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WEEK 2 PREVIEW

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Public hearing to be held in Park Falls regarding deer populations in the North

Meeting set for Thursday, Aug. 31

By Beckie Gaskill
OF THE LAKELAND TIMES

There has been a recent push to return deer management units in the north back to the numbered units used in the past. The logic behind this push is to manage deer based on habitat type, which many agree would make more scientific sense. Currently deer management units are delineated by county borders. While this seems to make things easier for the hunter, in the natural world, county boundaries are somewhat arbitrary. The idea has gained traction and also the attention of both the Assembly committee on sporting heritage and the Senate committee on financial institutions and sporting heritage. The two have set a joint public hearing on the matter for next week in Park Falls.

The effort to return to former management units was originally headed by Gregg Walker, Dean Bortz, Kurt Justice and several others from the Northwoods. By moving back to the smaller, habitat-type based units, Walker said, deer could be managed according to the populations in those habitat types. Populations, especially in the western part of Oneida County and also to the north, were not the same as they would be in the old unit 38, for example. The ability to manage those populations separately, and based on local con-

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Names released in fatal Lac du Flambeau stabbing incident

By Brian Jopek
OF THE LAKELAND TIMES

The names of the two men involved in a fatal stabbing during the early morning hours of Aug. 19 at a residence in Lac du Flambeau were released Monday.

In a press release from T.J. Bill, chief of the Lac du Flambeau Tribal Police Department, Joshua J. Hart, 38, was stabbed with a large butcher knife.

He was later pronounced dead shortly after arrival at Howard Young Medical Center.

Witnesses at the scene identified Hart's assailant, who fled prior to the arrival of law enforcement personnel.

Matthew L.T. Allen, Jr., 20, was found by authorities in Woodruff and arrested in connection with the incident and taken to the Vilas County jail in

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TREVOR GREENE/LAKELAND TIMES

DRUMMER SETS TO BEAT THE COMPETITION

Emily Weitz of Trig's Fiery Fresh team pounds the drum to set the tempo for paddlers during the Grocery Wars Exhibition Race during the 7th Annual Minocqua Dragon Boat Festival on Saturday, Aug. 19.

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Oneida zoning will hire outside counsel on DNR challenge

County gives thumbs up to analyzing differing interpretations

By Richard Moore
OF THE LAKELAND TIMES

On a 16-2 vote at its most recent meeting, the Oneida County Board of Supervisors has approved spending up to $10,000 for the county's zoning committee to hire outside counsel for advice on the DNR's challenge to its proposed shoreland ordinance changes.

Supervisors Steven Schreier and Jim Winkler were the two dissenting votes.

The decision to seek outside legal counsel came after the Wisconsin Department of Natural Resources (DNR) told the committee it would not certify certain proposed changes to the county's shoreland ordinance that the committee had submitted to the agency for review.

That incensed some members of the committee who believe the DNR's statutory interpretations do not necessarily align with legislative intent, and, more, other counties have been allowing — some through policy, some through code — some of the same provisions the DNR says it won't certify in Oneida County.

The zoning committee is seeking the counsel — in particular attorney Larry Konopacki, a former attorney for the state legislature who was involved in the writing of the state's shoreland statutes — to review the proposed ordinance amendments and relevant state statutes and administrative rules and provide the committee with a legal analysis of the proposed revisions or to provide language the DNR might find acceptable.

As Oneida County zoning director Karl

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Calls for vaccine compensation reform go unheeded for quarter century

With little hope for success, lawmakers push new effort in Congress

Part five in a five-part series

News analysis

By Richard Moore
OF THE LAKELAND TIMES

Almost from the beginning, experts residing both outside and inside the federal government recognized serious problems with the national Vaccine Injury Compensation Program, which Congress established in 1986 to provide a non-adversarial, fast, and fair process to compensate the victims of vaccine injuries and their families.

A 2000 report for the U.S. Committee on Government Reform, chaired by then Rep. Dan Burton (R-Indiana), recommended an overhaul — which did not happen — but by then the complaints had already been rolling in for well more than a decade.

"[T]he program has received criticism that it does not operate as efficiently or equitably as intended

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Reform

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by Congress," the report stated. "Designed as a 'no-fault' alternative to litigation against vaccine manufacturers, the program was envisioned by Congress to compensate 'quickly, easily and with certainty and generosity' those individuals who are injured or die as a consequence of our universal vaccination policy."

That was not the case, the committee found.

"Based on testimonial and documentary record, the subcommittee finds that the program under the direction of HHS [Department of Health & Human Services] has approved changes that substantially restrict compensation coverage," the report stated. "Furthermore, avoidable, protracted and adversarial litigation of claims has resulted, thereby undermining the remedial nature of the program as intended by the Congress."

Precise criticisms were legion, too.

For example the Vaccine Injury Compensation Program (VICP) divides injuries into two categories — Table Injuries and Non-Table Injuries. Table injuries are automatically deemed to be vaccine-caused if the injury occurs within a short time after vaccination. But critics say that the government over the years has whittled down that list so much that it is almost pointless.

Specifically, the Table Injuries were amended as far back as 1995 and 1997 with significant impacts on the program.

"Far more claims were associated with the injuries removed from the Table than were associated with the injuries that were added," the 2000 report stated. "Prior to the Table revisions, three quarters of the claims alleged injuries on the Table, after the revisions were implemented, more than half of the claims filed were Table injuries. Of note, almost half of past claims awarded compensation were for injuries subsequently removed from the Table."

For non-table injuries, petitioners must prove causation as well as temporal association to receive compensation. That involves a hearing before special masters who, unlike traditional judges, have greater leeway to help level the playing field between the government and the families, even to the point of guiding petitioners to evidence they may not have uncovered themselves.

Given the government's vast resources, the idea was to get to the truth in a non-adversarial way, and, as the 2000 report stated, to be generous.

That idea went by the wayside, critics say. The process now is as litigious and adversarial as civil court, with the government hiring armies of expert witness to discredit the claims of petitioners, while the petitioners themselves are often outgunned in money and expertise and experience, and often face special masters who are indifferent, unknowledgeable, or downright hostile.

Instead of being fast, the process has become for many a nightmare of endlessness, taking years rather than months to be resolved.

Plus, the compensation is a pittance — capped at 1986 levels, and only $250,000 for a death — and the government often fights even the most trivial compensation claims, right down to a pair of sneakers for one severely injured girl.

New reform bills

For most of the program's 37-year existence, calls for reform of the VICP have fallen on deaf ears. Still, reformers keep trying, and, in this session of Congress, two lawmakers, Rep. Lloyd Doggett (D-Texas) and Rep. Lloyd Smucker (R-Pennsylvania), have introduced the Vaccine Injury Compensation Act to provide what they say are much-needed updates and improvements to the program.

So far their efforts have fallen on deaf ears, too. With some variations, this bill is essentially the same version they introduced in the last session of Congress, which went nowhere. So far, this one isn't going anywhere, either.

In the bill, the lawmakers are targeting the exclusion of Covid-19 vaccine injuries and deaths from the VICP, which they say only undermines confidence in the government and in vaccines.

"Our bill would update the program and correct the unjust decision to have Covid-19 claims considered by a separate, and even more inadequate governmental program," Doggett said. "By assuring a prompt and fair response to any related injury, we build confidence in vaccines and reduce hesitancy."

Democrat Dogget has made clear that he opposes "anti-vaxxers," and he says vaccine injuries are rare but should be compensated when they happen.

"Vaccines save lives, but in the rarest of cases, usually caused by an error in administration rather than the vaccine itself, they involve injury," he said. "While strongly disagreeing with the dangerous misinformation spread by anti-vaxxers, I believe that those who suffer rare injuries associated with vaccines, including those to fight Covid-19, should receive prompt, reasonable compensation for medical bills and other losses. The existing program involves unreasonable delays and inadequate redress."

Smucker said many people had relayed to him stories about their vaccine injuries, or the injuries to someone in their family.

"Constituents of my congressional district have shared with me their stories about adverse reactions they experienced, the devastating daily struggles they face, and the woefully inadequate government response to the very real difficulties they experience every day," Smucker said. "For some, the Covid-19 vaccine caused devastating health consequences and it is critical that the reforms included in this legislation are advanced to assist vaccine-injured individuals in my congressional district and across the nation."

Specifically, the legislation would shift pending Covid-19 vaccine claims from a program known as the Countermeasures Injury Compensation Program (CICP) to the VICP. The CICP provides compensation for covered serious injuries or deaths that occur as the result of the administration or use of certain countermeasures during public health emergencies.

Because the Covid-19 vaccines were issued under emergency use authorizations in a public health emergency, injury claims were initially filed under the CICP. The lawmakers believe the claims need to be shifted to VICP because the federal health emergency has been canceled and because Covid-19 claims have received full FDA approval and are being added to regular immunization schedules.

Unlike the VICP, Doggett and Smucker say, the CICP does not offer judicial review and claimants may only recoup medical and work-loss expenses that have not been compensated by other payors, thus they say the VICP offers stronger due process protections as well as damages for pain and suffering.

The modernization act would also expand the number of special masters from a ceiling of eight to a floor of 10 to help reduce backlogs, and it would permit special masters to serve for multiple terms. Doggett and Smucker also say claims would be expedited by requiring the secretary of Health and Human Services and the attorney general to submit a budget implementation action plan outlining the required resources to eliminate the backlog.

In addition, the legislation seeks to increase transparency by requiring special masters to provide an annual report on caseload, number of pending cases, and whether hearings have been scheduled, how many days it took for cases to receive a judgment, how many cases received a judgment, and the results, and any recommendations regarding the need for more special masters.

The bill would increase the cap on damages to the amount it would be today based on inflation increases, and it would establish an inflation-based formula to automatically increase the cap moving forward.

Finally, the statute of limitations on filing a claim would increase from three to five years, and it would shore up the Injury Table by requiring HHS to promulgate rulemaking to add a CDC-recommended vaccine or injury to the injury table within six months of a recommendation rather than two years. That effort would be bolstered by expanding the types of vaccines eligible for coverage under the VICP, which would include vaccines and injuries recommended by the CDC for routine administration in adults.

In separate legislation, Doggett and Rep. Mike Kelly (R-Pennsylvania) have introduced the Vaccine Access Improvement Act. The lawmakers say it would streamline the application of the 75-cent excise tax on covered-vaccine doses by eliminating the requirement that Congress pass legislation to apply the tax each time a new vaccine is added to the VICP.

The tax would now be automatically applied once HHS adds a vaccine to the injury table.

A deeper probe

While critics of VICP support Doggett's and Smucker's bill, many also say said it does not address systemic problems.

Many of those problems have been addressed in various analyses of the VICP over the years, but perhaps the most comprehensive was that by Peter Meyers, a professor of clinical law at The George Washington University Law School, in a 2011 paper entitled, "Fixing the Flaws in the Federal Vaccine Injury Compensation Program."

Though the paper was written 12 years ago, the same flaws persist today.

In his paper, Meyers said the program had worked well for the federal government, for the pharmaceutical industry, and for health care providers who administer the vaccines, but, for the victims, it was another story.

For one thing, the standard of proving causation that most petitioners must meet is too high a bar, Meyers argued, and he suggested the adoption of a legal standard of proof that would be more generous to petitioners.

"The Vaccine Act currently requires petitioners to prove their cases by the 'more likely than not' or 'preponderance of the evidence' standard," Meyers wrote. "There is substantial confusion and uncertainty in applying this standard today."

Meyers observed that several federal circuit court decisions had emphasized Congress's compassionate intent in the statute, and so they held that "close calls regarding causation" should be resolved in favor of petitioners, while other federal circuit court cases emphasized that traditional tort causation standards should be strictly applied in Off-Table cases.

That created an unpredictable and confusing situation, Meyers contended, and he urged Congress to clarify the burden of proof requirement central to the resolution of Off-Table cases.

"In this author's view, the Vaccine Act should be amended to allow petitioners the benefit of a more explicitly relaxed standard of proof of causation, similar to the standard of proof adopted for petitioners in other recent American and international compensation laws, which give petitioners the 'benefit of the doubt' in close cases," he wrote.

Indeed, Meyers reported, several other recent federal compensation laws had already adopted more relaxed standards of proof for petitioners, such as the Radiation Exposure Compensation Act, which provides that any "reasonable doubt with regard to whether a claim meets the requirements of this Act shall be resolved in favor of the claimant."

Meyers observed that the Japanese-American internment compensation law also contained a "benefit of the doubt" provision that mandated compensation if there was "an approximate balance of positive and negative evidence" with respect to a claimant's eligibility.

"Similarly, the Department of Veterans Affairs statute provides that an injured veteran is entitled to the benefit of the doubt on whether the veteran is entitled to disability compensation in a close case," he wrote. "There are also a number of international compensation programs that have adopted a more lenient standard for petitioners to satisfy."

The more generous standard should be incorporated into the Vaccine Act, Meyers wrote.

"It is justified by both the compassionate intent of Congress in adopting the Vaccine Injury Compensation Program, and the uncertainty and unknowns in the vaccine-injury area that often make it very difficult to show a causal relationship between a vaccination and a subsequent adverse event," he wrote.

Meyers also believed that the law must require that provisions of the Vaccine Act be construed liberally.

"As noted above, there are unresolved questions about the underlying philosophy of the Vaccine Act," he wrote. "The Act is sometimes described as a generous compensation statute that should be liberally construed in favor of compensating injured parties, but it has also been described as a statute waiving sovereign immunity that is to be strictly construed in favor of the government. There is language in the Federal Circuit's decisions supporting both points of view."

Meyers said Congress needed to resolve the inconsistencies.

"Congress should recognize that the compassionate intent behind the Act is best embodied in a generous application of its terms that will allow the Vaccine Compensation Program to operate with the 'generosity' that Congress intended," he wrote.

As many have, Meyers also called for expanding the statute of limitations.

"Many petitioners have missed filing deadlines for reasonable and potentially excusable reasons, such as in Brice, where the pro se petitioners were facing delays in getting complete medical records to file along with the petition while simultaneously trying to find an attorney to represent them," he wrote.

Meyers said the statute should be amended to extend the time for filing bodily injury and death cases.

"Three years is an unnecessarily short time limit to file a petition in the Vaccine program," he wrote. "The HHS Advisory Committee on Childhood Vaccines recommended a six-year statute of limitations, and bills proposing the six-year period have been introduced in Congress. A modification to six years, or even ten years, would reflect the 'basic gen-

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Challenge

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want to sit here and bring you something and then sit here and we all argue about it. …. So that's what we're looking for. And as far as $10,000, I would rather come to you knowing what we're presenting."

Timmons also said that, with Konopacki, the committee was trying to figure out lawmakers' intent when they passed the legislation. That way the committee and counsel can assess the strength and validity of the DNR's positions, Timmons said.

"The intent, what is the intent?" he said. "None of us will ever know what they were, but he was in the room and would understand the conversation that got it to where it is. NR115 is a guidance tool. It's not the rule. We write the rules and without knowing their true intent, that's what they keep going back to. 'Well the intent was to do this. The intent was to do that.'"

Newman questioned whether the $10,000 would open a money spigot that couldn't be turned off. She calculated the committee would only get 25 hours of consultation.

"That is like a small beginning and once we're into it for $10,000, how much more money are we going to have to follow that with to progress along that timeline?" she asked. "And my guess is this is not a $10,000 commitment. This is going to be a lot more than $10,000 once we're all done."

Newman said she would like to see if the matter could be resolved without private counsel.

Holewinski said he believed the $10,000 would be enough without more being needed.

"We're not getting into a legal battle, we're just looking for direction," he said. "And he would be probably the smartest guy since he sat in with the legislators writing the statutes."

Supervisor Robb Jensen pointed out that the committee could take Konopacki's advice and still be challenged by the DNR if the agency thought it was wrong, but Jennrich said the process was a little more complex than that.

"Mr. Konopacki, as part of his discussion with me, he really wants to sit down with the DNR legal staff, not DNR staff, and find out why they're taking the positions that they are, what legal analysis they are doing and either agree or disagree with what they're doing and advise the committee accordingly," he said.

Schreier asked about any help coming from other counties that have found out they are not in compliance.

"We're talking about other counties that have already technically adopted language or policy, which they're now told they're not in compliance, even though it was certified by the DNR in those instances," he said. "Where's their buy-in on this? I feel like were putting out the $10,000, and then potentially looking at them [the DNR] holding a hearing and then obligating us for more costs, which we won't have a choice in spending. And everybody else, the people we reached out to get advice on all this language, they're just going to sit and watch us spend more and more money on trying to find out how we can bring the language into compliance. I mean I kind of have an issue with that."

Schreier said he would like to see other counties ante up something.

"That would be my biggest concern is that we're fronting the majority of this, if not all of it fiscally," he said. "And it's going to benefit more than just Oneida County at the end is my guess."

Soon after that comment, the board voted to hire outside counsel, presumably Konopacki, to try and put an end to the guesswork.

Richard Moore is the author of "Dark State" and may be reached at richardd3d.substack.com.

Reform

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erous purpose of the Vaccine Act.'"

Meyers argued that once a new statute of limitations was adopted, the special masters should also have the option of reconsidering old cases dismissed for late filing that would have met the new statute of limitations deadline.

Another place where families have been at a disadvantage is the lack of adequate legal representation, and that's because petitioners often have had a hard time finding a competent attorney who will take the case. Meyers said fixing attorney compensation issues would help fix the problem.

"The payment of attorneys' fees and costs has generated considerable litigation in the Vaccine Program," he wrote. "The statute should be amended to pay appropriate market rates for these complex vaccine injury cases, and make both interim and final fee payment procedures quicker, less adversarial and more predictable."

Meyers said the U.S. Court of Federal Claims had a dedicated and experienced but small bar of petitioners' counsel, and it needed to support those attorneys with reasonable, promptly paid fees.

"This is also necessary to encourage other experienced attorneys to assist in these cases in the future," he wrote. "The switch to predominately Off-Table cases in the Program has also resulted in cases that are often much more complex both medically and legally, requiring substantially greater time and work, and imposing higher expert witness fees and other costs that the court must pay promptly and fully."

Meyers also thought that parents should be able to sue for their own injuries.

"As currently drafted, the Vaccine Act allows only the party directly injured by the vaccine to bring a claim for compensation under the Act," he wrote. "As a result of this limitation, the Vaccine Act provides no protection for manufacturers or doctors being sued by family members of vaccine-injured persons for injuries recognized by state law, such as loss of companionship and loss of consortium. The Vaccine Act should be amended to allow the parents of a minor child, or the spouse of an adult, to be named as an additional party to the case, in order to seek compensation for their own pain and suffering, lost income, and expenses incurred."

A lot has been made of the compensation caps, too, and Meyers said they should be raised accordingly. That's one thing the new proposed legislation would accomplish.

"Under the Vaccine Act, as originally enacted in 1986, the payment for a vaccine-related death is a one-time lump sum payment of $250,000," he wrote. "Similarly, compensation for any pain and suffering that an injured petitioner may have experienced, and will likely experience in the future, is capped at $250,000. Even assuming that $250,000 was appropriate when the law was first adopted, $250,000 in 1986 dollars is not the same as $250,000 in 2010 dollars. Accounting only for inflation, $250,000 in 1986 dollars is equivalent to over $500,000 in 2011."

In 2023 dollars, it comes out to about $700,000.

"Similarly, the cap for pain and suffering should also be raised ….. to reflect the value of the award in [today's dollars], and to more accurately reflect the value of the pain and suffering that many people with serious injuries suffer for their entire lives," he wrote.

In addition, Meyers thought expenses should be allowed for guardianships and conservatorships and family counseling.

"Petitioners are sometimes required to set up court-ordered guardianships and conservatorships in state court as part of a vaccine case settlement," he wrote. "The expenses in setting up these proceedings have been considered reimbursable expenses to the petitioner in some cases, but not in other cases in the Vaccine Program. It would be fair and appropriate to compensate petitioners for these expenses in all cases, because they are incurred only as a result of court-mandated procedures in the vaccine case."

Expenses for family counseling services are generally not reimbursable to petitioners, Meyers wrote, but they can be of critical importance to an injured person and their family members, and should also be reimbursable.

Meyers urged a complete review of the vaccine compensation program by the Court of Federal Claims, and he said the Government Accountability Office should conduct another oversight review of the program

"The U.S. Government Accountability Office has conducted a number of evaluations of the Vaccine Injury Compensation Program over the years, and it has documented a number of serious problems in the operation of the program, including delays in resolving cases, the overly adversarial nature of the cases, and problems with payment of attorneys' fees," he wrote. "The GAO has a long history of reviewing this compensation program, but it has been more than a decade since the GAO conducted a comprehensive review. It would be desirable for the GAO to investigate and report on the current operations of, and problems with, the Vaccine Compensation Program. The flaws in the current operation of the Vaccine Injury Compensation Program should be investigated and fixed."

In 2014, the GAO did finally undertake another comprehensive review — nearly a decade ago — finding many of the same problems Meyers dissected in 2011, and which had been exposed as early as 1999 and before.

They persist today.

Richard Moore is the author of "Dark State" and may be reached at richardd3d.substack.com.

Hearing

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ditions, was, he felt, the only way for the herd in those units to rebound.

"Use unit 31 as an example," Walker said in a meeting last winter when introducing the idea to a group of local hunters. "You can implement laws. No doe tags. No youth tags. Whatever you want to do. Change the seasons — you can administer rules different from the other units. That's tools. That's deer management." With a set population goal, he said using 20 per square mile as an example, regulations in that unit should not change until the deer herd has rebounded to that threshold. That, Walker said, is what he was going back to Madison for. He was going to advocate for a return to the old management units and also managing to a number of deer per square mile.

The public hearing on deer management in the north will be held at 1 p.m. on Thursday at the Town Hall in Park Falls. Public testimony will be received after invited speakers have spoken.

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