh, Julie McClelland, Stephen Goetz, Donna Leslie, Larry Deiter, Lynn Job, Chris Rounds, Dan Maguire, Scott Schuetzle, Jill Kruger, Patsy Mehlhaff, Bonnie Ackerman, Dan Nelson, Bob Mercer, Dick Tieszen, AJ Franken, Deb Mortenson, Lindsey Riter-Rapp, Don Schatz, Pat Tollefson, Randy Grisner, Dan Thielsen, Chris Specht, Mike McKnight, Jennifer Andrisen Selzler, Carla Townsend, Spencer Hawley, Jodi Hammeers, Larry Klaahsen, Brad Wilson, David Andersen, Ladene Bartlette, Amy Olson-Miller, Drew Duncan, Dean Nasser, Jolene Nasser, Justin G. Smith, Jeff Shultz

DDN Sites at the following locations: Aberdeen, Rapid City, Sioux Falls

Chairman Matt Michels called the meeting to order at 1:10 p.m., and roll call was taken by Julie McClelland. A quorum was present.

Chairman Michels asked Kory Rawstern to introduce himself as a new council member. Kory informed the council he is the Eastern Representative for the National Brotherhood of Electrical Workers, his office being in Sioux Falls.

Chairman Michels asked for approval of the previous meeting minutes. Thomas Huegel MOVED to approve the December 2, 2014, meeting minutes. Jeff Haase SECONDED.
MOTION CARRIED.

Chairman Michels stated the council would act as a mechanism for legislation suggested in response to the recent Wheeler v. Cinna Bakers LLC Supreme Court decision. Director James Marsh gave an overview of the Wheeler v. Cinna Bakers LLC to the council, along with relevant examples. The ruling declared that if an individual has multiple jobs, those multiple wages are to be aggregated into one sum before compensation rate calculation. Director Marsh then referred to a report the Division had received from the National Council on Compensation Insurance (NCCI) concluding the cost impact due to the Wheeler ruling could not be initially assessed. Director Marsh concluded there were a series of choices available in response to the new changes.

- 1.) Take no action.
- 2.) Take the position the ruling should only be prospectively applied due to the possible negative impacts on insurance companies and employers who may find it difficult to handle retroactively.
- 3.) Codify the ruling and allow it to affect both retrospective and prospective claims.

The council discussed appropriate changes with the new wage and data rulings and cases dealing with workers' compensation. Chairman Michels asked the Department to prepare legislation codifying the Supreme Court ruling.

Director Marsh next presented a report on the state of the workers' compensation system. The four key points of interest included:

- The Workers' Compensation System of South Dakota was functioning well overall and staying competitive with surrounding states.
- House Bill 1105 was passed by the 2015 Legislature adopting a proposal by Representative Hawley concerning independent contractors which the WCAC had supported in 2014. The Division of Insurance (DOI) since then has adopted rules to implement the new law.
- The DOI has also adopted average base rates for the voluntary insurance market which are a decrease of 8.9 percent for the period of July 1, 2015, to June 30, 2016. Assigned risk rates will also be decreased by 8.4 percent. 2015 is the fourth year for voluntary market decreases and the third year for assigned risk. The Director noted that this was primarily due to a steady decrease in catastrophic claims.
- The Division's relationship with the OSHA office been doing increasingly well. OSHA's time for inspections has been reduced from 13 months down to 2 months thanks to the Division's involvement.

Additional cases of relevance were shared by Director Marsh:

- Petrik vs. JJ Concrete: Observed that "horseplay" was more likely if:
 - A.) Active work duties were abandoned during the time of said horseplay.
 - B.) The horseplay was not impulsive.
 - C.) The horseplay was generally/reasonably accepted as common in the workplace. The Division does not intend to draft or introduce anything concerning horseplay in response to this ruling as of yet due to its fact-specific nature.
- Dakota Trailer Audit by United Fire and Casualty: United Fire reclassified some of Dakota Trailer's workers from machine shop employees to welders which Dakota Trailer challenged all the way to the Supreme Court. The Court ruled in favor of Dakota Trailer after reviewing the contract documents and manuals the insurance company and NCCI used. Director Marsh noted that the Division has yet to determine what the impact of this case will be.
- Supreme Court consideration of the Department of Labor's authority on issuing declaratory rulings on legal issues that amount to advisory opinions: The DLR issued a ruling a year ago stating discretionary bonuses were not be included in calculations for earnings. On appeal, the Circuit Court ruled the ruling had to be vacated because it was not a "case in controversy." The Circuit Court ruling has since been appealed, and a final decision is ensuing.

Chairman Michels requested Director Marsh includes the medical data report on the next agenda along with the next report from NCCI.

Mike McKnight gave an update on his program “Kid’s Chance.” Mr. McKnight summarized the history of the program and as well as its newly organized status in South Dakota.

Chairman Michels then moved to open public discussion on the Wheeler case.

Jolene Nasser who represented the Plaintiff in the Wheeler case testified and provided a handout about claimants who are not getting proper wage calculations for the injuries that keep them out of work.

Dean Nasser testified that re-evaluation of retroactive claim applications should to be left up to the claimant to initiate.

Larry Lawson testified new changes might lead to employers creating policy that may prohibit second jobs in an effort to limit the added risk exposure.

Brad Wilson testified it would be safe to assume rates would go up despite not having any measured data as of yet. Costs may “trickle down” to the employee.

Dick Tieszen testified the issues should be treated as both unique and complicated since South Dakota and its workers are not identical to other states. Many of the insured under his self-insured group are teachers who work second jobs in the summer and the new changes are very likely to affect premium costs.

Dan Maguire testified it was a possibility to estimate the rise in premiums. By using a program called “Mod Master” that is able to forecast what the “mod factor,” will be. He described the mod factor as the rating that gets applied to your premium based upon your personal experience in claims.

Carla Townsend reiterated how the new rulings can be assumed to impact only small number of claims.

Director Marsh introduced Sarah Harris as the Division’s new Administrative Law Judge.

Chairman Michels then MOVED to adjourn the meeting. Jeff Haase SECONDED. **Motion carried.**

Meeting adjourned at 2:46 pm.