

**2023 Engrossed House Bill No. 1052**  
**Testimony before the Senate Industry & Business Committee**  
**Presented by Anne Jorgenson Green, Workforce Safety and Insurance**  
**Date: February 14, 2023**

Mr. Chairman and Members of the Committee: My name is Anne Green, Legal Department Director at Workforce Safety & Insurance (WSI). I am here today to provide testimony regarding Engrossed HB No. 1052. The WSI Board supports this bill with a proposed amendment that I will discuss later in my testimony.

**SECTION 1:**

Section 65-01-02(11)(b)(1) establishes the conditions necessary for WSI to pay for preventative treatment when an employee is exposed to bloodborne pathogens. In its current form, the organization will only cover preventative care for what are commonly understood to be first responders. However, WSI does cover all North Dakota employees for preventative care for rabies exposures.

The list of covered employees includes “a health care provider as defined in section 23-07.5-01, firefighter, peace officer, correctional officer, court officer, law enforcement officer, emergency medical technician, or an individual trained and authorized by law or rule to render emergency medical assistance or treatment.” More importantly, it excludes all other North Dakota employees.

Examples of bloodborne pathogens for which reliable preventative treatments exist include HIV and Hepatitis C. Common exposures outside of first responders include janitorial staff and sanitation workers who might be subjected to needle sticks within the course of their employment. In the event the needle stick would cause one of these diseases, the claim would be compensable. This statute just controls preventative treatments.

The changes proposed would remove the restrictions on the classes of employees to whom preventative care may be rendered. In other words, this opens the coverage to all North Dakota employees. While it is impossible to accurately estimate how many exposures might arise, typical reimbursements for the preventative cares are about \$1,000 and, in most cases, must be administered within 72 hours.

**SECTION 2:**

This subsection is part of the statute that governs injured employee appeals of WSI decisions. The proposed change is in response to recent litigation at the North Dakota Supreme Court in which WSI was a party. The issue was whether an appeal was timely filed with WSI. If an appeal is not timely filed, it cannot be considered by WSI.

WSI’s historical interpretation of this statute requires WSI to be in possession of the appeal document within 45 days to be timely filed. In litigation, the assertion was made the appeal was timely because it had been mailed within 45 days, even though it was received by WSI after the 45 day deadline.

WSI’s interpretation prevailed at the Supreme Court but we agree clarification is prudent. This proposed amendment clarifies the term “file” requires receipt by WSI within 45 days. This same proposed change appears again in Section 6 of this bill for appeals involving employer coverage

matters. In summary, if the appeal document, sent electronically, by mail, or personally delivered, is in WSI's possession within 45 days, it is timely filed.

### **SECTION 3:**

Section 65-04-15 is WSI's confidentiality statute for employer files. It is restrictive by design and intended to protect an employer's account information held by WSI. There are situations, however, where good customer service requires the release of certain types of information. The proposed changes in subsection 4 is just that situation and were suggested by staff who handle these types of requests.

A good example of a situation where the proposed changes would be beneficial is the release of information to a business that is purchasing another business. A prospective buyer has an interest in the claims history, the surcharge or discount to premium attributable to a business, and the experience rating of an entity they are considering purchasing. The proposed changes allow for the release of this information to the prospective buyer.

This proposed language also permits the disclosure of confidential information to another employer assessed general contractor liability under section 65-04-26.2. A general contractor can be required to pay the premium owed by one of its subcontractors who does not secure required coverage or pay the premium owing. If this situation occurs, the proposed change allows WSI to provide the general contractor with account information of the delinquent subcontractor.

The next proposed change provides an exception to this statute for local law enforcement's benefit. Under current law, WSI may provide any state or federal agency with employer file information for the administration of that agency's job duties. Working with other agencies, WSI shares information with OSHA, North Dakota's BCI, Federal Immigration agencies, the North Dakota Tax Department and Job Service North Dakota.

The changes in subsection 6 propose a narrow expansion to sharing data with local law enforcement agencies such as county and city law enforcement. WSI has received inquiries from local law enforcement looking for information which might prove valuable in a local criminal investigation. Under current law, we are unable to provide that information.

Subsection 7 proposes to align the law and WSI practice. As mentioned above, WSI shares information with other state agencies for the administration of the agency's job duties but does not automatically forward its information to other state agencies.

### **SECTION 4:**

Section 4 creates a presumption in favor of WSI to calculate premium based on information gathered through Job Service North Dakota or through WSI's investigative processes in cases where an employer does not provide WSI with the required information to calculate premium. The premium paid by employers is based on the payroll report submitted by the employer. Most employers provide timely, accurate payroll information and premium is calculated without incident.

WSI only calculates premium without the employer supplied payroll report when it is confronted with a nonresponsive, noncompliant employer where WSI's best efforts did not result in a response from the employer. In these limited cases, WSI must have a method to generate reliable payroll information to calculate an employer's premium.

The proposed change is in response to a recent North Dakota Supreme Court decision which called into question the requirements of WSI to calculate premium without the benefit of an employer supplied payroll report. While the Supreme Court found the information WSI used to calculate premium in that situation to be insufficient, it did not provide WSI guidance on what was sufficient in these types of cases.

As a result, WSI proposes the change before you which allows WSI to calculate premium in these situations with the best information possible. The employer then has an opportunity to rebut that presumption by providing additional information. If the presumption is not rebutted, WSI's premium calculation stands.

## **SECTION 5:**

When discussed in the House IBL committee, an amendment was proposed and passed by the committee. The amendment modifies WSI's general contractor liability statute. This important, although infrequently used tool permits WSI to assess liability for the unpaid premium of an independent contractor or subcontractor to the general contractor when the independent contractor or subcontractor does not pay their WSI premium.

The amendment creates a mechanism where the general contractor can confirm only annually that the subs and independents on their worksite had workers compensation in effect and thereafter, cannot be held liable for unpaid premium for that calendar year. Interestingly, WSI's website currently provides the general contractor the ongoing ability to check into a subcontractor or independent contractor's insured status at any time. This tool is available to anyone seeking to confirm the insured status of an entity that has workers. Section 5 shifts the burden away from the general contractor to ensure that the entities working on a project are continuously covered by WSI for their workers compensation exposure even where a tool already exists to confirm good standing.

A challenge in confirming coverage at only one point in time is that it does not ensure that a subcontractor or independent contractor maintains their coverage and premium payment. In other words, a sub or independent could present a legitimate certificate of coverage, secure the contract for the work with the general and then let their coverage lapse by not continuing to pay the premium beyond what is required to secure the initial certificate of payment. WSI does not pursue a civil action against a delinquent employer until a number of steps have been taken to bring the employer current. During that time, the entity is likely working on the general contractor's worksite when they are uninsured.

The amendment also provides a sub or independent the opportunity to present a "signed form" to the general contractor indicating they are exempt from securing workers compensation coverage. Presumably, this form would generate from WSI. The process of representing that an entity is exempt from coverage takes time and research. This would likely have the effect of slowing down the process of an entity securing the necessary paperwork to bid and secure a project with a general contractor.

This tool was enhanced and tightened in the 2017 and 2019 sessions in response to the influx of out of state entities resulting from hail events, floods and the oil boom. Entities coming to North Dakota for short term, transient work are difficult to pursue once they leave the state. It's use by WSI is for the general contractor who isn't diligent. Current law, and the infrequency in which WSI uses this tool, reflects that most general contractors, those in the best position to know the status

of their subcontractors, do the footwork to ensure that workers are covered on their worksites. The amendment to HB 1052 hampers WSI's ability to hold accountable those who are not diligent.

For these reasons, WSI proposes an amendment which removes section 5 from Engrossed HB 1052.

#### **SECTION 6:**

WSI's cease and desist authority is an infrequently used, but powerful compliance tool. It permits the agency to require a business to stop operating where there is solid evidence that an employer has employees working, but without workers' compensation coverage. The statute also provides penalties for this violation.

The proposed changes expand this tool to another business that engages in commerce with a business precluded from operating by a cease and desist order. The burden on WSI to issue a cease and desist order against a business is high. WSI must prove the entity "knowingly" engaged in commerce with the business ordered to stop operating. This proposal also assigns a penalty of \$5000 to the offending business.

A correction, with no substantive intent, is also included in this section. An employer has 45 days to request reconsideration from a WSI cease and desist order. This is consistent with other appeal timelines within workers' compensation law.

#### **SECTION 7:**

This subsection is part of the statute that governs employer appeals of WSI decisions. The purpose of the proposed change is the same as in Section 2. The only difference is Section 2 applies to claim decisions and this section applies to employer coverage decisions.

North Dakota's workers' compensation laws have specific sections which apply to claims benefits and others which apply to employer coverage. Some statutory language is equally applicable to both areas. WSI tries, whenever possible, to align statutory language of the claims benefits and employer coverage sections of the law.

#### **SECTION 8:**

This subsection is part of the statute that governs confidentiality of injured employee claim files. An employee's claim file is generally confidential, with few exceptions. The purpose of the proposed change is the same as in Section 3. The only difference is Section 3 applies to employer file information and this section applies to injured employee claim file information.

#### **SECTION 9:**

This section provides an application to Section 1 making it applicable on or after August 1, 2023. Sections 2 and 7 of this bill apply to all requests for reconsideration regardless of the date of decision issued by WSI.

This concludes my testimony. Our proposed amendment as discussed previously is attached to my written testimony. I am happy to answer any questions you may have.

PROPOSED AMENDMENT TO ENGROSSED HOUSE BILL NO. 1052

Page 1, line 3, remove "section 65-04-26.2,"

Page 1, line 8, remove "general contractor liability for subcontractors and independent contractors,"

Page 4, remove lines 13 – 31

Page 5, remove lines 1 - 23

Re-number accordingly