
CHAPTER 5

Emphasis on Formal Hearings By-Passes Other Alternatives for Dispute Resolution.

WSCD dependence on formal proceedings to resolve disputes has disadvantages.

When dealing with issues as complicated as what caused a compensable injury or how disabled an individual may be, some cases inevitably will lead to disagreements. Those disagreements sometimes become too complicated or ambiguous to be resolved except through formal hearing or medical review. However, hearings on Workers' Compensation cases are expensive to conduct, often concern relatively small dollar amounts, threaten to overwhelm the capacity of the Office of Administrative Hearings (OAH) and the Medical Commission, and prolong the time it takes claimants to obtain benefits. In addition, most claimants win their disputes at the hearings level.

Use of alternative approaches is left to analysts' discretion.

W.S. 27-14-601 through 616 outlines the use of formal hearings to resolve Workers' Compensation disputes. Several less formal alternatives exist for settling disagreements, but the decision to refer injured workers to them is a matter for analyst discretion. WSCD has not promoted the use of less contentious dispute resolution procedures and continues to rely on the formal hearing process. It needs to adopt a new focus to ensure disputing claimants are consistently offered resolution alternatives appropriate to their dispute level.

Any Party Can Contest WSCD's Decisions

According to statute, employers and health care providers as well as injured workers can request a hearing if they disagree with a WSCD determination regarding injury compensability, medical benefits, indemnity benefits, or related costs. In addition, if WSCD has not made a final determination regarding a benefit within 60 days, an interested party can request a hearing.

Most WSCD decisions are not contested.

In FY '02, analysts determined 2,337 reported injuries to be non-compensable, and denied payment at least partially on

23,108 medical claims. Potentially, each of these decisions could be disputed at a hearing before the OAH or the Medical Commission, although most are not. OAH has jurisdiction over compensability disagreements, while the Medical Commission hears disputes on issues requiring the evaluation of conflicting medical evidence.

More than half of contested cases are withdrawn or settled prior to hearing.

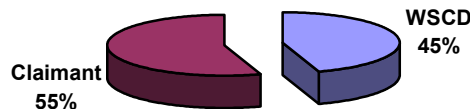
WSCD loses 55 percent of the cases referred to hearing

Relatively few denied cases advance to these bodies, but those that go to hearing tend to be decided in favor of the claimants. In the two-year period FY '01 and '02, claimants took 1,765 cases to OAH and the Medical Commission. Of those cases decided and for which resolution and prevailing party are known, 61 percent were withdrawn or settled prior to being heard. Of the remaining 39 percent of cases that went through the formal hearing process, WSCD won fewer than half (see Figure 5.1).

Figure 5.1

Contested Cases Decided at Hearing in Favor of WSCD FY '01-'02

Claimants win over half the contested cases heard.



Source: LSO analysis of WSCD data

In addition to settling some cases already referred to hearing, the Division on occasion offers claimants unhappy with their decisions the opportunity to settle as an alternative to a hearing. However, the Division could not provide the number of cases settled in this manner, or on the final outcome in those cases.

Relatively few Workers' Compensation appeals reach the Supreme Court each year, and the Division appears to fare better

at this level. For the period 1990 to 2001, the Supreme Court heard 184 Workers' Compensation cases. WSCD won 80 percent of these cases.

Not all requests for hearing are appropriate.

Additional claims should be put on hold until the initial compensability decision is made.

The 1,765 cases referred to OAH and the Medical Commission in FY '01 and '02 represented 1,591 injuries and even fewer individuals; this is because some individuals had multiple cases referred to one or both hearing bodies. These cases were often claims that could not be paid because the compensability of an injury had been denied and this decision was being contested.

According to W.S. 27-14-601(a) additional claims cannot be considered until a compensability decision is made; in essence, they are on hold. The referral rate to OAH and the Medical Commission would have been almost 13 percent lower in FY '01 and '02, had these additional cases been put on hold. We did not find written procedures directing analysts to put subsequent claims for these individuals on hold. Each of these additional cases has its own administrative, court, attorney, discovery, and deposition costs.

Cases go to the wrong hearing body

Improper referrals cause further delay in decisions.

OAH and Medical Commission staff expressed frustration that each receives cases more appropriate for the other hearing body. Inappropriately referred cases are further prolonged because they must be returned to WSCD for re-referral to the proper hearing body. Both staffs also expressed frustration with the quality and completeness of information WSCD sends when referring a case.

Several Less Formal Dispute Resolution Procedures Exist

Alternatives to a formal hearing process are available, some developed by the Division and some authorized in statute:

- Individuals who have missed an application deadline can request a hearing with the Internal Hearing Unit
- WSCD can reverse its final determination within one year, if additional relevant information arises

- Disputes involving \$2,000 or less that do not involve a compensability issue can be pursued in small claims hearings
- WSCD can settle for up to \$2,500 without acknowledging compensability
- OAH and the Medical Commission offer voluntary mediation services

Alternatives to formal hearings are not always apparent.

When first denying a worker's injury or benefit compensability, the claims analyst sends a letter that announces the denial and explains the worker has the right to request a hearing. The letter does not mention less formal alternatives for resolving disputes. Consequently, use of these options depends on whether the analyst informs the parties of them verbally.

Analysts we interviewed seemed largely unfamiliar with the mechanics of referring disputes to mediation and with other less adversarial means of resolving issues. Referral data shows that analysts continue to rely on the most formal procedures to resolve claims disputes.

Reliance on Formal Hearings Has Negative Financial and Medical Consequences

An emphasis on formal hearings has financial consequences for WSCD since the Division pays its own attorney fees, the injured workers' attorney fees, court fees, and OAH and Medical Commission costs. In FY '01 and '02, the Division's costs for contested cases averaged \$2.7 million annually; this represents 2.5 percent of total Workers' Compensation program costs, and 15 percent of the program's administrative costs.

Hearings cost WSCD nearly \$3 million annually.

Attorney and court fees were recorded for only a handful of cases in the data we obtained from WSCD. Consequently, our analysis is limited by lack of complete information and cannot be considered statistically reliable. Nevertheless, the available data suggests an additional area of concern: cases in which information on legal costs were recorded show that WSCD frequently paid far more in legal costs, or settled for a larger sum, than the amount originally at dispute. One dispute

concerning \$28 in benefits resulted in court and claimants' attorney costs (not including WSCD attorney fees) of \$2,001. While this case is extreme, it is representative of other cases for which data were available; in one, a dispute over \$452 in benefits was settled for \$5,000.

No written policy directs analysts to pursue early dispute resolution.

Division officials maintain that each case has the potential of setting a precedent, and in some, a good business decision may be less important than the principle at stake. However, we found no written policy or training that directs WSCD staff to do all they can to resolve disputes early in the process.

Cases Threaten to Overwhelm OAH and the Medical Commission

OAH and the Medical Commission staff say they are overwhelmed with the volume of WSCD cases they receive. In their words, their dockets are out of control: OAH has WSCD hearings scheduled five months in advance. Medical Commission hearings are currently scheduled ten months in advance.

Contested case load results in hearings being scheduled months in advance.

Once a case goes to OAH or the Medical Commission, the rules, procedures, legal requirements and timeframes of those bodies supersede WSCD requirements. Hearings proceed according to their own schedules and legal requirements. In FY '01 and '02, less than one percent of the injury compensability cases that went to hearing were decided in under 60 days after referral to hearing. By comparison, 93 percent of all injuries found compensable were decided in that amount of time.

Hearing delays can result in financial and medical hardships for injured workers.

In addition, injured workers may encounter financial hardships due to the extra time it takes to resolve disputes and receive benefits. A less obvious but potentially more serious outcome is that some injured workers may make their own decision to discontinue medical treatment pending the outcome of their hearing. In cases where delaying treatment can result in deterioration, this can have long term or even permanent health consequences for the injured worker.

Little Attention Given to Promoting Alternative Methods

WSCD has not developed policy to guide the use of alternatives.

Alternative dispute resolution procedures are known to minimize time and aggravation and reduce costs for all parties in a dispute. WSCD has not set up an administrative structure that directs analysts to suggest dispute resolution alternatives such as redeterminations, mediation, and settlements. If the Division is committed to alternative dispute resolution, it needs to develop policy, written procedures, analyst training, outcome measures, an information system, and review procedures to highlight that commitment.

Rather than finding written policy that promotes use of such alternatives, we found a disturbing acceptance of formal hearings as the only option. In denying benefits or missing the statutory 60-day decision limit, WSCD sets the stage for a dispute because referral to hearing is the only recourse an injured worker may be told about. When asked to describe how they decide which cases to refer to hearing, several analysts and supervisors commented that statute says they have 60 days to make a decision and then the matter goes to hearing.

WSCD has not developed procedures to inform analyst decision making.

WSCD's written procedures are not adequate to guide analysts through the range of alternatives; the procedure manual provides little more than their legal definitions. Generally, information the manual contains about hearings, such as who pays court reporter fees, is not germane to the analyst's decision-making process. There is no written policy to assist in determining the circumstances under which a settlement or a redetermination might preclude the need for a hearing.

WSCD staff depend heavily on informal employee mentoring and word of mouth for transmitting policy and procedural changes. This appears to be the case with referrals to hearing: within individual districts (internal units consisting of analysts and a supervisor), we saw a similarity in the rate of referrals and the proportion of "wins" at hearing. These measures were not, however, consistent among districts. Consistency within districts suggests that each supervisor is successfully communicating a

version of policy to subordinates. However, differences among districts suggest that Division policy and procedure may not be consistently communicated across the organization.

Recommendation: WSCD should develop explicit policies and materials promoting the use of less formal approaches to dispute resolution.

Other states initially require less formal means to resolve disputes.

Analysts need specific guidance on their key role in the resolution of disputes, a role that starts at the earliest stages of a case. Analysts are in a position to steer some disputes towards less costly and less contentious resolution than can occur in a formal hearing venue. Some states allow, and at least one even requires, disputing parties to participate in less formal attempts to resolve their differences. In North Dakota, cases cannot be referred to a formal hearing process or review body, nor will attorney fees be paid, until less litigious alternatives have been exhausted. In this way, hearings are reserved for cases that cannot be resolved less adversarially.

Claims Analysts Are Claimants' Only Identified Source of Information

Participants rely on analysts to inform them of alternatives.

WSCD's procedures make the claims analyst an individual's initial contact, the ongoing contact, and generally only contact and source of information about the Workers' Compensation system. No suggestions of alternate contacts appear in the written information available to claimants. For example, if a benefit is denied, the disputing party is instructed to discuss the matter with the claims analyst. However, this is the very person who decided to deny the benefit in the first place. If the misunderstanding or disagreement continues, the disputing party can only know of alternatives from the information the analyst chooses to transmit. At present, a claimant can get independent information and impartial legal advice in one of two ways: by requesting a contested case hearing, or by paying for the services of an attorney out of pocket.

Recommendation: WSCD should provide participants with a neutral source of procedural and legal information.

As an initial step, WSCD needs to provide participants with a clear explanation of dispute resolution alternatives that are currently available. Participants should have a description of the procedures, the costs and who covers them, and the average time associated with each choice so they can make informed choices regarding the resolution of disagreements. Should a customer service unit be created as recommended in Chapter 4, that staff could also transmit this information verbally.

Other states find independent review of disputes to be cost effective.

Other states provide participants with an independent source of information in addition to their claims analysts. For example, North Dakota provides no-cost assistance to injured workers attempting to resolve disputes through its Office of Independent Review (OIR). OIR staff have several functions: they help avoid costly and lengthy litigation by offering an independent review of the disputed claim, they communicate with Workers' Compensation staff, and they advocate on behalf of the claimant. Their efforts are geared to resolving disagreements early, before disputes grow to become formally contested cases.

WSCD Lacks Information Needed to Improve Referrals to Hearing

WSCD does not study why it loses so many contested cases.

With the data currently available, WSCD management cannot determine why the Division loses as many cases as it does at hearing. The Division lacks internal procedures that ensure a substantive review of cases that are going to hearing, and it knows little about the outcomes of the hearings. The Division also does not track data that would demonstrate whether cases are lost because the information on which a decision was made was inadequate or incorrect.

Current procedures call for supervisors to review referrals to hearing to ensure that required paperwork has been completed. However, they do not consistently review the appropriateness of the decisions that prompted claimants to request hearings.

Recommendation: WSCD should identify ways to improve the current referral process and its outcomes.

WSCD needs to undertake a systematic review of its role in referring cases to hearing, and revise current practices. Management can set the tone by emphasizing the importance of resolving disputes early, thereby avoiding unnecessary legal proceedings and their related costs. Management needs to develop policy that directs analysts to recommend alternative dispute resolution options when appropriate. New procedures and materials highlighting these options should be created and integrated into the Division's way of doing business.

Alternative approaches may require new policies, procedures, and staffing practices.

WSCD may also need staff with special skills. For example, a professional with expertise in resolving administrative, legal, and medical issues could review referrals for substantive merit. This level of scrutiny could help ensure that claimants are treated fairly and equitably, and that appropriate cases are offered mediation, settlement, or other means of resolution.

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