

Minutes
Labor-Management Advisory Council
October 28, 2009
10:00 a.m., Great Northern Hotel, Helena

Advisory Council members present: Lt. Governor John Bohlinger, Bill Dahlgren, Annette Hoffman, Don Judge, Jason Miller, Bob Worthington, Riley Johnson, Danny Lee, Jerry Keck

Others present: Marv Jorday, MCCF; Connie Ferriter, Karen Wiles, Teresa Graham, Anni Druce, Employment Relations Division; George Kochman, WorkSafeMT; Rick Clark, Plum Creek; Rhonda Morgan, Corvel; Larry Jones, Liberty Northwest; Patricia Bik, DOLI/Legal; Pat Murdo, Legislative Services Division; Dwight Easton, Famers Insurance; Andy Adamek, BKBH; Mari Kindberg, State Auditor's Office; Nancy Butler, Kevin, Braun, Montana State Fund; Mike Sadowski, Ravalli Services; Al Smith, MTLA; Erin Maclean, Montana Medical Association; Karen Harrison, Fran Sadowski, MDSC; Lance Zanto, Department of Administration

I. Welcoming & Opening Remarks

Lt. Governor John Bohlinger opened the meeting by thanking those in attendance for coming. He had members of the advisory council and the audience introduce themselves.

II. Overview of Workers' Compensation Research Activities

Ann Clayton, Consultant for the Employment Relations Division, gave a PowerPoint update on the work she has done thus far. She stated she has been interviewing stakeholders and is about 2/3 complete with the ones on her list. If members of the Council feel there are others she needs to talk with she asked them to let her know. She shared her hypothesis that Montana's premium rates are 1 to 3 percent higher than other states because of the lack of ability to do any subrogation on workers' compensation claims here.

Ann reviewed a slide that showed the percentage medical benefits are of the total workers' compensation benefits. Montana's ranking was 4th after one year at 57.6% and 2nd after 5 years at 72.5% when ranked against the comparator states. Lt. Governor John Bohlinger asked about the lower cost of health care in Washington. He asked if providers really work for less money there. Ann explained that Washington has a challenge with long term disability cases. Washington pays longer indemnity benefits than other states. This makes the percentage of medical to indemnity look lower. She will be able to tell more as she gathers additional data. Bill asked if the numbers included reserves. Ann explained that the NCCI data includes what they expect will be paid over the life of the claim and NASI only includes what has been paid.

Ann reviewed the information she has gathered on states using medical panels. Only 2 states currently use panels, North Carolina (agency staff) and Texas. She said that the quality of decisions was good, but the downside is it takes a long time and bifurcates the decision. She recommends waiting until you have some experience before considering changes as mediation is a healthy process. Danny inquired if the panels were in lieu of a workers' compensation judge. Ann explained this process was prior to going before the workers' compensation judge.

Jerry explained that under the current process, you file for mediation, then to the workers' compensation court. The Medical Provider Group's concerns are that they are not comfortable with legal proceedings rather than a medical process. An alternative might be to have a medical director who tries to resolve beforehand. Ann replied that other state do use trained staff to try to get resolution.

III. Follow-up Discussion Process

Jason explained that he had been giving some thought to how the Council might proceed with making decisions on the issues being brought forward. He said the Council needs a range of tools to utilize in decision making. He proposed tentative agreements on issues rather than a consensus position on each issue. Then at the end you would address all issues as a whole. Don commented that he saw this as similar to the way Al Smith approached Riley about a compromise. For example, if Labor agreed to U&T then Labor needs to get a compromise on attorney fees. This would be a way to avoid deadlock on items. He questioned whether the operating procedures require 3 votes from each side. Jerry agreed

that without a process to give and take there could be deadlock. If management was unwilling to give, would need to wait until the end to see if tradeoffs can be made.

Lt. Governor Bohlinger stated that it would be unfortunate if we lock up on an issue. We need to seek common ground. Jason said if we have 10 sub-issues and we may agree on 7 of the 10, we need a way to catalog the others. He has a growing understanding that we will need a package decision. Don inquired that if under the current process the information is provided and then a decision is made, do we need to change the operating agreement to allow us to reconsider decisions made. He said his concern is that we make a motion that passes and later a vote to reconsider is needed, it may not happen. We need some guaranty that we will have the opportunity to reconsider.

Jerry said that a decision was not needed today. At the January meeting is the first time a decision is called for. He proposed working with the Co-chairs and Judy Bovington to come up with a proposal for how these decisions could be addressed. Anne summarized the discussion: an agreement to compromise is needed until you can look at all issues together; break the issues into smaller parts if possible, agree on a tentative agreement process and bring a proposal back to the next meeting.

Jason suggested that the chairman be able to declare a tentative agreement without a vote. Lt. Governor Bohlinger declared a tentative agreement.

IV. Presumptive Illness

Jerry Keck said that a presentation was made at the last meeting, and inquired if there was any follow-up. A decision is not needed until January. Bob said that there were questions that have not been responded to yet from Doug Neil. He remains concerned that it is important to look at the issue in a general context as it is a legal and constitutional issue and the courts may expand the presumption. Don suggested that since we are still awaiting additional information that the discussion be postponed until the information is received. Jerry reported that Mike Taylor suggested the Council look at the history of this process in Oregon. Last session a bill there narrowed the presumption. The overall affect was a 3% premium hike for employers of firefighters.

V. WorkSafeMT Status Report

Carl Kochman provided an update on the WorkSafeMT activities. The launch video was previewed in Missoula at the WorkSafeMT conference. He received nothing but positive comments. On November 1st, a 2 minute versions of the video will be shown on all newscasts. They are planning a Safety Fest for March. The website is now up and constantly being updated. A direct mail announcement will go out to everyone tomorrow about the video. In November and December there will be follow-up messages sent about the pledges. They have developed a print and radio campaign called "Good Morning". The ads are based on the premise that you don't wake up in the morning saying I'm going to lose a couple of fingers today. He played a couple of the radio ads as examples. November will be "Work Safe Commitment Month. The week of December 7th an email will focus on the SIMMS success story. He urged the Council to take some time to look at the website. A speakers' bureau has been put together and a presentation and script are being developed so that the audience hears the same message for consistency and branding purposes. Letters to the editor templates are being worked on. A press kit has also been developed. A survey firm from Washington DC has been contracted with to survey white and blue collar workers. Preliminary results show that there are barriers to awareness such as: accidents will always happen; spending money on this issue is a waste; my place of business is already safe; fraud is the real issue; and anti-government sentiment where any emphasis will only lead to more government. In his travels Carl has become aware that there is a total lack of awareness of the need for safety. There is a lack of understanding about the need for safety and about the need for workers' compensation insurance. Fundraising letters went out to 14 large companies, asking them to watch the video and raising the funding request. After November 1st he will follow-up with phone calls and personal visits.

Don asked if the phone surveys were live callers. Yes, live out of Michigan. They have 800 individuals targeted. Don asked if the high schools and colleges have been encouraged to use the WorkSafeMT materials. Carl responded that they are moving slowly on that. Marilyn Ryan is a teacher and is working to get the information in front of the MEA and teacher conventions. The Independent Insurance agents are already interested in becoming involved in getting this message into the schools. Lt. Governor Bohlinger said the problem can be solved by meeting with the MT School Boards Association. He will get the names of the Board members to Carl.

Jerry asked if they were using the AFL/CIO mailing list. Danny said he will check with Jim McGarvey. Riley is checking with his board about the use of their email list. Carl said they can work it so the organization themselves send the email.

Lt. Governor Bohlinger applauded the group's creative efforts, saying they are doing a wonderful job. He asked how much money will be raised. Carl responded that 2.5 million dollars is possible. Lt. Governor Bohlinger said when they hear the story you are telling, it will be easier to sell. Carl agreed that they were waiting for this moment and they want to make it so companies want to contribute, not feel they have to.

VI. Economic Affairs Interim Committee

Pat Murdo, staff for the Economic Affairs Interim Committee, reported on the status of the committee's work. The Committee will be doing a MetNet meeting with Billings on November 17th. Annette will be moderating 2 panels including a Return to Work and Safety and Fraud panels. A medical provider panel will be talking about their concerns as well. Senator Keene had asked about the percentage of Plan I payroll to claims and also do they have better safety and health insurance that leads to lower percentages. She met with a stakeholders group comprised of insure representatives and determined that none of the data collected is useful for answering Sen. Keane's questions. Ann Clayton will be giving a presentation on fraud at the 11/17 meeting. There is still a perception that fraud is a problem. The committee is struggling with do we change policy when things are off and running. For example, do we change the Safety Culture Act to add more teeth?

Bob commented on the ad hoc group of insurers that met saying it was unfortunate it was not a broader base. The group was looking at establishing common data points. Bob will address the EAIC to ask them to be very careful with analyzing the data.

Lt. Governor Bohlinger asked if the committee understands the LMAC work and role and asked if it would be helpful for committee members to come to LMAC. Pat responded that they do and are appreciative of it. Some members want to proceed in parallel; others want to wait until you are done. She said it will take the committee more meetings than were originally scheduled and she is concerned that they won't have anything finalized until July. She said she will try to schedule EAIC meeting closer to the LMAC meetings so member can attend. Jason asked if we can be sure all LMAC members are on the interested party list. Pat suggests that the members sign up themselves and she will forward the link to Anne.

VII. Attorney Fees Panel Discussion

Jerry explained that every session there is a bill brought forward to get attorney fees for claimants. He introduced the panel members, Al Smith, Montana Trial Lawyers, who spoke as the proponent and Kevin Braun, Montana State Fund who spoke as the opponent.

Al Smith gave a brief history of the issue including an explanation of the Lockhart case and the resulting Lockhart liens. When an attorney is successful in obtaining benefits for an injured worker the attorney is entitled to a lien for those efforts. This lien is included on medical benefits, so if it is a \$100 medical bill the provider gets \$80 and the attorney gets \$20. During the 2001 session and every session since, the proposal has been made that medical bills paid through the efforts of an attorney, the insurer should pay the attorney, not the medical provider. He said as a general rule the claimant attorney's do not pursue payment from the individual providers, but do the hospitals and clinics.

Kevin Braun said that in 1987 the system was in crisis due to unfunded liability. As part of the reform, the legislature removed attorney fee payments by the carriers if the claimant prevailed. It went back to the American rule where each side pays its own attorney costs. Section 39-71-105 states the public policy that the system is designed to be self-administering to minimize the reliance on attorneys. You would be incentivizing attorney involvement by providing for attorney fees. If you are worried about claimant or unreasonable action the claimant can get awards from the WC Court for "unreasonable conduct". The rate in these cases is capped at \$100 per hour. He stated that Lockhart is not unprecedented in the legal system.

Riley asked if every claim has a health component. Kevin responded in order to process the claim there is always a medical charge. Don asked Al if the legislative proposal provided for payment if the court made a decision that the insurer made settlement within 30 days of the hearing in Workers' Compensation Court. Al responded that they have looked at a grace period for the insurer to resolve the cases before becoming subject to the penalty. Don asked Kevin if there was an incentive to deny legitimate payments if there is no provision for attorney payment. Kevin responded that if an insurer did that they would be setting themselves up for a bad faith claim.

Riley asked if there are any statistics on what happened after 1987. Kevin responded that the Department used to publish list of attorney fees, but that would be misleading. Diana said no data is available prior to 1987 for comparison. Current data base information is from 1995 forward and fees are not separated by medical benefits.

Riley asked about unreasonably denied benefit numbers. Kevin said at the Fund in the last 4 ½ years there has been 2. Don asked what it takes to prove unreasonable denial. Al replied it is almost impossible. If 5 witnesses saw an accident and said it was work related and 1 says it was not, it is reasonable to deny. Kevin added that of 30 cases before the Court, 15 were won by each side and 3 fees were awarded. In a second year the claimant prevailed on 13 of 18 cases and 2 penalties were assessed. (2007 and 2009 data). A reasonable person standard is all that is required.

Jason asked if the Department can find stats for those claimants that go to mediation without an attorney and then how many get an attorney before going to WC Court. Diana said she would gather this information. Al said that generally, represented claimants get 40 to 50% more in auto and other cases. Kevin responded that the vast majority of cases get settled at the mediation phase. Don stated that the provider is not getting compensated for the work being done. Kevin replied that as Al said, some attorneys are reluctant to take the fee from the provider; others have no problem doing that.

Al commented that most of the time the system works the way it is supposed to, mediation is still there and a small number of cases go forward after that to the WC Court. He is not talking about going to the pre 1987 provision. Danny asked if the fee changes after mediation. Al explained you get 25% if the case goes to the WC Court.

Riley asked if in the course of bills from 1999 forward was there an estimate of the cost of the bills proposed. Kevin said he did not have that cost on hand, but in Florida the attorney fee cap was removed and costs increased 6.8%. He did not know if NCCI priced the bills, saying it would be difficult to do so. Al stated there is a cost driver but it is the amount paid to hospitals and doctors not the attorney fees. Kevin responded that the fee is not relegated to a % of the medical bill. It will go to an hourly fee if this bill passed.

Don asked if in the cases where the insurer lost, does the insurer give the employer his money back. Kevin responded no, the costs will increase because additional cases will result. Bob added that this would be a cost of doing business and the cost charged back to the employer. Kevin added in cases where the claimant represents self, these are cases where the claimant has a bad case.

Bob asked Al if awards go to an hourly fee from a % and the issue is a disputed claim versus a disputed medical, does the bill provide for this. Al responded the % or hourly basis is in statute. If the attorney is putting in an enormous amount of time, the % doesn't make sense. He has not looked at the compensability of the claim. It could be covered under the bill, but only on the medical benefits part.

Riley asked Kevin, if this goes forward would you have more involvement of attorneys and less denials as a result. Kevin replied there would be a greater incentive to dispose of claims regardless of merits.

Don commented that there is always a fear of more litigation. We lose sight of the limited nature of these that go to court and the number of cases resolved. The providers are the losers getting 80% of their fee. How do we resolve and keep them in the system. Kevin replied that when you provide financial incentive, it will push more cases toward litigation rather than resolution. The fee schedule pays hospital 165% of Medicare, where is the disincentive?

Riley proposed as a compromise, if you were to drop the per hour charge and get paid 20% of the claim. Al responded that this would mean a diminished return. A \$600 medical bill and you spend hours. Remember the only reason this is an issue is because the insurer denied benefits and the claimant is getting the benefits entitled to through litigation. The insurer could always offer settlement. Attorneys are small business people and they can only do so much pro-bono work.

If the insurers would do a better job this would not be an issue. Riley asked if attorneys are really taking \$600 cases. Al said he saw one for \$192 and the attorney was handling the case because he was standing on principal.

Riley asked what other states have this requirement. Jerry said he is not sure if any other states have a Lockhart lien equivalent. Ann said the surveys contain some questions on this and we will have results later.

VIII. Workers' Compensation Insurance Regulation Overview

Ann Clayton provided a PowerPoint presentation on insurance regulation alternatives. She reported that rate approval requirements vary across the nation from "prior approval is needed" to "no approval is required". For the State Fund, regulatory review over rate setting is "no approval is required". The only regulation is by the State Legislative Auditor's Office. Rate variation deviations of up to 200% either way are allowed for the State Fund. She explained the rate setting for individual companies and the variance that can occur. Bob added that there is a bill pending before the US Congress to look at national regulation.

IX. Utilization and Treatment Guidelines.

Keith Messmer reported that the third meeting of the Utilization and Treatment Guideline Medical Provider Group was held on October 21st. A representative from the Work Loss Data Institute provided an overview of the Official Disability Guidelines and then reviewed the 7 injury scenarios that were provided by the Medical Providers Group. Five states have adopted the ODG's thus far including Texas, Ohio, California (for pain only), Kansas and North Dakota. North Dakota adopted in May of 2005 and found that their premiums already the lowest in the nation dropped another 40%. Texas said that the number of disputes declined by 44%. And 67% of injured workers reported no problem getting the needed care compared to 61% previously. The average medical cost per claim declined 26.2%. Return to work improvements were also seen. At the meeting in November, Dr. Lee Glass from Washington will comment on their guidelines.

X. Claims Examiner Certification and Continuing Education

Diana reported that the administrative rule became effective October 30th. An email will be sent to everyone on the interested party list with the comments received to the original rule draft and the Department's responses and changes explained. Seven applications have been received already with 2 requesting grandfathering. A 60 question test has been developed. Riley asked if an insurance company is doing their own training can they apply for continuing education credits. Diana said they may apply and gave the example of the State Fund's upcoming Medical Conference in November.

XI. Public Comment

The Lt. Governor asked for public comment. None was received.

XII. Next Steps

Anne reviewed the next steps. A meeting with the Vice-Chairs and ERD will frame up procedures for a follow-up discussion process. She will contact Doug Neil to make sure he provides the additional information promised for the presumptive illness discussion. History of the presumptive illness issue from Oregon will be obtained. An attempt to gather the cost of the presumptive illness proposal will be made. Anne will send a link for the interested party list of the EAIC to members. Stats on the number of mediation cases without attorneys will be gathered. The next meeting of the LMAC will take place on Thursday November 19th.

After some discussion it was determined a meeting will be scheduled for December. Bill asked if some numbers could be gathered on the attorney fee issue. The number of cases and the costs involved if possible. He would also like to see a flow chart on the way these cases go forward. Where are the cost incentives to compromise? Don responded that it is the mediator's job to get compromise. If the carrier says we are paying it, the case is done; there is nothing for the attorney to do at that point.