



North Dakota Workforce
Safety & Insurance

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Director

2023 SB No. 2296
Senate Judiciary Committee
Written Testimony Submitted by Workforce Safety and Insurance
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Madam Chair and Members of the Senate Judiciary Committee:

On behalf of the Workforce Safety and Insurance Board of Directors (WSI), I write in opposition to Senate Bill No. 2296.

WSI, employers, and injured employees subject to North Dakota workers' compensation laws participate in the administrative hearing process on a consistent basis to resolve disputes. In fiscal year 2022, WSI referred 140 requests for administrative hearing services to the Office of Administrative Hearings (OAH). Ultimately, 94 administrative hearings were completed. WSI believes the current laws governing the administrative hearing process generally work well. The Board's opposition to this bill is its potential to unduly frustrate the administrative hearing process, increase appeals, and ultimately increase costs for all participants. The following outlines the main concerns.

Section 1(1) It is unclear what the term "supervise" means in this context. WSI does not supervise OAH proceedings and is unaware of any instance in which this has been an issue in WSI's administrative hearing process. OAH has statutory processing standards found in Section 54-57-09 to follow in WSI cases. The broad language of this subsection raises questions regarding whether OAH and WSI's communications about these standards are permissible.

Section 1(2) It is unclear what the term "influence" means in this context. In WSI administrative hearings conducted by OAH, WSI's legal counsel puts forth legal positions based on the law and counsel permissibly advocates for WSI's position. There are laws and rules in place to preserve the integrity of this process. For example, laws preclude communications with an administrative law judge (ALJ) outside the presence of another party (Section 28-32-37). In addition, OAH's "Code of Judicial Conduct for ALJ's" prohibits impropriety in all an ALJ's activities (Canon 2).

Section 1(3) Under existing law, all orders issued by ALJ's in WSI matters are final orders.

Section 1(4) For WSI, this provision is redundant and unnecessary. There are provisions in workers' compensation law that confirm a decision is final if it is not appealed. However, it is unclear how this proposed subsection will affect a party's ability to request reconsideration of an ALJ's decision under Section 28-32-40 of the Administrative Agencies Practice Act.

Section 2(1) The North Dakota Supreme Court has long held an agency's interpretation of a statute is entitled to deference. The Court has done so for good reason. Agencies apply the law on a daily basis and agency personnel have developed expertise on how the law is consistently applied to various situations. This expertise is especially critical in specialized, technical areas

like workers' compensation insurance law. Deference to an agency's reasonable interpretation of a statute to accomplish its functions is logical.

In addition, on appeal, the North Dakota District Courts and the North Dakota Supreme Court are not required to defer to an ALJ's interpretation of the law. As a result, the appellate courts' reviews will not be limited to the language imposed on an ALJ in this bill. Because appellate courts still may give deference to an agency's legal interpretation, we expect this will create more issues for appeal.

Finally, the breadth of the subsection makes it unclear whether it could limit WSI's ability to explain to an ALJ its use of certain forms and questionnaires used in the processing of injured employee claims and employer premiums.

Section 2(2) Of utmost concern is the review standard proposed in this subsection. It is unclear what this standard means and how it could be applied to administrative proceedings in WSI matters. We expect this standard will result in considerable time during the hearing devoted to whether a statute maximizes, or even impacts personal liberty and limits agency power. Under this standard, it appears an agency could be interpreting a law reasonably, but if the ALJ determines it does not "maximize individual liberty" or "limits agency power" that interpretation can be rejected.

Practically speaking, this standard could create significant challenges for WSI in the application of workers' compensation laws governing the obligations of injured employees and employers. For example, following a work injury, an injured employee is required to conduct a good faith work search for appropriate employment after the vocational rehabilitation process is completed. Does this standard mean that if an injured employee does not want to look for work in a job that does not pay what he/she believes they are worth, the ALJ could rule the employee does not have to conduct the work search to "maximize individual liberty", regardless of what the law requires? The required attendance at functional capacity evaluations, skills upgrading courses, or medical appointments are just a few additional areas in which this proposed standard may pose considerable issues during WSI administrative hearings.

Because of the potential to complicate the administrative hearing process, increase appeals and ultimately the costs to all parties, the WSI Board of Directors opposes this bill.

Respectfully submitted,



Art Thompson