
CHAPTER 3

Contracting For Workers' Compensation Representation Has Begun to Receive Needed Management Attention

Workers' compensation representation is one area in which the Attorney General's Office (the Office) routinely contracts with private attorneys. Wyoming statutes require the Office to represent the Workers' Safety and Compensation Division (the Division) in contested cases. Before 1991, the Office provided this representation in-house, but since then has contracted with private sector attorneys to defend the state in workers' compensation contested claims. The Workers' Compensation Fund, not the Attorney General's Office budget, bears the cost of this representation.

Contract payments have not been based upon volume of work.

Between 1991 and 2002, the Office contracted with a small group of attorneys or firms on an individually-negotiated flat fee basis, requiring them to handle all contested claims filed in their geographic areas. The Office did not base payments to the contractors directly on an accounting of hours or volume of cases worked, and over time, firms received inequitable compensation for the work performed. Further, we found that by only sporadically monitoring these contractors, the Office left this aspect of the state's litigation work less controlled than other state litigation, and less accountable than the Division would like. The Office has begun to address these problems, and needs to continue to expand its management oversight in this area.

For a Decade, the Attorney General's Office Has Contracted Out Workers' Compensation Defense Cases

W.S. 27-14-602(c) requires the Attorney General's Office to provide legal representation to the Workers' Safety and Compensation Division of the Department of Employment in all contested cases. Contested cases arise when interested parties request hearings as to the compensability of an initial injury or claim for medical care, or on denial of an impairment, disability, or death benefit.

Relatively few of the injuries reported to the Division each year generate contested cases. Between 1996 and 2001, the number of injuries reported to the Division remained flat, at about 18,000 per year, while the number of contested cases assigned to contract attorneys averaged about 900. Most contested cases go to the Office of Administrative Hearings, which holds hearings around the state; some go to the Medical Commission. Decisions from these bodies may be appealed to District Court and on to the Supreme Court.

Attorney General switched to contractors because excessive travel led to high staff turnover.

In 1991, due to heavy travel obligations that led to high staff turnover, the Office began contracting with private sector legal firms to represent the state in these matters. The Office assigned cases according to the geographical location in which the claims were filed. The Division paid for the state's representation by funding the costs of contract attorneys plus, eventually, the costs of three staff attorney positions within the Office who, among other duties, handle Workers' Compensation appeals to the Wyoming Supreme Court.

Contract Amounts Were Independently Negotiated, Not Based on Volume of Work

Over the years, the Office for the most part renewed existing contracts and also gradually added new ones, thus retaining a stable group of nine firms around the state. It saw this overall approach as building a cadre of highly experienced firms that could efficiently perform this specialized work.

Higher-paid firms were not necessarily handling more cases than lower-paid firms.

An ad hoc approach to compensating firms, unrelated to the numbers of cases handled, allowed disparities in compensation to develop among contractors. In FY '01, individual firms' payments ranged from \$36,000 to \$99,000; the number of cases assigned per firm ranged from 47 to 154. However, the higher-paid firms were not necessarily handling more cases or working more hours than the lower-paid firms. (*See Appendix D, Payments to Worker's Compensation Contractors.*)

At different times, the Office increased some, but not all, contract payments for these services. It based contract amounts with each firm on a judgment of the firm's competence and experience, on an estimate of hours of service to be performed during the contract period, and on the firm's willingness to contract for a specified amount. Contracts did not tie monthly payment amounts to a uniform hourly rate of pay or to the volume or complexity of cases handled, nor did they allow for adjustments based on the actual number of cases handled or hours worked during a previous period.

Workers' Compensation pays contractors, but does not report payments to the Attorney General.

In addition, the Office and the Division have operated independently of one another in carrying out contract negotiations and payment processing. Firms submit monthly bills claiming the flat contract amount that was negotiated with the Office, plus itemized reimbursable expenses such as phone, copy, and travel costs. As long as these bills fall within contractual parameters, Workers' Compensation pays them and does not report total expenditures to the Office.

The System Has Given Rise to Inequitable Payments

Because contracts were not standardized as to payment methodology, inequities developed in the base contract amounts. The Office acknowledges that some workers' compensation cases require more attorney effort than others, particularly those appealed to District Court. Nevertheless, it has estimated an average of 10 to 12 hours' work per contested case. Using this standard, we reviewed contract amounts and found considerable variation among the nine firms, even when the number of cases referred to them was similar:

- Firms handling similar *numbers of cases* received markedly different base compensation. One firm handled 154 cases and received \$45,000; another handled 139 cases and received \$99,000. Similarly, a firm handled 51 cases for \$36,000, while another with 60 cases received \$79,200.
- In 2001, the Office calculated the average payment *per case* at one firm was \$1,250, while at another it was \$308.

- In a review of four firms, the Office estimated their *hourly pay* ranged from \$37 to \$69.
- In a six year period, one firm's *annual contract amount* increased from \$34,300 per year to \$60,000, while its caseload dropped from 82 to 47.

Assuming equal distribution of complex cases, payments lack equity.

Based on these four measures, and assuming equal distribution of complex cases, we did not see the equity in contracting procedures that would be expected of a governmental entity and that we think most contractors would assume existed. Absent other evidence concerning volume or quality of services, we concluded that the contracts gave some firms inappropriately high or low compensation for work performed.

Some Basic Management Information Is Lacking

The Office and the Division lack management information systems to generate basic expenditure data that can be used for decision making in each agency. For example, we were unable to calculate the total amounts paid to each firm by year. The Office could tell us what the base contract amount was, but neither they nor the Division had data systems in place that could provide actual payment amounts including reimbursable expenses.

Neither the Attorney General nor Workers' Compensation has been able to monitor overall costs.

Overall, this approach has not provided assurances that the state is getting the best possible representation with a reasonable amount of funding. Neither the Office nor the Division has been able to closely monitor and control overall costs for workers' compensation representation, as neither has had complete information.

- The Office's contracting method did not require firms to submit documentation of the volume of efforts made to defend the state's position, such as hours worked per case. Without this data, it would have been difficult to develop a fair and systematic approach to contracting.

- For its part, the Division lacks information that would enable it to allocate the exact cost of legal fees to individual cases. The Division believes charging these costs to an employer's experience rating would allow for more accurate adjustment of employer premiums.

By Contrast, Claimant Attorneys Are Paid By Flat Hourly Rate

Claimant attorneys (those who represent the injured parties in claims against the Workers' Compensation program) are paid according to a different standard, even though they work within the same system. They submit detailed billings to the Office of Administrative Hearings, showing hours worked by case, and are paid a uniform hourly fee of \$60 per hour, an amount that increased to \$90 in November 2002. Similarly, when the Attorney General's Office contracts with tort defense attorneys, it is for a standard hourly rate.

Years of Minimal Oversight Resulted in Weak Accountability

During more than a decade of contracting for workers' compensation representation, the Office tended to look on this work as being largely repetitive and therefore requiring little management guidance. We noted two consequences of this approach.

Contracting arrangements created the appearance of partiality.

First, at least an appearance of partiality was created by the fact that all but one of the nine contracting firms remained in place, the methodology for reimbursing them was unclear and inequitable, and other firms did not have an opportunity to obtain the work. Thus, the Office has not been in a position to systematically evaluate and compare the performance of individual firms: Its ability to make informed judgments about value received has been limited by lack of performance data, and its basis for adjusting reimbursement rates has not been apparent.

There has been minimal Office supervision of the contractors.

Second, the Office provided minimal supervision and oversight of the contractors' performance. Supervision consisted of monitoring the number of cases each firm handled, talking with them by phone, watching their win/loss records, and spot checking work products on those cases appealed to the Wyoming Supreme Court. Thus, it has not applied the same rigorous internal office review process to workers' compensation contractors as it has to others, such as tort contractors.

The Office Has Begun to Correct System Weaknesses

Attorney General has added accountability measures in new contracts.

As we were conducting this research, the Attorney General's Office began to address many of these concerns by ending some long-term contracts and signing new ones; requiring in new contracts that all firms submit monthly statements showing date, duration, and description of services performed, by case name; and by making several personnel changes. As of this writing, the Office continues to implement management changes.

Recommendation: The Attorney General's Office should continue to develop oversight systems and gather performance data on Workers' Compensation contracting.

The Attorney General's Office needs to continue recently-instituted efforts to build systems that provide assurances of both the quality and the quantity of representation being purchased. The reimbursement system needs to be adequate, equitable, and accountable, and a management information system needs to provide useful data to both agencies. Since the Workers' Compensation Fund pays for the representation, the Office should work closely with Division to develop systems that, where possible, satisfy both entities' needs for information. Also, to better manage contractors, the Office should develop guidelines and reporting requirements to apply to these contracting situations.

A final decision on these questions now, however, would be premature. The Office needs to gather baseline data from the new contract reporting requirements in order to make cost projections that may point to a preferable approach. With this information, the Office will also be in a better position to negotiate a series of new contracts that are both cost-effective and equitable.

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