

HM83 Task Force Meeting February 20, 2024; 11:30

Attendance:

Michael Holt, WCA General Counsel

Diana Sandoval-Tapia, WCA PIO

Rinda Dewhirst, WCA GC Paralegal

Pamelya Herndon, Representative

Charles Cordova, WCA Economist

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)

Michael Holt – On behalf of the agency and the director and myself, thank you for showing up and your continued participation. There is a light at the end of the tunnel and we are going to get through this process.

Michael Holt – Dan Giralmo and Megan Kuhlman sent in a submission to add to the draft that I circulated to the task force, hopefully you received it. Between what Megan and what Dan have sent, I think we have a good draft. I think I can pull it up if I share my screen.

Charles added a QR code to the report that directs people to our task force web page. The Economic Research and Policy Bureau did some *pro se* research to see how many *pro se* filings there have been at the complaint and lump sum settlement phases. The research is need for that access to justice issue, namely, do we have a lot of unrepresented workers trying to find their way through our system? The results thus far show nothing earthshattering. I do not believe this data will materially change the final conclusion of the task force once we are at the point of drafting conclusions. Hopefully, everybody has looked at the task force web page. It is the WCA’s effort to be transparent and show, not just for the task force, but all the stakeholders, the work of the task force and of the agency on behalf of the task force. Also, once we tender this report in as a resource for the advisory council, the work produce will be

available moving forward, including the next legislative session. It will be here before we know it.

Kathryn Lueker-Eaton – She still needs to finish her portion of the report; it will not be a long portion. Her portion of the report input is called: “Legal Provisions in the Act for Attorney’s Fees” (how they are awarded).

Dan Giralmo – What is the process going to be for those of us who want to submit suggestions to what has already been written? How do you want to handle that?

Michael Holt – We have until March 15th to complete the second draft; then we will want to host another zoom task force meeting around March 19th. I want to have some draft recommendations in place. I have ideas where I want to go with the recommendations. I am the Director’s Designee, but I want the stakeholders on this task force to be the drivers of the recommendations. Even if we all do not agree that is fine, we can make various recommendations. Between the drafts I think the content is going to be good. There is always going to be more references for tables, graphs, charts, those kinds of things. Maybe when we start the recommendations, the report will look to charts and graphs that bolsters the recommendations. But, we are at the point where we want to finalize and produce a good working draft, including starting the recommendations section. If anybody has any ideas on how we move forward, I welcome any feedback.

Representative Herndon – The task force has been doing great work; she has been receiving our updates. She knows the task force will conclude in April 2024. What she wants to do is to find out if she needs to get us on a work plan for purposes of presentation during our interim session coming up, so if there are money or financial aspects of the budgets that are going into play with the recommendations that will interplay, we need to get started this summer so they are presented to the Legislative Financial Committee during the summer also. Once we get ready for the 60-day session, if anything has to be done, we are efficiently prepared before the legislative session starts. That is why she is participating in today’s meeting to see where the task force is at in this process. The next step for the summer committees is presenting the task force recommendations.

Michael Holt – Whatever the content of the bill is, it will feed off this task force report. I do not believe there will be an appropriation. The task force has not talked about that or the WCA needing money to implement the task force recommendations. Any future bill will be similar to what I call the “Bob Scott Bill,” with the difference being that the next bill will have the backing of the task force not to mention the underlying research behind the task force report.

Representative Herndon – That does help a great deal. If your ultimate recommendation is an increase in the fees, then whatever that bill is going to look like, I would like it presented during the summer so we can get a committee endorsement for the bill before the 60-day session. I want to make sure we have a smooth transition for the recommendations to the bill being introduced during the 2025 legislative session. We have to determine who that committee will be, it will be the recommendation, and that will be good for moving it forward. She wants to make sure we are following that process.

Michael Holt – Are you referring to the Advisory Council Committee or House or Senate?

Representative Herndon – It would be an interim Legislative Committee, which is a combination of both House and Senate.

Michael Holt – In terms of drafting the bill, does that come from the task force or do we tap into legislative drafters?

Representative Herndon – We tap into legislative drafters based upon your recommendation(s).

Michael Holt – Our report is due April 30th. I don't know when we will have our first advisory council meeting after the April 30th date. Diana, do you know?

Diana Sandoval-Tapia – At this point in time, Representative Herndon and Michael, the advisory council, do not have any meetings scheduled beyond March 14th. Their typical process is to schedule their next meeting at the current meeting. On March 14, she anticipates they will schedule their next meeting; they seem to be scheduling their meetings every other month. She anticipates sometime in May.

Michael Holt – I invite any of the task force members to the next advisory council meeting. It is an open meeting, and it will be held in our Albuquerque office. Anybody can come and voice their opinion to the advisory council. In theory, the report/recommendations will funnel into a bill. I will have to talk to Director Robert Doucette and Representative Herndon to make sure he and the governor's office are onboard with this process. I believe it makes sense what Representative Herndon described in terms of how this task force's recommendations turn into potential legislation.

Representative Herndon – The committees will start putting their work plan together in late March, early April. She wants to make sure the task force is on somebody's work plan. We still have to determine which committee it will be assigned, but I do not want to interrupt the work - I just want to give an idea of

what is ahead for the task force. If the advisory council committee meets in May, she will ask that you all not be put in for presentation before August.

Michael Holt – In terms of a presentation, is that similar to like – we have all watched those hearings on the webcast. We would give the presentation in person, and would it be webcast?

Representative Herndon – Yes, your presentation would be in person. Because you all are in Albuquerque or Santa Fe. She will see if we cannot get that placed in a meeting in Albuquerque or Santa Fe. You will talk about what the task force did to come up with the recommendations. Before the final meeting of the committee that we chose to go before, the bill will have to be presented to look over in its final format. It will be a committee adopted bill. That is what tends to get heard first.

Michael Holt – Thank you for giving us direction going forward. We are all excited about a legislative change and if it does not go through it's like another 2 years. I do appreciate you coming today and shedding some light on the process.

Representative Herndon – She does not want to interfere in this meeting; she will review the committees and see which is most aligned with the WCA presentation. The next step is to be placed on the legislative agenda and to be on their work plan so that you are presenting it to that committee and they adopt it as priority legislation for the 60-day session.

Michael Holt – We have one draft, and we hope to have another by mid-March, and knocking on the door of a final draft by mid-April so we timely meet the April 30th deadline within the House Memorial.

Representative Herndon – She will get her staff working with the WCA staff to set up all the preliminary work that needs to be done to make sure this bill is pre-filed early and talk to the governors' office to make sure everything is aligned. Thank you again for the exceptional work you all have done; it has been great to watch it develop.

Michael Holt – My biggest concern with all this is we draft a bill and it goes nowhere. Representative Herndon is a very powerful member of the house. Any bill she introduces will have legs, assuming the task force can make good recommendations and write a good report. Does anybody have any input?

Randy Akin – The draft that was sent out, there is a lot of good work. He can tell Dan and other task force members have done good work. There are a couple minor things that we do not need to go into. As for your questions, his belief is from here every member has a different point of view. Some on the carrier side vs. injured worker side is different. As a recommendation, if there

is a neutral party on this task force, it would be the WCA, meaning you and Charles. He would recommend that we have a starting point, some recommendations that are going to get us started. He would recommend you come up with a recommendation(s) based on the data as a starting point. If everybody is throwing out their point of view on it, we will be all over the map. His recommendation would be that the WCA come up with an initial starting point based on data.

Dan Giralmo – He was going to say something similar to what Randy said. He thinks the sooner we can get to discussing the recommendations the better. He does not want to have us learn late in the process.

Michael Holt – Looking at that attorney survey, it showed approximately 75% of attorneys strongly agreed the attorney cap should be raised. Going from \$22,500 and using Charles' inflation analysis, it gets us to around \$32,000. The legislature does not understand very well the subject matter of workers' compensation, so the simpler the bill is, the more likely the bill will be passed. I do not think the statistics or economics necessarily supported raising the \$3,000 discovery fee; it does not look like the discovery fee cap is exceeded often. Using Charles' inflationary analysis - we can debate right or wrong - but going from \$3,000 to \$4,500 or \$5,000 – is one key issue as to whether the task force recommends a raise to one of those amounts. As an important aside, the WCA is approaching potential rule changes, and one area we are going to look at is deposition costs for doctors. They have not had a raise in thirty years. An increase will impact the \$3,000 discovery cost advance value. On the other hand, if the doctor fees are raised, it would not be that much, so that is a debatable recommendation. The survey and the other findings of the task force and inflationary analysis support the \$22,500 attorney cap being increased. Lastly, giving judges judicial discretion, I believe it would be a nightmare to come up with language that identifies what the trigger is; a legislative change in this regard opens a can of worms. Also, we need an executive summary at the beginning of the report.

Charles Cordova – He thinks we should review the ODA (Occupational Disease Act) and make sure any legislation is mirrored in the ODA.

Michael Holt – This is something we should look into. It does not make sense to raise the attorney fee cap for accidental injuries but not for injuries filed under the occupational disease act. We have not really talked about that issue as a task force, but I think we need to be consistent between the two acts. Hopefully everybody agrees on that but if not let me know.

Kathryn Lueker-Eaton – It makes sense to her. Sometimes it is difficult to differentiate, for example a mold injury, it is sometimes hard to tell if that is an

occupational illness or an injury; for consistency's sake, it makes the most sense.

Michael Holt – I do not want to exclude anybody from any changes in the next draft, but I will work with Charles to prepare the next draft and will add Kate and Dan's recommendations. If you have thoughts on recommendations, he can start working those into a narrative also. That may be an approach to start factoring input from the task force members.

Chris Elmore – He does not mind if there is open discussion. We probably have a lot of agreement on some aspects of this. Most of us are probably okay with an inflationary attorney fee increase, and a very small increase on the discovery advance. He agrees with Michael regarding not giving discretion to judges and trying to word it, on a per instance basis; that is probably going to become a logistical nightmare. It is easier to get it passed if there is a set number, more than it is now. He is opening this up for discussion, but he thinks that is the easiest way to go.

Michael Holt – I originally thought we would find supporting economic data for a discretionary trigger. Appeals or complicated cases with more complaints and filings are cleaner triggers, but then defining what is or is not a "serious" case is problematic. In Megan Kuhlman's write up, she also talked about the conflict of interests between the lawyer and the client in terms of the lawyer wanting to petition to get paid more when such a request is contrary to the client's best interest. Does anybody else have any comments?

Randy Akin – He thinks we should take some care in the writing of the draft and the discussion that we also mention impacts to injured workers and employers, just to make sure this is a well-rounded task force recommendation(s) and report. We want to consider all the different stakeholders that are involved. He thinks we can reach common ground but increasing the cap by \$10,000 has the potential to increase costs for both injured workers and employers, and we should take time to recognize that in the report.

Megan Kuhlman – Her recollection was that making a solid finite recommendation was maybe not what others wanted to do, but she always thought we should. It sounds like Representative Herndon is absolutely expecting this report to have a consensus recommendation from us. She thinks we need to decide as a group what that should be.

Michael Holt – I thought we would give our report to the Advisory Council and wash our hands of it. He talked to the Director about meetings this summer with the legislative committees. He does not want the WCA to participate in these meetings alone. He would like to see one lawyer from each side. However,

no matter what we do or introduce, people will be against it, people will hate it, as when the Bob Scott bill came up for hearing. People will come out against the task force bill no matter what. Does anybody have any ideas in furtherance of what Megan said?

Kathryn Lueker-Eaton – Her suggestion is to increase the attorneys' fee cap overall but to have a separate or potential additional fee cap if there is an appeal. In other words, raise the fee cap altogether, but if there is an appeal, and it is successful, then an additional fee should be available. A lot of times when attorneys are appealing an issue, it is because there is a good reason to appeal. She thinks that option should be available.

Michael Holt – I just wrote a brief, or I am about to file my friend of the court brief on the fee cap constitutionality issue. You have the \$22,500 fee cap, but the appellate court has no power to award additional fees. The argument is that this limitation impinges on their authority to regulate the practice of law. In an earlier equal protection case, the majority opinion held over a dissent regarding what difference does it make if it is a \$22,500 hard fee cap for all work versus a \$22,500 fee cap with an additional sum for appellate work. Why not just add the two together for one cap? Do we go to a \$30,000 main attorney fee cap and then \$2,500 for appellate work, to make it \$32,500, or do you just do \$32,500 across the board. By a simple raise from \$22,500 to \$32,500, for example, we put out some of these fires. I am not disagreeing with you Kate, just talking out loud. That is a decision of the task force. Do we limit an incremental, additional sum to appeals and if so, how much.

Megan Kuhlman – What she would recommend is a fee increase up to \$30,000 with an additional maybe \$2,500 for a successful appeal.

Chris Elmore – He would have the same concerns about the appeal language. As someone defending claims that are routinely appealed, what is a successful appeal? If the worker wins, the defense does not get paid for defending the appeal?

Megan Kuhlman – Same thing, it is a little extra for an appeal, but the system would not change. Not an extraordinary amount, just enough that your briefing does not kill you.

Michael Holt – My question: who would award it? Does it get remanded to the WCA or does the appellate court do it?

Kathryn Lueker-Eaton – It would go back to the WCA for award of fees upon a successful appeal. I just do not know if \$2,500 is enough for a successful appeal. There is a difficulty in defining successful depending on the issues.

But she thinks \$2,500 is very little when you consider what goes into doing an appeal.

Michael Holt – I agree with that - \$2,500 equals twenty-five hours at \$100 per hour. A good brief takes you twenty hours, three plus solid days of no phone or email interruptions. He does not know if we are going to come to an agreement on that today. He is not saying we will do nothing about it. Does anybody have anything else that they want to talk about.

Ben Sherman – He thinks the cap should be \$32,500 - one we have to take inflation into consideration, but there is also the fact that the next time this thing gets raised could be ten years from now. If inflation keeps up, even at \$32,500, we will have the same arguments in six years. There needs to be enough of a raise there to keep us good, so to speak, to avoid this situation coming up year after year. His recommendation is \$32,500. Workers' wages are going up, and comp rates are going up, cases that used to settle for \$40,000 - \$50,000 now settle for \$70,000 - \$80,000 cause the comp rates are higher and workers are making more. He pays staff more than he used to, his rent has gone up, his supplies have gone up. That's just a number that sticks out in his mind.

Michael Holt – We talked about building an automatic inflation adjusting mechanism into the fee cap. Maybe we could raise it every few years based on Economic Research Policy Bureau research, or whether it stays in the statute. If it stays in the statute, who knows when it gets raised again. Maybe the statute gets changed to build in an inflation figure, so we do not have to come back every five or ten years.

Kathryn Lueker-Eaton – Ben you said the fee cap should be \$32,500 and no separate amount for an appeal, is that what you said?

Ben Sherman – He does not have an opinion on that part of it, but he thinks if there is going to be an additional amount, he does not think we should reduce the pre-appeal cap so to speak to below \$32,500. Whether to also add an additional appeal amount - he does not have a strong opinion one way or the other.

Dan Giralmo – He would argue against creating a standard cutout that attorneys' fees are always adjusted based on inflation. There are consequences to doing that, today, we may not even be able to appreciate or realize. If we just automatically increase it for inflation that excludes stakeholders from the conversation.

Randy Akin – He definitely agrees that just setting an automatic inflationary adjustment provision leaves out so many factors, including what is the best thing for the injured worker. He does believe it should be raised from \$22,500.

There is a compromise from the get-go on the comp act of 1991, and we have not even focused on the injured worker and what their best interest is. We need a fast and efficient system; the data shows it is pretty fast and efficient. We do need to tweak it but tying it just to an inflationary factor takes up so many other factors that we are not even considering. I am definitely not in favor of just doing an inflationary adjustment whether it be today or in the future. It must be based on data. He was here in 2013 when it was done. This is now the best data he has ever seen, and we need to use it and not just ignore it and focus on inflation.

Kathryn Lueker-Eaton – She does not know how raising the fees negatively impacts a worker who needs a worker attorney to assist on their case. Michael said the director would have the discretion, if Charles continues to do the research, which is given to the director, there would be an Advisory Council meeting to discuss an increase in the fee cap based on current research.

Chris Elmore – He would not want to add another layer of bureaucracy to the system where its fluid, and changes year by year; it cannot be predicted. He thinks an increased set number that we all can agree to and present in the report is best. He thinks \$30,000 would cover most cases that run slightly over the cap. What he is hearing we are looking around \$30,000, or maybe \$32,500. He does not care for the whole necessary increase on appeals just because cases in New Mexico are the most appealed case by sector anyway. Throwing in an extra amount to have frivolous appeals - he would not recommend; he would suggest \$30,000.

Ben Sherman – He would argue for an increase of \$35,000. That gives us some room to absorb some more inflation. The data says its \$32,750 currently; it might be even higher now as inflations is still raising. It might not get increased again until 2034.

Kathryn Lueker-Eaton – She agrees with \$35,000, that is what she was going to recommend, not the \$32,500 but a \$35,000 increase.

Megan Kuhlman – She agrees with everything Chris Elmore said, that is where she stands as well.

Johnna Padilla – She does not really have any opinion one way or the other. She thinks it needs to be increased but, as far as the specific amount, she is unsure.

Dan Giralmo – He concurs an increase is necessary; he knows the costs are increasing for staff and real estate. Other things have changed about workers' compensation practice: we are meeting today by zoom; we do mediations by zoom; we do depositions by telephone; attorneys do not have to travel and

incur the time for travel. They can stay in their offices at the same time. That has minimized costs in another way as well. It also softens some of the inflation increase. He wanted to throw that out there as an anecdote to the inflation argument.

Michael Holt – I raised the subject of an automatic inflation adjustment for discussion. I do not know if the legislators will give up that power. I could foresee some legislators not agreeing to that, and we end up killing our own bill by making it too complicated. I really do not think it is a good idea as it complicates the bill, and I worry about politics. Right now, Robert is our director. Who is going to be the director three or four years from now? Maybe it is better to look at the Charles inflation analysis, add a bit, and call it done. Also, trying to figure out what a successful appeal is or is not opens a can of worms. Does everybody agree that Charles and myself can write up recommendations? To sum up the fees up to \$32,500, discovery from \$3,000 to \$4,000 and no appeal?

Chris Elmore – He thinks that is sufficient, raising \$3,000 to \$4,000.

Ben Sherman – He thinks \$3,000 to \$4,000 is reasonable but that is his personal opinion.

Randy Akin – His opinion is to raise the discovery figure as the data indicates, but he can see why raising it an additional \$1,000 would be prudent. He would not sign off on that. Something Chris said earlier which is, those that do not have to worry about charging employers for their premiums do not understand. There does need to be strong predictability in our model. The \$35,000 figure to him does not make sense; would it be useful in a few situations? Yes, but overall, we do not get there, and he thinks access to justice has shown in the data not to be prohibited. He even struggles with a raise to \$30,000, which is on the high side in his opinion. He would have to talk to his board regarding this issue.

Chris Elmore – He agrees with what Dan pointed out; since Covid he does less traveling which leads to less billing time. There have been savings in a lot of areas that he thinks have offset a lot of the inflation, although inflation has been high. He agrees \$30,000 is the appropriate number, obviously we heard \$35,000.

Dan Giralmo – He thinks \$35,000 is too high; he agrees with Chris and Megan that \$30,000 should be the maximum. In regard to expenses, nobody in any of our discussions has mentioned that we go over \$3,000 for discovery costs, so why are we going to increase it? It just does not get there. He knows we have talked about fees for doctors, that would cause a bit of an increase. But, as we

sit here now, it does not get past \$3,000 often. So, he does not know why we need to increase it past \$4,000.

Kathryn Lueker-Eaton – She thinks depositions are getting more expensive and thinks doctors also want to be paid more for depositions. It helps encourage them to treat injured workers if they are going to be compensated for their time. She thinks a lot of doctors are not happy about treating workers' compensation patients. She thinks increasing it to \$4,000 is a modest increase.

Michael Holt – The proposed rule change on doctors – I think it is \$450 for the first hour?

Chris Elmore – The dollar amount is \$400 for the first hour then \$360 for any additional hours.

Michael Holt – I believe we are looking at \$750 for the first hour, based on inflation. That is one justification for going from \$3,000 to \$4,000. But if the WCA raises costs for doctors that may justify giving a little more wiggle room to this scheme where employers basically pay for their litigation against them. Let us leave it at that, maybe compromise at \$3,500? He will work with Charles next week on getting this report wrapped up.

Maybe by the end of next week. I can get a report out. In reviewing the agenda, his goal is to have a second draft by March 15th. The next zoom meeting will be March 19th. The goal is to give us a solid two weeks, so if March 19th is the second draft due date, by April 19, I want to have the report finalized. If someone hates what we wrote or hates one of the recommendations, task force members can write a supplement which will be included.

If nobody has anything else, we will adjourn.