

Meeting Minutes
WORKERS' COMPENSATION ADVISORY COUNCIL

Missouri River Plaza, Sharpe Conference Room
123 W. Missouri Ave., Pierre, SD
October 9, 2018 1:30 p.m. CDT

Chairman Matt Michels called the meeting to order at 1:39 p.m. CDT, and roll call was taken by Rick Augusztin. A quorum was met.

Members Present: Chairman Matt Michels, Secretary Marcia Hultman, Peter Bullene (DDN-Watertown), Randy Stainbrook, Jean Murphy (Conference Call Line), and Kory Rawstern. Daniel Tribby was excused.

Members Absent: Guy Bender and Russ Hohn

Others Present: Deputy Secretary Tom Hart, James Marsh (Conference Call Line), Carla Townsend (Conference Call Line), Susan Schulte (Conference Call Line), Roggie (Conference Call Line), Leslie (Conference Call Line), Julie Johnson (Conference Call Line), Kristy Lorang (Conference Call Line), Patsy Mehlhaft, Dan Nelson, Mike Shaw, Deb Mortenson, Nathan Sanderson, Ryker Tieszen, Sara Garbe, Sue Simons, Amber Mulder, Jeff Steinberger, James Whitcher, Julie Wingen, and Rick Augusztin.

DDN locations: Aberdeen, Pierre, Rapid City, Sioux Falls and Watertown

Chairman Michels asked for a motion to approve the minutes of the July 26, 2018 meeting. Kory Rawstern moved to approve. Randy Stainbrook seconded. **MOTION CARRIED.**

As requested from the July 26, 2018 Council meeting, Deputy Director Tom Hart provided an update on the constitutional challenge of SDCL 62-3-15(2) and SDCL 62-1-23 currently in Circuit Court. The first challenge on SDCL 62-3-15(2) regarding the Wheeler v. Cinna Baker case has been settled as the constitutional merits were not reached. On the constitutional challenge of SDCL 62-1-23 regarding the AG exemption from Workers' Compensation, the oral arguments on the Summary Judgment have been completed and the Decision is in front of Judge Patricia DeVaney of the 6th circuit court. The Decision has not been reached.

The second request from July's meeting was regarding a constituent request from Sue Simons of Risk Administrative Services (RAS) for discussion on the language of the Lagler v. Menard case. Hart previously provided the Council members with a copy of the Department's summary and proceeded to discuss the report for public input.

The major dispute is whether Lagler was permanently and totally disabled and whether she could receive a lump sum of benefits. According to SDCL 62-4-53, there needs to be expert opinion on whether work search was conducted for permanent total disability to be paid. Hart summarized that Sue Simons provided the Department proposed legislation regarding work search requirements. Hart said that the Department agrees with Simons that such determination does require an expert opinion. Simons brought proposed legislation intends to clarify 62-4-53. Simons also brought other alternatives for discussion.

Chairman Michels added that his understanding of the Supreme Court case was that Lagler's work search did not require an expert opinion, but according to the Supreme Court decision, Lagler's testimony was sufficient.

Chairman Michels introduced Sue Simons with RAS to elaborate on her proposals regarding expert witnesses. She explained permanent total benefits to council members. She also explained what good faith work effort was, the importance of knowing the job market, medical restrictions, and how expert testimony is helpful to hearing officers to making a final determination. Simons stated that the language in the law was what caused the Supreme Court decision and said the easiest way to fix it is to adjust the language. Her solution is to introduce in the proposed legislation to change to following in 62-4-53:

"An employee shall introduce *evidence* of a reasonable, good faith work search effort. . ."

to

"An employee shall introduce *expert opinion evidence* of a reasonable good faith search effort."

This goes parallel to the last sentence of "An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible."

Simons said the Court focused on the terminology of the "expert opinion evidence" that was contained in the last part as to the rehabilitation. She said that changing that language to place it in front of the reasonable job search would solve the problem and it was a simple resolution at that.

Before Chairman Michels turned the meeting over for public input, he stated what the Council's options of adding "expert opinion," make no recommendations, or doing nothing regarding the current language in the state law. Michels did state that he wouldn't recommend the Department to offer the legislation, but depending on the new administration, we would support the change if it came up during the legislative session.

Chairman Michels asked if anyone wished to testify regarding the change in language. Mike Shaw said that he has nothing of substance to add but believed everything had been covered between the Lt. Gov., Deputy Secretary, and RAS. Shaw said his understanding has always been that an expert opinion was needed and the Lagler decision did change his mind. He believes the clarification is needed and he likes Simon's first suggestion by keeping the change simple.

Randy Stainbrook asked what constituted expert opinion. Simons explained that a medical doctor would testify as to the imposed employee's restrictions then someone who is a certified vocational expert would determine what type of job is appropriate. They also look at the employee's background, but the expertise is mostly vocational to help that person know what type of job is appropriate and assist them in a reasonable good faith job search. The medical and vocational testimony together help define jobs better. In conclusion, this assists the hearing officer in determining a reasonable job search.

Chairman Michels did rule that this change is within our jurisdiction because the language is creating confusion and he said we could support or do nothing and wait for it to come up within the legislative process. Secretary Hultman said if the Council had a position on the proposal it should be noted on the record.

Jean Murphy had a question about the lump sum procedure. Michels stated that permanent total lump sums have been given out in the past and it is not uncommon.

Chairman Michels asked the Council members for their views. Michels offered a vote that Council legislation introduced in support of the addition of the two words in 62-4-53. Michels answered the question of whether this would affect the Lagler case. He stated that it would affect future cases.

Chairman Michels made a motion to support the clarification of the language change. Bullene, Murphy, and Michels voted aye. Rawstern and Stainbrook voted nay. Chairman Michels determined that since the Council did not have unanimous support that no action should be taken by the Council.

Susan Schulte, the National Council on Compensation Insurance (NCCI) Department of Labor Relations Executive, presented the September 2018 NCCI Medical Data Report for South Dakota. Schulte brought to everyone's attention that the regions and zones for South Dakota were modified, a change from the 2017 format of the data report. She mentioned that some charts were added as well as some changed from a pie chart to a tree map format.

NCCI staff member, Raji continued the presentation explaining individual data and charts to Council members regarding hospital in-patient/out-patient and surgical center costs. Schulte continued by explaining the workers compensation drug charts with Raji explaining the top body systems and diagnosis groups by date paid charts. These are new charts introduced in the data report for 2018. Schulte finished explaining the remainder of the report as being a comparison of the last five years.

Schulte then directed Council members to the September 2018 Medical Data Report Opioid Utilization Supplement report for the State of South Dakota. Schulte explained the charts extensively and then after no questions from the Council, she turned the floor over to Roggie to explain how she compiled her data for the oxycodone comparison in the charts.

The 2018 Workers' Compensation Draft Report was presented by Deputy Secretary Hart. Chairman Michels asked that the Lagler discussion be added to the report and took constitutional challenge (62-4-53) on the language under advisement. Randy Stainbrook moved to approve. Kory Rawstern seconded. **MOTION CARRIED.**

Chairman Michels entertained a motion to adjourn. Kory Rawstern moved to approve. Randy Stainbrook seconded. **MOTION CARRIED.**

Chairman Michels called the meeting adjourned at 3:38 p.m.