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May 16, 2017

Joint Committee on Finance

Paper #101

Division of Hearings and Appeals Worker's Compensation Court Reporters (Administration -- General Agency Provisions)

[LFB 2017-19 Budget Summary: Page 26, #6]

CURRENT LAW

The Division of Hearings and Appeals (DHA) within the Department of Administration (DOA) conducts contested case hearings and appeals for many state agencies and is provided base funding of \$7,721,900 PR in 2015-16 and \$9,519,500 in 2016-17 and 83.15 PR positions annually to DOA's hearings and appeals fees appropriation. Under current law, testimony at a hearing held under worker's compensation (WC) law must be taken by a stenographic reporter or, in emergency, recorded by a recording machine.

GOVERNOR

Delete \$555,000 PR and 4.0 PR positions annually to reflect savings based on statutory modifications that would reduce the need for WC court reporters. Expected savings would be: (a) \$169,100 PR annually for salaries; (b) \$64,700 PR annually for fringe benefits; (c) \$255,000 PR annually for contracted court reporters; and (d) \$66,200 PR annually for materials and services related to the elimination of the four position.

Modify current law to allow the testimony at a hearing held under worker's compensation law to be recorded by a recording machine or taken down by a stenographic reporter. This provision would first apply to hearings for which an application was submitted on the effective date of the bill.

DISCUSSION POINTS

1. The Division of Hearings and Appeals has offices in Madison and Milwaukee and is organized into four subunits: (a) General Government (Department of Health Services (DHS) cases regarding nursing home regulation; Department of Natural Resources (DNR) cases; Department of Justice (DOJ) cases; Department of Transportation (DOT) cases; Department Public Instruction (DPI) cases; Department of Employee Trust Funds cases; Department of Workforce Development (DWD) cases regarding vocational rehabilitation; and Department of Safety and Professional Services cases); (b) Corrections (cases regarding revocation of probation, parole, and extended supervision); (c) Work and Family Services (DHS cases regarding FoodShare, medical assistance, foster homes, day care center licensing, medical care facility licensing, certification or penalty issues, and Medicaid rate-setting and recoupment; Department of Children and Families (DCF) cases regarding adoption, child care, and foster care; and DOA cases regarding low-income energy assistance); and (d) beginning in 2016, the Office of Worker's Compensation Hearings conducts hearings for the DWD Worker's Compensation Division.

2. In the 2015-17 biennium, the Division was provided \$1,794,100 PR in 2015-16, \$3,588,100 PR in 2016-17, and 33.0 PR positions annually to transfer adjudicatory responsibilities relating to WC disputes from the DWD to the DHA in DOA starting January 1, 2016. The 2017-19 budget bill includes the transfer of an additional 5.5 DWD positions from DWD to DHA, and a \$1,240,700 PR annual increase in funding for supplies and services.

3. According to DHA, current practice (for all but WC hearings as discussed below) is to make electronic recordings and then have legal associates transcribe the hearing if a decision is appealed (approximately 150 hearings in 2016). Transcription is the process of making a written record by listening to a recording of a hearing or proceeding. The Division records 7,500 hearings per year and keeps these cases for seven years. The Division indicates that their current information technology (IT) could absorb the 400 WC cases per year and maintain these records for 12 years. As DHA already retains electronic records, there is no anticipated increase in IT costs. The Division is the custodian of only some electronic recordings, depending on the agreement DHA has with the agency for which hearings are held.

4. The Division has three recording systems that are used for hearings and indicates that the system used "is more a function of the portability or room than the type of hearing. It's a function of the acoustics, the number of parties (need for microphones), participation of the public, and power need. For example, some jails don't have power outlets in a hearing room, and some hearings are held in rooms with loud vending machines. Worker's Compensation hearings are usually held in larger rooms because occasionally there are multiple parties. For DNR hearings, there can be an opportunity for public comment on a permit, which requires a big room such as city council chambers." The three systems are described below:

a. Different versions of Olympus handheld recorders to which microphones can be attached to augment sound receptivity. The majority of this equipment is older and less technologically advanced;

b. Approximately five administrative law judges (ALJs) use laptops to record using an

Audio Record Wizard program and attach a microphone to augment recording. Laptops are usually used for video hearings as access to an outlet and table is necessary to use this equipment. Having the file of the hearing on a laptop can be convenient as it can be uploaded along with the rest of the exhibits.

c. For large hearings, for example DNR, DHS, and DOT, DHA uses a laptop with SonicClear software that is fed by a soundboard to accommodate eight microphones.

5. In addition, DHA indicates that "current recording equipment and video capability will move to Hill Farms, with upgrades as necessary. DHA is also transitioning to high quality Cisco DX-80 monitors to enhance video hearings. However, DHA does not yet know what additional equipment, if any, will need to be purchased."

6. In 2016, approximately 400 WC hearings were attended and recorded by WC court reporters per statutory requirement. A court reporter sits in the hearing and records the proceeding as it happens. Approximately, 240 hearings were conducted by DHA WC court reporters and 160 were completed using contracted court reporters. About 360 of the 400 were transcribed after a WC court reporter recorded the hearing, which means an attorney requested a transcript for brief writing or for an appeal.

7. Since the presence of court reporters to take down testimony at WC hearings would no longer be required under the bill, WC court reporters would not have to spend time traveling to hearings and DHA would no longer have to employ sufficient WC court reporters to cover hearings scheduled at the same time. The Division estimates the reduced workload would allow for the reduction of 4.0 PR positions (\$169,100 PR salary, \$64,700 PR fringe, and \$66,200 PR materials and services annually) and \$255,000 PR annually through the reduction of contracted court reporters and other materials and services savings.

8. The bill retains 3.0 stenographic reporter positions for WC cases. The Division indicates these positions will be sufficient to meet the need for transcription when hearings are appealed. Requestors will be provided electronic records, which can be transcribed by the requestors. Participants in hearings will be able to bring private stenographers to hearings. Given these plans, the Committee may wish to accept the Governor's recommendation. [Alternative 1] As a result, the Committee would delete \$555,000 PR and 4.0 PR positions annually and modify statute to allow the testimony at a hearing held under WC law to be recorded by a recording machine or taken down by a stenographic reporter.

9. According to the administration, the budget provision was offered as part of DHA's response to 2015 Act 201 that required each agency to submit a five percent reduction and was intended to meet that requirement. In general, the workload may be reduced through the implementation of this provision, but it will not eliminate the need for transcription by WC court reporters. In addition, the bill does not require the use of electronic recordings for WC hearings and still permits the use of court reporters. Since either ALJs or litigants may still request court reporters, it is unclear what the actual reduction in demand for court reporters may be.

10. In addition, according to the administration, WC court reporters currently have duties

beyond recording WC hearings. For example, WC court reporters schedule contract court reporter and interpreters for upcoming WC hearings, check that all pertinent materials have been received before the hearing, prepare files for appeal to Labor and Industry Review Commission (LIRC), and perform legal associate work as well as other administrative functions. Along with the change to legal requirements regarding WC court reporters, WC court reporters would no longer perform administrative tasks. Court reporters would only transcribe hearings when the appellate body requests transcripts of WC hearings as discussed above. The administration indicated that the administrative and legal associate tasks currently performed by court reporters would be absorbed by current staff resources.

11. Under current practice, 20% to 30% of each WC court reporter's tasks are administrative. With the removal of four positions, 0.8 to 1.2 positions worth of work may still be needed to handle the administrative tasks of the positions that are deleted. In addition, if remaining WC positions are redefined to do less administrative work and more transcription work, a total of 1.4 to 2.1 positions may need to be retained for administrative tasks. Given that the reduction in workload is an estimate, a reduction of a different number of WC court reporters may be appropriate. For example, if the number of court reporter positions is reduced by 2.0 and spending authority for contract court reporters is reduced by half, the agency may be able to address any non-transcription workload handled by the deleted positions. [Alternative 2] As a result, the Committee would delete \$277,500 PR and 2.0 PR positions annually and modify statute allow the testimony at a hearing held under WC law to be recorded by a recording machine or taken down by a stenographic reporter.

12. The administration indicates that since the three WC court reporters being retained know WC law, are familiar with the WC exhibits, and are familiar with the voices and habits of each WC ALJ, the intent would be to have these court reporters preform WC transcription. One could argue that legal professionals in WC cases may prefer to be charged for the service of WC court reporters provided by DHA, rather than have the WC court reporter service not available. Further, the agency charging for the service may be more cost effective for the state and the WC litigants than each party bringing in their own court reporters and having to determine, if there are discrepancies between the two records, which is the "official" copy.

13. Wisconsin's workers compensation system, including the costs of ALJs, is funded by an assessment against WC insurers (s. 102.75). Any change in the cost of operating the WC Division or in the cost of handling workers compensation claims is factored into the assessment rate charged to insurers. Any change in the assessment charged to insurers would then be passed on to employers through a change in the rate structures. If the system costs more to operate (such as the system becomes more litigious, and/or the time to close cases increases), rates would be expected to increase. Under the proposal, it could be argued that there could be an increased risk that worker's compensation premiums could increase in Wisconsin given the likelihood that more cases would require further litigation due to conflicts about the record.

14. A WC court reporter has duties during a hearing in addition to taking down the record. A WC court reporter will briefly stop the proceeding to ensure that people only speak one at a time, identify who is speaking, clarify spelling of any unknown words, and are practiced understanding

accents. Taking care of these procedural points as they happen is more cost effective than relying on a recording that may not pick up the important part of a hearing for a multitude of reasons and having to complete the hearing again. In addition, WC court reporters handle all of exhibits during the hearing so that the ALJ can concentrate on the hearing itself. In addition, they provide assistance with pro se litigants (litigants that do not have the assistance of an attorney). It is possible that without the WC court reporters, these tasks may still need to be performed by other administrative staff.

15. Without a WC court reporter, the first indication of a recording malfunction may be when DHA is directed to create a transcript. Further costs may then occur through the loss of the proceeding or needing to re-create the proceeding. Some of these concerns could be mitigated by requiring identification of person responsible for making sure the electronic recording is working.

16. The Division indicates that it had 275 non-WC cases appealed to the Circuit Court from January, 2015 to date. From January, 2015 to date, DHA has had two Circuit Court cases remanded due to inadequate or missing recordings (both from the Corrections unit). In one case the hearing had to be redone, and for the other the parties stipulated to a synopsis of the hearing. In addition, one transcript from the work and family services unit was returned for an amendment due to a typographical error produced by low audio. Workers compensation cases are longer and appealed more frequently than cases from other units. In 2015-16, 340 of 400 WC cases were appealed, thus requiring transcripts. Therefore, assuming the same rate of error, approximately four cases a year would have to be remanded to DHA for further proceedings.

17. An audio recorder does not automatically give feedback that it is not functioning properly or that the proceeding is being conducted in a manner that does not give it the ability to play back the proceeding in an audible manner. Particularly, if multiple people are speaking, it does not identify the speaker. Video would help to identify the speaker, but has a number of the same technical issues as audio recordings. While video may aid witness credibility determinations, it often does not provide the context of the entire room and will not identify a speaker off screen.

18. To provide the reliability that WC cases require, the technology used would need to provide feedback to the users if an issue occurs or if someone is speaking too softly to record. In addition, while some of the hearings may take place at the new Hill Farms building, WC hearings take place around the state and there are over 20 other locations at which WC hearings may occur. This means that either stationary equipment would need to be acquired for each location or portable equipment would need to be acquired and arrangements made for the equipment to be transported to the hearing location. The Division did not request additional funding for the equipment and, thus, the funding would need to come from existing resources.

19. The Workers Compensation Advisory Council (WCAC) is statutorily required to advise DWD in carrying out the purpose of the Workers Compensation Act. Council membership is comprised of five voting representatives from organized labor; five voting management representatives; three non-voting representatives from the insurance industry; and one representative from DWD. The Council can submit its recommendations for changes in worker's compensation law to the Legislature in an "agreed bill" and report its views on any other pending legislation which relates to worker's compensation. According to the Department, the "agreed bill" concept is a long-

standing tradition of the Council. As the name implies, Council members come to a consensus agreement to support the Council's proposed changes in the Legislature and not to individually seek any changes to those proposals.

20. It could be argued that audio or video technology may be reliable enough for WC cases or if not currently then in the future. In order to assess technology available and keep WC insurance premiums down, however, DHA could conduct a study of available audio and video technology for WC hearings and present its findings to the WCAC by July, 2018. The Council could submit a recommendation to DHA about what WC recording equipment would be sufficient to replace a court reporter in time for inclusion in next the 2019-21 agency request. If the technology is insufficient, WCAC could advise DHA about what is inadequate. The Division could be directed to include WCAC's recommendations in its budget request if applicable. [Alternative 3] Under this alternative, current law would be maintained.

21. The proposal to no longer require WC court reporters was not presented by the WCAC and included in an "agreed upon bill." The WCAC was provided with a summary of the changes in the 2017-19 budget bill at the March 14, 2017, meeting. The WCAC may report its views on any pending bill to the proper legislative committee. To date, the Council has not taken action to support or oppose any provisions found in the bill.

22. Based on the detailed and subject specific work performed by the WC court reporters, the litigious nature of WC hearings, and the reporters administrative involvement with these hearings, the Committee may feel that the current WC professional staff and services should be retained. Therefore, the Committee could delete the provision and maintain current law. [Alternative 4]

ALTERNATIVES

1. Approve the Governor's recommendation to modify statute to allow the testimony at a hearing held under worker's compensation law to be recorded by a recording machine or taken down by a stenographic reporter and delete \$555,000 PR and 4.0 PR positions annually to reflect estimated savings associated with the statutory modification.

ALT 1	Change to Base		Change to Bill	
	Funding	Positions	Funding	Positions
PR	- \$1,110,000	- 4.00	\$0	0.00

2. Modify statute to allow the testimony at a hearing held under worker's compensation law to be recorded by a recording machine or taken down by a stenographic reporter and delete \$277,500 PR and 2.0 PR positions annually to reflect estimated savings associated with the statutory modification.

ALT 2	Change to Base		Change to Bill	
	Funding	Positions	Funding	Positions
PR	- \$555,000	- 2.00	\$555,000	2.00

3. Delete the provision. Instead, direct that DHA conduct a study of the audio and video needs of worker's compensation hearings that could allow for the use of such technologies in WC hearings. Direct DHA to present its findings to the WCAC by July, 2018. The Council may submit a recommendation to DHA regarding what WC recording equipment would be sufficient to replace a court reporter in time for inclusion in the 2019-21 agency request.

ALT 3	Change to Base		Change to Bill	
	Funding	Positions	Funding	Positions
PR	\$0	0.00	\$1,110,000	4.00

4. Delete the provision and maintain current law.

ALT ~	Change to Base		Change to Bill	
	Funding	Positions	Funding	Positions
PR	\$0	0.00	\$1,110,000	4.00

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