

2025 Engrossed Senate Bill No. 2109
Testimony before the House Industry, Business & Labor Committee
Presented by Tim Wahlin, Workforce Safety and Insurance
March 5, 2025

Mr. Chairman and Members of the Committee: My name is Tim Wahlin, Chief of Injury Services with Workforce Safety & Insurance (WSI). I am here today to provide testimony regarding Engrossed Senate Bill No. 2109. The WSI Board supports this bill.

SECTION 1 (Amended Definition of Compensable Injury 65-01-02(11)(a)(6)):

The Engrossed Bill contains an amended definition regarding mental or psychological conditions. This amendment was precipitated by a recent Supreme Court ruling invalidating an administrative rule which clarified the existing statutory language. In Reile v. WSI and Core Mark International, Inc., 2025 ND 6, the Court called for the Legislature to act, “to the extent the statute requires clarification, it is not within in the purview of the executive branch to provide it.” (Paragraph 23). WSI echoes this request to clarify the statute. Clarity eliminates most litigation and allows the agency to fairly and consistently administrate benefits.

In North Dakota, “A mental injury arising from mental stimulus” is not a compensable injury. NDCC § 65-01-02(11)(b)(10). These are commonly referred to as “mental-mental” claims. In order for a mental or psychological condition to be compensable, there must be a physical injury. However, a mental or psychological condition is not necessarily compensable just because it is associated with a physical injury. North Dakota law states a compensable injury includes:

A mental or psychological condition caused by a physical injury, but only when the physical injury is determined with reasonable medical certainty to be at least fifty percent of the cause of the condition as compared with all other contributing causes combined, and only when the condition did not pre-exist the work injury. NDCC § 65-01-02(11)(a)(6).

Determining fifty percent of the cause of a psychological or mental condition and conducting a comparative assessment of the other causes is complicated. Mental conditions often lack clear causes and are diagnosed, in part, based on an individual’s self-reported symptoms which make it harder to objectively verify. This is very different than most physical injuries that can be documented with x-rays, MRI’s, and other objective tests. As a result, in 2017, WSI adopted an administrative rule to provide clarity in applying the statute. Without this definition, arguments to include most any psychological condition exist.

The administrative rule clarified a physical injury must be the direct cause of the mental or psychological condition and must be the physiological product of the physical injury shown by objective medical evidence. Mental or psychological conditions that are a physiological product of the physical injury can be found in such injuries as suffocations, poisonings, or trauma to the brain. These types of injuries, in and of themselves, cause changes in brain function that can be proven by objective medical evidence.

The rule further clarified the “other contributing causes” that are not considered compensable. These contributing causes are not the physiological products of the work injury, rather, they are emotional stressors or mental responses to the work injury. These responses vary widely in

individuals, based on personal experiences and perceptions. The clarification provided in the rule keeps the focus on the physical injury and provides compensability for those mental and psychological conditions that can be verified with objective medical evidence.

The amendment has incorporated terms and will both clarify and simplify application of the standard. Without the clarifying language, ironically, it will be the courts that will clarify the statute through caselaw.

SECTION 1 (Amended Definition of Disability):

Workers' compensation systems typically provide an injured employee two basic benefits:

1. medical benefits which pay for the care and treatment costs related to the work injury, and
2. disability benefits which provide wage replacement payments as a result of the injury.

In North Dakota, WSI has historically paid workers' compensation disability benefits to replace wages actually lost as a result of a work injury. This interpretation was altered slightly in a North Dakota Supreme Court decision entitled Houn v. WSI, 2005 ND 115. In the Houn case, the North Dakota Supreme Court ruled the statutes allowed initial applicants to receive disability benefits by simply showing a loss in earnings capacity, and not an actual wage loss. This interpretation has proved problematic in a handful of cases each year and WSI seeks to return to the interpretation in place prior to the Houn case.

Typically, an employee is injured while on the job and earning wages, so there is no issue with providing disability benefits to replace wages if the employee is unable to work. However, cases proving particularly problematic are those in which an injured employee's injury progresses after they have left employment. Some examples include when an employee is terminated for cause or must leave employment due to incarceration. In these instances, should the employee's injury worsen while they are not employed, and disability benefits are sought, under Houn, WSI must begin paying disability benefits, even though there are no actual wages to replace as a result of the work injury.

In these problematic cases, wages would likely be based on the employment which they departed potentially years earlier. These infrequent cases have proved to be costly and very difficult to explain to an employer years after an employee has departed.

Adding the proposed language to the definition of "Disability", which requires actual earnings be lost as a result of the work injury, will rectify these otherwise absurd results. It likewise makes parallel the actual wage loss requirement already present in our reapplication system codified at 65-05-08(1)(b).

SECTION 1 (New Definition of Electronic Means):

WSI is in the process of updating its major business technology applications. This is a large, multi-year initiative with multiple releases. One of the goals of updating WSI's technology is to streamline information processes to and from external stakeholders and partners. As a result, the proposed change in this section adds a definition of the term "Electronic means" to provide WSI with the authority to electronically issue decisions in the dispute resolution process when the technology updates allow us to do so. Currently, only regular mail or service by mail is allowed. In approximately the next year, we expect to have the ability to allow a recipient to opt-in to receive electronic notifications. WSI will electronically track and confirm receipt of the notification.

SECTION 2:

The proposed changes in this section provide WSI with the discretion to issue decisions using either regular mail or electronic means in the claims dispute resolution process.

The last proposed change in subsection 7 is to provide the same clarifying language regarding the filing of an appeal as is found in subsection 4 of this section. In order for an appeal to be considered filed by WSI, it has to be received by WSI. This clarifying language was added in subsection 4 during the 2023 Legislative Assembly. As a matter of consistency, it makes sense to have this same clarification language in this part of the appeal process as well.

SECTION 3:

The proposed amendments in this section allow for the Decision Review Office, a step in the dispute resolution process, to issue a notice to an injured employee by regular mail or electronic means.

SECTION 4:

This statute establishes WSI's system of indemnity benefits payable to the survivors of a deceased injured employee. It sets forth who receives the benefits, the rates of payment, and establishes the caps on these payments.

Currently, this benefit is capped at three hundred thousand dollars. This rate was established in 2009 when it increased from two hundred and fifty thousand dollars.

The proposed change will increase the cap to four hundred thousand dollars. Our research suggests this increase puts this benefit in line with workers' compensation systems in several other states.

The proposed changes also increase the benefit cap by ten thousand dollars every odd-numbered year moving forward. This will eliminate the need to revisit benefit cap increases and provide a more predictable compensation system for these benefits.

SECTION 5:

This statute establishes the parameters of our scholarship system. North Dakota provides scholarships to the spouses and children of those employees who are catastrophically injured or who have died as a result of those injuries; to those injured employees who have completed a retraining program; or to those who show exceptional circumstances and would benefit by further education.

This is truly a unique benefit. This amendment proposes to adjust the yearly maximum amount paid to a recipient from ten thousand dollars to twelve thousand five hundred dollars. Our data demonstrates nearly eighty percent of our present applicants do not use the full ten thousand dollars, however, in an effort to anticipate increasing need, we are proactively requesting this change.

SECTION 6:

This section provides for application dates of the Engrossed Bill. On Page 25, Lines 24 and 25, refers to claims for indemnity benefits filed on or after August 1, 2025. Further, on Page 25, Line 28, there is a typographical error which should indicate Section 4, not Section 5.

This concludes my testimony. I am happy to answer any questions you may have.