

**HM83 Task Force
In Person Meeting
June 20, 2023; 11:30 – 1:00**

Attendance:

Michael Holt, WCA General Counsel

Diana Sandoval-Tapia, WCA PIO

Rinda Dewhirst, WCA GC Paralegal

Pamelya Herndon, Representative

Victoria Bratton - Injured Worker

Marsha Schmidt - Injured Worker

Chris Elmore - E/I Attorney

Megan Kuhlman - E/I Attorney

Kathryn Lueker-Eaton – Workers’ Attorney

Ben Sherman – Workers’ Attorney

Johnna Padilla – Employer (SPO)

Matt Sanchez – Employer (Jaynes Corp.)

Dan Giralmo – Insurer (NM Mutual Casualty)

Randy Akin - SI Group (Builders Trust of NM)

Jeffrey Steele - Ironworkers Local 495

Greg Montoya - IAFF Local 244

(Highlighted names did not attend)

Non-Task Force Members

Tyler Weiss (intern) – Economic Bureau

Ruili Yan – Economic Bureau

Charles Cordova – Economic Bureau

Michael Holt – WCA General Counsel and Director’s Designee

Michael Holt – He is the WCA General Counsel and the Director’s Designee of this task force. He has no idea where this task force is going, nor should he. His goal of the task force is to ascertain the will of the task force and, at some point, create a report by April 2024 and submit the report to the advisory council members. From there, it becomes political, goes through legislation.

Introductions...

Michael Holt – The economic bureau is helping to provide underlying data that might be important to the task force. They are helping decide what to collect and, if it ever comes in a useable format, to analyze and present it in a way that everyone understands (ex. Pie chart or graph) instead of raw data.

When the Bob Scott bill was introduced, the economic bureau looked at the bill and did an inflationary analysis, which is part of today’s handout. It is important information to transmit to the task force at the beginning of these meetings.

Charles Cordova – The primary purpose of putting the handout together was to analyze if an inflationary analysis was performed, what would the fee cap become? When the original legislation was being proposed, the discussion as to why a bill was introduced included the significant amount of inflation that has transpired since 2013. We have cap numbers in our statute that do not adjust to inflation, and it was proposed that it was unfair because the cap was functionally lower (due to inflation) than when it was put in place. The inflation analysis included a few categories of analysis: 1) discovery advance 2) attorney fee caps & 3) bad faith. Bad faith could not be analyzed because there were substantive changes and an inflationary analysis would not work very well.

Michael Holt – The plan moving forward is to collect data from different companies but also do a data collection in house at the WCA based on claims data reported to the WCA. However, the in-house data is only as reliable as what has been reported to the WCA – that is one limitation. The second limitation is: can we do an effective query that pulls responsive data. Lastly, even if we can obtain responsive data in house, is it statistically meaningful in terms of providing a basis to raise or lower the fee cap or discovery advance dollar figure?

Turning to paragraph 1 on the agenda, there is a statute that authorizes our director to do a data call. We normally rely on our WCA economic bureau to do a data call on workers' comp carriers. We have the authority if it is the will of the task force to send out such a request.

Paragraph 2 of the agenda: since the last meeting, I have been working with the economic bureau to figure out what data we have in house. A data call on an industry is burdensome, and the WCA will only ask for data that we absolutely need. Dan (NM Mutual) and Randy (Builder's Trust) wanted input to the data call in order to help the WCA formulate it.

Paragraph 2A of the agenda: in the Bob Scott bill, not only did the bill seek to raise the fee cap from \$22,500 to \$32,500, there was an "escape hatch" for an additional \$10,000 for a "serious case," but there was also language about appeals. In other words, there would be more fees available to lawyers if there was an appeal from a compensation order.

At some point, the task force has to write a report. I want to be able to show the math behind the task force's recommendations. My hope between now and our August meeting is to do transmit to the larger NM insurers a data call of some sort; receive the data and review our WCA in-house data; compile it; and then present it at our next meeting in August. It remains to be seen whether the data received will be economically relevant or statistically significant as to the attorney's fee and discovery cost advance issues.

One of the issues from the Bob Scott bill while we were discussing it, is this concept of access to justice. Regarding Paragraph 2B of the agenda, if a worker's attorney has a complex case, some of the worker's attorneys have suggested they would not take a case because they were going to lose money. The WCA was able to look at certain in-house data such as the total number of complaints filed per calendar year, but also, I believe we can ascertain the number of pro se filings. The hope is to do a trend analysis or a pie chart. Agenda items 2A & 2B are items that the WCA can do in-house.

Paragraph 2C of the agenda: this is where potential data becomes problematic. Just because there is a compensation order does not mean the case is over. There could be medical rights or other issues that come up after a compensation order is entered. The WCA assigns a suffix when a new filing for the same accident date. Thus, in theory, the WCA can determine from an in-house query, of all the cases that get filed, how many have an additional suffix, which suggests supplemental litigation of some sort.

Paragraph 2D of the agenda: in the Bob Scott bill, the bill raised the fee cap to \$32,500 but in addition, it could be raised an additional \$10,000 for a "serious injury." Per the bill, the judges would have discretion to make a supplemental award of attorney fees where there is a "serious injury." However, how do you define a serious injury? Is a \$50,000 medical bill case half as significant as a \$100,000 medical bill case? If we use the length of time a case is open – is this a proper measure for a serious injury? What about the amount of TTD or TPD paid? This is problematic because, assuming the same injury occurs, some employers accommodate restrictions, whereas other employers do not.

Chris Elmore – He wonders how important that is because if you have a death case it usually straight forward. The only issue might be the legal question of whether the worker was within the course of scope.

Michael Holt – The WCA can track in-house the number of death cases - they are in our annual report. I believe the WCA can track permanent total disability cases. These are potentially two categories of "serious cases." Another idea: NM allows a worker to obtain up to 700 weeks of benefits, which in theory is a worse case than a 500-week case. The trigger is a disability rating greater than 80%. The issue is can we track this through relevant data? Would this data help identify what is and is not a "serious case"? Beyond a death, PTD or 700 week case, how do we quantify through economic data what is or is not a "serious case"? Can a data call be done, and what will the data show to illuminate what is or is not a "serious case."

Ben Sherman – He agrees with Chris, severity of injury does not always mean severity of a case for litigation. You can have a guy that has 4-5 injuries with scheduled injuries/complex medical that is more complex than a serious back

injury. He does not know if attorney fees should be based on the severity of the injury.

Dan Giralmo – That is part of the reason why the bill failed; how does a judge interpret “serious case” language like that?

Kathryn Lueker-Eaton – The severity of cases she recalls, one case that may have been an exception to the rule. The injuries were severe; the woman was lucky to be alive. It was a bad car accident; her neck was broken. She was going to need medical care for the rest of her life. The case was appealed. It settled on appeal for \$750,000, she would have liked to get more money on that case.

Megan Kuhlman – When we are talking about this date mining, she thinks we should not compare severity of injury on appeal because some appeals are a discrete issue on an ankle sprain. I think what we are talking about is the complexity of litigation instead of severity of injury. She doesn’t know if there would be any data on that.

Kathryn Lueker-Eaton – Maybe we could categorize further the data from a suffix analysis regarding subsequent litigation - maybe a legal intern can cross reference to court of appeal cases.

Megan Kuhlman – The cases that she works on are mostly within the fine line between the question of 500 to 700 weeks. She thinks that would be relevant and the suffix, but sometimes that doesn’t come back for many years later.

Michael Holt – The hopeful take away from this meeting is to collect the internal WCA data the best we can and do a data call. The goal is to have the data back from the data call for our August meeting. I want to be able to send out the data to task force members before the August meeting. Some of the data will be good data, some will be irrelevant. My “ask” window/snapshot is 2013-2022. Part of this period is “covid years” and we do not know how good those years are. The last fee cap was in 2013, so it makes sense to use this date and go forward. Also, the WCA really does not have adequate in-house resources to do individual case file reviews. I am not foreclosing it, but it might be difficult.

Paragraph 3A of the agenda - discovery advance of \$3,000: This is one category that we might have to do a data call. The WCA has no in-house data on this data point. In a litigated case, what is the average amount of the employer advance? Even if we can obtain this data externally, is it meaningful?

Dan Giralmo – The problem is you are going to get jumbled data and it is all going to say “legal expense,” no other details (for ex: they have a case for \$30,000 in expenses but it’s all for Guardian Ad Litem paid by the defense side, so it has nothing to do with what we are talking about here today – that could throw the data off).

Randy Akin – He agrees, categorically it is all the same. You are going to get a bunch of data and you can look at it all day long and you do not know what it is.

Michael Holt – Paragraph 5 of the agenda: I have not talked to a representative of NCCI (she was on vacation). NCCI is a clearinghouse of data. I am not sure what data they have that is useful to the task force.

It may be that the task force report describes that there just is not any useful data that can be ascertained on a certain subject. Yet, the task force report should recite what data was sought but could not be obtained. I want to be able to show the task force did its homework, but the task force reached a dead end.

Chris Elmore – Have you had any cases that someone had to pay out of pocket, if so, how rare is that?

Kathryn Lueker-Eaton – It has come up every once in a while, not frequently.

Randy Akin – In their computer system you cannot tell what a discovery fee is and what it is not. He has a manager that knows how many times they have hit the cap - whether it is discovery fee or attorney fees. His team has been in the business for over 20 years. There are a handful of times when a case has reached the cap. He does not think there are any cases with discovery fee cap, no data that shows that. There might be one or two cases.

Dan Giralmo – He did a dive into some of their data: they have 59 depositions a year. The average cost was less than \$600 a deposition, and about \$930/claim on average (just doctor depositions).

Michael Holt – He does not know where this task force is going and does not know what the data is going to show but it would be nice to write something on this report about carriers' experience. The statistical data may indeed demonstrate there that there is no data to justify a raise to the employer discovery advance because it never is exceeded. The purpose of bringing this up today is because the WCA has nothing in-house, and I am not sure how to formulate to get relevant data.

Dan Giralmo – He is willing to share his data with the task force. Inflation has no impact on legal expenses.

Michael Holt – That is a good point, doctors have not gotten a pay raise either.

Matt Sanchez – Would the task force be able to rely on if there is not a mass statistical gathering? Would we be able to use anecdotal information instead or is that getting into dangerous territory?

Michael Holt – If he limited it to people on the task force that would be one way to control it, those of us who are lawyers all have stories. He was trying to look at raw data as best he could to see what story it told if anything.

Megan Kuhlman – Even if we do not produce or discover data, maybe we can make a recommendation to just provide a mechanism for getting additional discovery funds when necessary. She does not want to limit the opportunity if it does become necessary.

Ben Sherman – He agrees if those expenses are not being paid anyway, increasing the cost will not have an effect on what is being paid out. It is possible that doctor fees may increase in the future.

Randy Akin – There is no cap on discovery; this is about the advancement from the employer to pay for discovery. Those few times that it does go over \$3,000, it does not mean it is not an illegitimate cost to get to the verdict/judgment that you want and probably there is going to be a big dollar amount to that. We cannot even come up with the data that is saying we are approaching it today, why are we going down that path where there is no cap, it can be paid. It should be justified based on the outcome of where it is going to go; there is going to be money if that is the case. That is his non-claim logical mind, he may be wrong.

Michael Holt – There is data and then there is policy. He was trying to arm the task force with data. He is liking where this is going because people are starting to think of the end product. I am not trying to get the data aspects of this thing hammered out in this meeting. You all are starting to see the problems we have.

Ben Sherman – When it comes to finding data on attorney fees, I know the WCA says it has sufficient data on plaintiff attorney fees which are usually contained in a compensation order. Could someone from WCA go through the compensation orders?

Michael Holt – That's in 3B of the agenda, we have looked at it before and the economic bureau tells me that they are concerned about the data is only as reliable as what has been reported to the WCA (it might be unreliable).

Kathryn Lueker-Eaton – For worker's attorneys, we have to have our fees approved by a judge. It would be reliable for the worker's side because we can't get paid without approval, it should be in the data. The only thing that wouldn't be in the data is how defense attorneys get paid. Many of her cases settle for more than \$112,500.

Ben Sherman – That is what he was trying to say: the comp orders should have workers' attorney fees.

Michael Holt – We will talk about it in-house. We are relying on what people report to us. When we get NM Mutual data, at least we know it is clean. There was one example that there was a \$40,000 fee - when WCA pulled the order it was a mistake. These types of mistakes cause the WCA some concerns. I plan to do a data call for the workers' side and employers' side from 2013-2022 and bring this to the task force -see where it takes us in August.

Kathryn Lueker-Eaton – She is confirming if we are only relying on data from employer insurer - you're not going to look internally ex. Lump sum petitions or comp orders?

Michael Holt – We can talk about it in August meeting, he doesn't know how many compensation orders there are a year or orders where there are fees. If we get the data call information with workers name and case number, we would be able to compare apples to apples. It's difficult to find people to that deep data search, but he's not foreclosing it.

Charles Cordova – It would be difficult to try to use the comp order as the source of attorney fees because there's thousands of cases; they would have to go through, and they are not organized in a format where they have the data available. They would have to go through PDFs to find what the award was and then there are cases with amended orders which could change the amounts as well as a wide variety of situations. He is not saying they could never do this, but it would a significant amount of work.

Kathryn Lueker-Eaton – Maybe what comes out of this task force is the WCA can better categorize pleadings so there can be a search done.

Randy Akin – The problem with that is NM is a small market. Bigger markets like CA and NY-they do not track them either.

Matt Sanchez – That is a valid point from what he sees from systems and software that they implement. In a way, general contractors are builders, but they are managers in data, too. That is the way their industry is turning. That resonates with him because it is a huge expense. Could there be a middle ground? Could there be a way that data call happens and, on the administrative side, could you do a statistically significant sampling -it doesn't mean to go through all the pleadings from the last 10 years.

Randy Akin – You look at NCCI, they don't care they are going to look at what cost are. Until nationally it becomes an issue, we cannot drive it here in NM.

Michael Holt – The data call would be over 10 years. My hope is that the statistical data kinks in the system would be worked out if you have 10 years' worth of data.

Dan Giralmo – It is easier to track attorney fees because you normally only pay it once, right?

Michael Holt – We have cooperative relationships with CCMSI, NM Mutual and Builders Trust. He is not saying we'll go beyond those three companies, but if we get to the 75% data accumulation level from those three companies, that would be a good initial call for the task force. Once that comes in then we can decide if we want to go beyond that.

Charles Cordova – We have talked about different ways of who to send this to. One way to do is to look at the top filers by year and then looking at it based on AM group. We can also look at our annual expenditure report and look at the top 10 companies by number of claims or by total amount paid. If we went beyond our three existing relationships, it would be quite a bit more work and it would not get us more data.

Ben Sherman – That all makes sense, we are trying to get data at this point. We can do random sampling.

Kathryn Lueker-Eaton – Dan, let me ask you this question, will the data have the case name/caption?

Dan Giralmo – It will have their claim number which means nothing to the WCA.

Michael Holt – When it comes to the WCA, the data becomes confidential so if anyone IPRA's it, we would redact the names. Question to Dan: is the indemnity tracked separately?

Dan Giralmo – Yes, it is. There's a code for a lump sum.

Kathryn Lueker-Eaton – She would not want to overly burden the carriers as well. Maybe another option would be to do a sampling on attorneys who currently practice within the WCA who have filed in the last 5-10 years and ask them to produce their records that hit \$22,500.

Michael Holt – It is a great idea. We would have to create some type of questionnaire. That is a great addition rather than just data.

Jeffrey Steele – Could you get some of this data from the court system?

Michael Holt – Yes, we have E-1 and E-6 to verify data but we cannot rely on it exclusively because we have concerns of reliability.

Randy Akin – It will be hard to get the data for defense attorneys, due to their system.

Kathryn Lueker-Eaton – It will be interesting to look at the differences between workers’ attorney vs. defense attorney fees since workers’ attorneys have to get their fees approved.

Michael Holt – If it is okay with the task force, we will skip the July meeting and reconvene August 15th at 11:30 again. We can do it again here. Whatever data we get we can share via PowerPoint.