

HM83 Task Force Meeting March 19, 2024; 11:30-1:00

Attendance:

Michael Holt, WCA General Counsel

Diana Sandoval-Tapia, WCA PIO

Rinda Dewhirst, WCA GC Paralegal

Charles Cordova – WCA Statistician

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

Pamelya Herndon, Representative

(Highlighted names did not attend)

Michael Holt – WCA General Counsel and Director’s Designee

Michael Holt – Introductions (Everyone introduced themselves.)

Michael Holt – Robert Doucette is joining us today. I hope to have everyone present at the last meeting. May 2nd is the advisory council meeting, that is when the formal report will be presented to the advisory council in a public meeting; everyone is invited, it will be held in our Albuquerque office.

Robert E. Doucette – He has been here a little over two years, he is also a Cabinet Secretary at GSD. This issue has always percolated over the years, he knows it takes a lot of time and work; he wants to thank everyone for their work. He can say by talking to a lot of elected officials this last session workers compensation is becoming more prevalent of their understanding, so this report will help that. He is truly appreciative of everyone’s hard work and could not do it without everyone. It does not mean everyone will agree on everything, but he would rather figure out where there is common ground so we can get something that is fair to everybody.

Michael Holt – I sent around task force draft number two; the report is pushing forty pages. We are trying to cast a wide net; he is wanting the recommendation of the task force to be supported by the body of the report without over killing it. I like the graphs and pictures that spell out topics neatly.

I am trying to get everyone's input, put it into the document and harmonize it. The report is coming along. People have nominated him and Charles to ghost write this report. There are two primary new additions to this second draft - an executive summary and the recommendations of the task force. I thought the consensus was to raise the fee cap from \$22,500 to \$32,500. I also thought it was the consensus on the discovery advance to raise it from \$3000 to \$3,500, but I took the liberty to raise it to \$4,000. I believe that is where it will end up. There is a new study report posted on our Task Force page to the WCA website called, "2024 Analysis of Attorney Fee Cap Increases on Benefits Proportionality in Workers' Compensation." I took some of that information from that report and put a brief discussion in draft two.

I wanted to go through the recommendations, there are eight of them:

- 1) Raise the fee cap from \$22,500 to \$32,500;
- 2) Increase discovery cost advance from \$3,000 to \$4,000;
- 3) If we are going to update the workers' comp act, we need to update the occupation disease act. Those figures are in both acts.
- 4) Do we apply this retroactively (we haven't discussed this issue, but he's putting it out there). Need to put an effective date, will it affect pending cases?
- 5) The legislature should review this issue more often, rather than every ten years.
- 6) Do we build into future legislation, automatic cap increase based on inflation adjustment?
- 7) It was the consensus to not give judges new discretionary authority to raise fees for certain classes of cases.
- 8) No additional attorney fees on appeal.

I want this report drafted by April 5th (Friday). Members can read it and then we will have the next zoom meeting on April 16th. We will have two weeks to edit it and obtain signatures. Also, if someone wants to submit a separate discussion from their viewpoint, or wants to clarify something, we would include that too. He tried to capture the will of the task force.

Kathryn Lueker-Eaton – What are those deadlines again? She does not see that on the agenda.

Michael Holt – I will ballpark it when it comes to dates in the agenda. I am putting the burden on myself and Charles to finalize this report by April 5 close of business. Next zoom meeting will be April 16. Of note, this report is not an easy

read. I will take in all the edits and comments. Hopefully we will have a good final draft.

Kathryn Lueker-Eaton – She apologized for submitting her draft late, but she does not see it made it into this draft report.

Michael Holt – I did not want to bombard the task force members with multiple drafts and, at a certain point, we have to have a cutoff date for submissions. Charles and I have a third draft report in the works and Kate's submission will be included in that. Now, I would like to ask everyone for their feedback.

Jeffrey Steele – He has only read half of the document, but everything he has read he would be in support of. He would be interested in what Kate wrote up.

Greg Montoya – He has not read through the whole document either.

Ben Sherman – He has reviewed the document; he found the recommendations to be satisfactory. He is also curious about Kate's portion. In his opinion, he thinks the amount is fair. He likes the recommendation that the legislature should review this issue more often. His fear is that the inflation will continue to spiral and one to two years from now it is obsolete. He understands the concerns of having it automatically increase every year or having the director's authority to increase it, but he knows we are trying to keep it in the hands of the legislature. The actual recommendations, he agrees with them. Regarding the discretion of the judge to award additional fees, he thinks this would be problematic. It would become discretionary on a case-to-case basis; this could create more litigation. He knows the legislature may not want to pass somethings with a lot of complexities.

Michael Holt – My opinion: the more complex the bill is, the greater chance it will die.

Kathryn Lueker-Eaton – One of the things she thought we discussed was how long it has taken to review attorney fees since 2013, she thought her, and Ben recommended the fee cap to \$35,000.

Michael Holt – We have other task force members who are the payors, Randy, and Dan, I did not know if the votes were there. Representative Herndon mentioned that if the task force reaches a consensus, it is more likely that legislation will be introduced and passed through both houses and on the Governor's desk. Everyone has the option to add something different to the report if they disagree with anything. He is hoping to avoid that in that we all reach a consensus, but if not, that is fine by him.

Randy Akin – He finds it interesting that the director hopes we all can come to a consensus and now following up with what Kate just said, she remembers

hearing \$35,000, but he remembers Ben saying he would be okay with \$30,000. He remembers he spoke right after him saying that is pushing his (Randy's) limits but he would be willing to support that if we keep the discovery amount the same. He has people to answer to but some of these attorneys do not because they are their own bosses. He thinks \$30,000 is going to be a push for the industry. His main concern overall coming from a self-insurance fund, that yes, they are paid premium from their contractors, but a lot of their contractors want to know that their injured workers are being taken care of, that is one of their core values. There is no evidence in the data that shows the discovery should go up, we talked about it and very few cases ever exceed discovery advance. We looked at PPI for discovery, but it does not make sense; we have seen that access to justice is not really being harmed too much. What is the risk from our committee recommending a high amount even at \$32,500, let alone \$30,000. He sees it as if that decision is going to benefit the injured worker? Will that lengthen the process? This could harm the injured worker by delaying the process. There is no data to support this, he knows it has been 11 years since the cap has been adjusted but sometimes you have to let it go. An automatic adjustment is inflationary and if you do it too soon, do you really see the effects? He will go on record that there needs to be an increase, but he cannot support the \$32,500 and the data does not support it.

Dan Giralamo – Good job to you and your staff for putting this together; he knows it was a lot of work and there is some good stuff in the report. There are some recommendations that have his support; we have the right recommendation that carve out for specific cases. He agrees with Ben's comments - it creates a lot of disruption in the system and that threatens the health of the workers' compensation system when we do things like that. Also, he likes the recommendation to not tie future increases into inflation; he thinks that drowns out the voices of both workers and employers. This cannot be just about paying out the attorneys, it needs to be about protecting the health of the system. With respect to the fees, they are higher than what he committed to in the last meeting. At this point he agrees with Randy, and he cannot support \$32,500. It is too big of a jump. It is not supported by data. With respect to the discovery expense, he did not support an increase in the last meeting, and there is no data to support it. It may only seem like a \$1,000 increase but it's a 25% increase on something that there is no evidence to support why we need that increase. He wants to mention in §52-1-54(D) "cost of discovery shall be borne by the party who request it." He does not think this advance was intended to fully cover expense fees. He does not support the \$4,000 but he would consider \$3,500.

Michael Holt – In regard to discovery cost, we are in rule making mode; we sent an email soliciting for any rule changes from the public. One change WCA is considering changing is doctor fee/deposition figures; they have not changed

since 1990. On behalf of the agency, it is concerning that we have access to medical care issues, but it may be keeping doctors out from treating workers' compensation cases because they do not want to deal with litigation – it is not worth their time. A raise of doctor deposition fees supports an increase in discovery advance. The rule change, if any, will not take effect until January 1, 2025. Two weeks later the 60-day legislative session starts.

Johnna Padilla – She has limited knowledge of any of this; being a representative of an employer but she does not work in risk management. The recommendation we have outlined, she remembers the conversation about them. The report looks good and contains what the committee has discussed.

Matt Sanchez – He has reviewed the report, he thinks it is well structured. He thinks we have enough plain language, so legislators can comprehend. He is in Randy and Dan's camp, south of \$32,500 seems more logical to him. The \$32,500 is about a 44% increase on the cap. It seems too high to him, it is a selfish statement but there are not a whole lot of large companies in NM, and that is a fact. He knows there is a perception that contractors are doing great now, but he will be the first to say that it is a struggle to make the bottom line. He knows that is a self-serving perspective on that, but he thinks that voice needs to be heard and we stay reasonable. In regard to the discovery, if we increase it to \$3,000 or \$4,000 can we list a range. How important is it to give them an actual number versus percentage?

Michael Holt – I believe it is important. Representative Herndon was in the last meeting, if you recall, and she anticipates legislative hearings in advance of the next legislative session. Having the task force report available and a consensus is important; she may have a bill drafted that is presented for summer legislative hearings to begin the legislative process prior to the 60-day session. The economic support would be the inflationary analysis in support of the \$32,500 figure, but I know that it is just one factor. In the current draft, I had to put a number on the paper to start discussions with task force members. In the end, it is better if the task force could have universal consensus, if possible.

Megan Kuhlman – She had a chance to review the report and she appreciates all the hard work that was put into it. If we subscribe to the notion similar to mediation, that we did a good job if everyone walks away unhappy. This is the compromise from everything we talked about and worked hard on. There is nothing in the report that would cause her to dissent from agreeing on the recommendations, she also believes consensus is going to be important. She thinks \$30,000 as opposed to \$35,000 might be more of a consensus than a compromise if that is what we are going for. Second of all, in 2013, she was a baby lawyer, and she had nothing to do with running the firm. She was not a partner but her best recollection was more of a hint, hint, wink, wink agreement

that the effective date was the date of adjudication of attorney fees as opposed to the date of injury. She does not know anything about underwriting or premiums so she does not know if that will cause a problem or if there needs to be time to make up for this. If we use the date of injury as a barometer for when the new cap is going to come into place, attorneys will not be able to enjoy this raise until 2027. She wanted to throw that out there to use date of adjudication as opposed to date of injury to benchmark when this goes into place. It is something to talk about. As far as the discovery increase, that has always been a red herring, in practical matters, that has never been a problem.

Charles Cordova – If anyone has not had a chance to look at 2024 Analysis of Attorney Fee Cap Increases on Benefits Proportionality in Workers' Compensation that is posted on the website, they should. It has good information in there about how the attorney fee cap relates to the average weekly wage.

Chris Elmore – He wants to echo off the date of adjudication concept; he knows when the last fee increase took place, it allowed for the older cases if they had somebody who had an injury, there is a dispute and it ended up being litigated. That allowed an award of attorney fees in those situations. He thinks that is probably preferable as opposed to date of accident, but he defers to the carriers. He thinks that everyone is in consensus except for recommendation number one and two. In regard to the discovery advance fee, employer-insurer pays for half of the discovery fee (in the cases he is handling). In more than half the time, employer/insurer are setting the depositions anyway, so they are paying for it. He agrees there is no justification for an increase. He thinks it is absurd that employer-insurers fund discovery to pay for a case to build against themselves. The attorney fee cap, everyone is in an agreement that it needs to be increased, how much is the question. Inflation has played a role; he definitely has seen increased expenses in his firm. He has also seen significant increases in efficiency that has driven down some of his expenses. If you told him he would be doing 90% of his depositions via zoom he would not believe it. Last year he may have had ten trials and only one touched the cap, it may have gone over \$1,000. He thinks \$30,000 is fair, especially if we have a clause that the legislature should look at this issue more often.

Michael Holt – WCA did not look at the litigation efficiency aspects until Chris made that comment. Since Covid, our rules have changed to make mediations via zoom mandatory. He talked to one of our judges about the 2013 attorney fee change, when New Mexico passed that legislation, there were no effective dates. When they made awards after that bill became law, the prevailing amount that would get awarded was the higher amounts. The number four recommendation on an effective date should be changed to not include an effective date. The task force really had not discussed it prior to today.

Ben Sherman – He believes in the last meeting he agreed to \$32,500, but upon further reflection he changed it to \$35,000. That is his preference due to the large gap of time that occurs before this issue gets reviewed.

Kathryn Lueker-Eaton – She wants to echo that her recommendation would be \$35,000, because of what Ben said and, also, she has had more than just a couple of cases that capped out. She feels like the comments that Mr. Giralmo and Mr. Akin made seemed to imply that they feel that workers' attorneys are being greedy by wanting this increase. She is a solo practitioner; it is not as big as Chris or Megan's firm but she brings in \$250,000 – \$500,000 a year in gross revenue. It is hard to do and a lot of that is paid into taxes. We are forgetting about how many people do not practice workers' compensation because of this inherently uneven playing field in terms of the way workers' attorney fees are awarded versus how employer-insurers attorneys are paid fees. We are not going to attract new talent if we have outdated, antiquated fee caps. She would be willing to bet money that this issue will not be looked at for another eight years.

Matt Sanchez – He thinks Chris' comment about some of those efficiencies makes sense to him because he has lived a couple of those; he thinks that is valuable. It is valuable to him to give a proper perspective so maybe that should be incorporated into the report.

Michael Holt – I think it is a very important missed point. WCA changed its rule because there is more efficiency in the system. It seems like we are at \$3,500 in discovery advance limit, and it would great if everyone comes to consensus on this. He does not know what to do about the attorney fee cap amount; I was hoping the \$32,500 would be acceptable when I wrote the current draft. Listening to Dan and Randy (the payors) and the amount of \$35,000 being thrown around, I do not know what to put in the report due to the variety of opinions. There are good arguments for it to be higher, but I want to reach consensus. Consensus will streamline legislation; I would hate all this work to be for nothing.

Dan Giralmo – He believes everyone supports and agrees with an attorney fee increase, it is a disagreement of what the amount should be. He thinks everyone has legitimate positions on both sides of it. He would suggest writing it like that, task force supports an attorney fee cap increase, but there are disagreements on what that number should be.

Randy Akin – He wanted to follow up with Kate, from Builders Trust and he thinks he speaks for NM Mutual - we do not see workers' attorneys being greedy in this. The issue is exactly what the director said, there is a difference of opinion because there is not solid evidence or data on this. There is a risk of going too high or too low, so where is the sweet spot? Both him and Dan would feel more comfortable being south of \$30,000 because with \$32,500, that is a 44%

increase. There is going to be a difference of opinion, hopefully we can get to a consensus.

Michael Holt – If everyone is in consensus of an increase, can we at least input \$30,000 in the report and understand that Kate and Ben want it to go higher and they can write why it should be higher?

Kathryn Lueker-Eaton – No, she could agree with the \$3,500 discovery advance but she's sticking to \$32,500 and will not go any lower than that.

Ben Sherman – He agrees with \$3,500 for discovery fee, his bottom line is \$32,500; if he recalls correctly, he thinks inflation supports that amount. His cost to run a business has skyrocketed and his margins continue to decrease.

Michael Holt – Question: is anyone not on board with \$3,500 limit for discovery? We have a consensus on that issue.

Matt Sanchez – He does not know if he is going on a limb on this. He hears what Kate and Ben are saying. He doesn't think there is anything to change their mind on that, but would it be strategically better to agree to a lower number and have the consensus from the task force would have a better outcome from the legislature.

Michael Holt – In the end this will be Representative Herndon's bill and it is going to be political, and she could put \$40,000. He does not know (she has not said that). His takeaway is he needs to write it up as \$30,000; everyone agrees it needs to be raised but disagrees with the amount. The final report will permit people to submit a supplement as to why they think it should go higher.

Kathryn Lueker-Eaton – We are just the task force, we are only the representative of our groups. What if we take this back to their groups and do another simple number. She feels they are being held hostage to the fact that the major stakeholders (employer-insurers) who have the money to pay these claims are not agreeing so therefore nothing can go forward. It should be the will of the people.

Megan Kuhlman – She totally disagrees; we worked so hard in this task force to this point; introducing other people's arbitrary numbers, completely undermines our roles.

Kathryn Lueker-Eaton – All she is saying is that most of us here would agree to \$32,500 if not \$35,000; if we all took a vote, she thinks everyone would agree to \$32,500 but because the payors will not agree to that amount, we are held hostage with \$30,000.

Michael Holt – There will be people out there that will think we are nuts to only raise the attorney fee cap to \$32,500; they will think it should be higher. This

report will be presented on May 2nd in a public meeting, so if anyone wants to come and talk, please show up. People can voice their opinions during the legislative process, too.

Jeffrey Steele – Recommendation number five should be more important, because then if we can settle on a number knowing that in two to three years, they can address this instead of waiting for ten years.

Michael Holt – We have not talked about staggering the numbers, do \$30,000 now in in 2030 add an additional increment.

Matt Sanchez – The recommendations can be listed in importance.

Michael Holt – It is easy enough to update the word document. Dan and Randy, any thoughts about staggering the dollar amounts.

Dan Giralmo – He would need to think about that, we all do not know what the landscape is going to look like in seven years and what other factors could come to play. He would like to think about that.

Randy Akin – He agrees with Dan. We do not know what is going to happen in two years, let alone seven or ten years. It is hard because of all the hard work this task force has done with getting data. We still do not have the data that supports the increase other than the inflationary factor and that is what it comes down to. We have some hints towards things, the hint is it the fee cap needs to increase but the hint is it does not get hit all that much. So, there is no proof in the pudding so to speak. To set a schedule out there five to seven years from now, it takes away that opportunity to review the situation again. In 2013, we could see the changes of the cost on the insurers side, building in a set schedule becomes difficult if it is not warranted. He wants to go back to Matt's comment earlier that it is hard enough to get big businesses in NM; we do not want to make the employers cost too much. We also have to make sure the injured workers are taken care of – that is what we are tasked with and that is a hard thing to do especially when there is no data that supports it either way. The consensus has to be pain on both sides, and he does not know if we are going to get there. He would have to think about a set schedule, but his gut tells him it is a hard one to take into consideration.

Ben Sherman – When you put a period in seven years, there is argument that it should be every four to five years. When the inflation skyrockets and we have to wait for seven years. There is harm to both sides to something like that. Inflation is not slowing down; you do not have to read the news to know that. He thinks it should be \$32,500, there are also numbers in between \$30,000 through \$32,500; it is just an observation.

Michael Holt – We have not talked about a number in between \$30,000 to \$32,500. In the next draft, I will write it up as \$30,000.

Chris Elmore – What if we put language in there that legislature should revisit this issue more often.

Michael Holt – Right now it is generic language; it states it should be revisited more frequently, but he can put a more specific date. It is just a recommendation; the legislature is not going to be bound to it.

Chris Elmore – He understands Ben's concerns because ten years, it is ridiculous it is taking this long. He understands it needs to be a substantial increase; he does not think it needs to be as substantial as they do.

Ben Sherman – For the record, he agrees four to five years more palatable than seven years.

Michael Holt – We all have done such a good job, maybe we all reconvene the task force every four years? A house memorial is a good way to study a complex issue. There is also the Advisory Council; he thinks it was more active in past years, that maybe another avenue to make recommendations.

Johnna Padilla – Could the recommendation be that there is no agreement on the amount, but everyone agrees it should be increased and give them the range (\$29,000 - \$35,000) and let them pick the amount?

Michael Holt – That is not a bad idea, that is the agreeable range.

Randy Akin – Being close to some of the legislature that he is and attending various house and senate committees, if we go in there with a range. It will be harder for them decide; we need a hard number, or we will lose the message we are trying to send.

Michael Holt – He agrees with that, keep it simple. It is a sixty-day session and there is a lot that goes on. We will do a disservice to this task force if we do not come in with a hard number.

Kathryn Lueker-Eaton – She really thought we had a number that was \$32,500 from the last meeting. She does not understand why we cannot arrive at \$32,500 as a consensus. If we come to a compromise rather than being held hostage by the insurance companies, she thinks we should compromise to \$32,500. The insurance companies say the cap fee should be \$30,000, the workers' attorneys say it should be \$35,000.

Michael Holt – Dan and Randy have already made their point of view. He does not remember what was said in the last meeting, we talk a lot. The only other option is agreeing to \$32,000, is that an option?

Dan Giralmo – He is still at \$30,000; he appreciates what Kate has to say here but we all have different viewpoints. He does not think anyone's viewpoints are illegitimate. We did not have an agreement of \$32,500 in the last meeting.

Randy Akin – He agrees with what Dan says; he does not remember agreeing to \$32,500. He knows him and Dan are less than \$30,000. Workers' compensation in NM has had a nine year decrease in loss costs which means their rates have gone down in the last nine years. He understands having to deal with higher budgets is tough these days.

Michael Holt – We are beating a dead horse at this point. As the Director's Designee, my goal is to capture the will of the task force the best I can.

Ben Sherman – If you are approaching this as a mediation, the mediator can pick a number, but it sounds like you already have and you are within your right to do so. He respects everyone within this zoom call and their opinions.

Michael Holt – I am not wearing a judge or mediator hat in this role; I am trying to capture the will of the task force the best I can. I do not want to cram a number down people's throat that they do not like. The payor side may have something to write up at \$30,000; I believe that is a number that can go into the report. If people think it is too low, then they can write up something to voice their opinion. We should be proud of where we have come on this task force; it is a difficult issue.