1999 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1330

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1330

Industry, Business and Labor

❑ Conference Committee

Hearing Date Jan. 20, 1999

Tape Number	Side A	Side B	Meter #
1		x	33.1
Committee Clerk Signature	Lisa Horner		

Minutes:

HB 1330 Relating to worker's compensation bureau decisions, disputed decisions, and continuing jurisdiction; to repeal section 7 of chapter 532 of the 1997 session laws, relating to the effective date of chapter 532 of the 1997 session laws and to provide an effective date.

Chairman Berg opened the hearing.

Representative George Keiser, introduced the bill and spoke in support of the bill. He said that improvements in the Worker's Compensation have been made and this bill will continue that momentum.

Mr. Dave Thiele, Senior Litigation Counsel for Worker's Compensation Bureau, spoke in support of the bill. This bill will fine tune some of the improvements already made in the bureau.

(see attached written testimony)

Questions and discussion followed. Representative Glassheim asked about time limits on claim reporting and processing. Mr. Thiele said if decisions are reversed many areas are researched and 60 days is a good time period for reversing a claim if the need arises. Representative Ekstrom asked about hearings, orders, and recourse. She said the process is not intended to be a trial setting but to her it seems to be one. Mr. Thiele responded that improvements were made. He said usually if injured workers are told why certain procedures are followed then the injured workers generally understand the process. Workers Compensation is trying to make the process more user friendly.

Mr. Chris Runge, Executive Director Of The Public Employees Association and Secretary Treasurer of the AFL-CIO, testified in opposition to the bill.

(see attached written testimony)

Questions and discussion followed.

Mr. Steven Lathum, spoke in opposition to the bill. He said the bill was not necessary and gave examples of these reasons. According to Mr. Lathum, this bill relates only to litigated claims. This bill does not include any new information but a change in strategy by the bureau. This bill changes the ground rules and a court will have to decide who is correct.

Mr. Dave Kimnitz, President of ND AFL-CIO, testified in opposition to various language in the bill. He explained in detail his reasons. Questions and discussion followed.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1330.1

Industry, Business and Labor

❑ Conference Committee

Hearing Date Jan. 25, 1999

Tape Number	Side A	Side B	Meter #
3		x	11.5
Committee Clerk Signature	Lisa Horner		

Minutes:

HB 1330.1 Relating to worker's compensation bureau decisions, disputed decisions, and continuing jurisdiction; to repeal section 7 of chapter 532 of the 1997 session laws, relating to the effective date of chapter 532 of the 1997 session laws and to provide an effective date.

Chairman Berg opened the meeting on the bill.

Committee Members discussed workers compensation related claims and possible affects of any possible amendments to the bill.

Motion by Rep. Ekstrom to adopt the amendments, second by Rep. Stefonowicz

by voice vote 3 yes, 11 no, 1 absent, motion on amendments failed

No committee action was taken on the bill

Chairman Berg closed the meeting on the bill.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1330 2-2-99

House Industry, Business and Labor

❑ Conference Committee

Hearing Date 2-2-99

Tape Number	Side A	Side B	Meter #
2	x		38.9-54.0
		x	0.0-9.0
Committee Clerk Signature Lisa Homer			

Minutes: Chairman Berg asked the committee to discuss HB 1330 with the amendments brought forward.

A long explanation of amendments was lead by a representative from Worker's Comp Bureau.

(cont. into Tape 2, side B)

ACTION: Vice Chair Kempenich made a motion DO PASS on amendments and Rep. Brekke seconded the motion. VOICE VOTE with all yes. Passed.

Vice Chair Kempenich made a motion DO PASS as amended and Rep. Martinson seconded the motion.

ROLL CALL VOTE: 14 YES and 0 NO with 1 ABSENT and not voting. Passed. Vice Chair Kempenich will carry the bill.

FISCAL NOTE

(Return original and 10 copies)

Bill/Resolution No.: _____ Amendment to: HB 1330

Requested by Legislative Council Date of Request: 2-5-99

1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts.

   Narrative:

   See attached.

2. **State** fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	Special Funds	General Fund	Special Funds	General Fund	Special Funds
Revenues:						
Expenditures:						

3. What, if any, is the effect of this measure on the appropriation for your agency or department:
   a. For rest of 1997-99 biennium: _____
   b. For the 1999-2001 biennium: _____
   c. For the 2001-03 biennium: _____

4. **County, City, and School District** fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

If additional space is needed, attach a supplemental sheet.

Signed J. Patrick Traynor

Typed Name J. Patrick Traynor

Department Workers Compensation Bureau

Phone Number 328-3856

Date Prepared: 02-08-99

NORTH DAKOTA WORKERS COMPENSATION BUREAU
1999 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

***BILL DESCRIPTION*:** **Procedures for Disputed Decisions**

BILL NO: **HB 1330**

***SUMMARY OF ACTUARIAL INFORMATION*:** The Workers Compensation Bureau, with the assistance of its Actuary, Glenn Evans of Pacific Actuarial Consultants, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation would serve to expedite the claims hearing process; requires the Bureau to act more quickly on recommended decisions of hearing officers; and would expedite appeals from post-hearing orders.

***FISCAL IMPACT*:** Not quantifiable. May serve to expedite dispute resolution process resulting in earlier returns to work and reduced litigation expenses.

AMENDMENT: The proposed amendment will result in no change to the fiscal impact for the bill as introduced.

***DATE*: 2-5-99**

FISCAL NOTE

(Return original and 10 copies)

Bill/Resolution No.: HB 1330 Amendment to: _____

Requested by Legislative Council Date of Request: 1-13-99

1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts.

   Narrative:

   See attached.

2. **State** fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	Special Funds	General Fund	Special Funds	General Fund	Special Funds
Revenues:						
Expenditures:						

3. What, if any, is the effect of this measure on the appropriation for your agency or department:
   a. For rest of 1997-99 biennium: _____
   b. For the 1999-2001 biennium: _____
   c. For the 2001-03 biennium: _____

4. **County, City, and School District** fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

If additional space is needed, attach a supplemental sheet.

Signed J. Patrick Traynor

Typed Name J. Patrick Traynor

Date Prepared: 01-18-99

Department Workers Compensation Bureau

Phone Number 328-3856

NORTH DAKOTA WORKERS COMPENSATION BUREAU
1999 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

***BILL DESCRIPTION*:** **Procedures for Disputed Decisions**

BILL NO: **HB 1330**

***SUMMARY OF ACTUARIAL INFORMATION*:** The Workers Compensation Bureau, with the assistance of its Actuary, Glenn Evans of Pacific Actuarial Consultants, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation would serve to expedite the claims hearing process; requires the Bureau to act more quickly on recommended decisions of hearing officers; and would expedite appeals from post-hearing orders.

***FISCAL IMPACT*:** Not quantifiable. May serve to expedite dispute resolution process resulting in earlier returns to work and reduced litigation expenses.

***DATE*: 1-17-99**

98285.0101
Title.

Prepared by the Legislative Council staff for
Representative Ekstrom
January 22, 1999

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1330

Page 1, line 1, replace "sections" with "section" and remove "and 65-05-04"

Page 1, line 2, replace the second comma with "and" and remove ", and"

Page 1, line 3, remove "continuing jurisdiction" and after the semicolon insert "and"

Page 1, line 4, remove "and to provide an effective date"

Page 2, line 19, remove the overstrike over "~~error of fact and law to be reheard~~" and remove "errors in the"

Page 2, line 20, remove "decision"

Page 2, line 21, after the period insert "The workers' adviser program shall encourage a party to use the workers' adviser program to prepare the worker's written request."

Page 3, remove lines 8 through 20

Page 3, remove lines 23 and 24

Renumber accordingly

Defeated

Date: 1-25-99
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1330

House Industry, Business and Labor Committee

☐ Subcommittee on _____

or

☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken ~~do pass as~~ amendment -

Motion Made By Kempenich Seconded By Brekke

Representatives	Yes	No	Representatives	Yes	No
Chair - Berg		✓	Rep. Thorpe		
Vice Chair - Kempenich		✓			
Rep. Brekke		✓			
Rep. Eckstrom	✓				
Rep. Froseth		✓			
Rep. Glassheim	✓				
Rep. Johnson		✓			
Rep. Keiser		✓			
Rep. Klein		✓			
Rep. Koppang		✓			
Rep. Lemieux					
Rep. Martinson		✓			
Rep. Severson		✓			
Rep. Stefonowicz	✓				

Total (Yes) 3 No 10

Absent 2

Floor Assignment Kempenich

If the vote is on an amendment, briefly indicate intent:

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1330

Page 3, line 12, remove the overstrike over "~~at any time~~" and remove "is not prevented by the doctrines of res judicata or collateral estoppel"

Page 3, line 13, remove "from reviewing the claim and" and remove the overstrike over "~~may review the award~~"

Page 3, line 16, after "heard in, and" insert "specifically"

Page 3, line 17, remove "prior hearing" replace with "formal adjudicative hearing under subsection 8 of section 65-01-16"

Page 3, line 17, remove "or"

Page 3, line 18, remove "information not previously considered"

PRELIMINARY AND TENTATIVE

Renumber accordingly

After amendment section 65-05-04 will read as follows:

65-05-04. Bureau has continuing jurisdiction over claims properly filed. If the original claim for compensation has been made within the time specified in section 65-05-01, the bureau at any time, on its own motion or on application, may review the award, and in accordance with the facts found on such review, may end, diminish, modify, or increase the compensation previously awarded, or, if compensation has been refused or discontinued, may award compensation, except that the bureau may not reopen an issue that was noticed for, heard in, and specifically decided as a result of a formal ~~adjudicative~~ hearing under subsection 8 of section 65-01-16 except on the basis of new information. There is no appeal from a bureau decision not to reopen a ~~claim~~ previous decision after the bureau's ~~order on the claim~~ previous decision has become final.

Date: 2-8-
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1330

House Industry, Business and Labor Committee

☐ Subcommittee on _____

or

☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken do pass as amended

Motion Made By Kempenich Seconded By Martinson

Representatives	Yes	No	Representatives	Yes	No
Chair - Berg	/		Rep. Thorpe	/	
Vice Chair - Kempenich	/				
Rep. Brekke	/				
Rep. Eckstrom	/				
Rep. Froseth	/				
Rep. Glassheim	/				
Rep. Johnson	/				
Rep. Keiser	/				
Rep. Klein	/				
Rep. Koppang	/				
Rep. Lemieux	/				
Rep. Martinson	/				
Rep. Severson	/				
Rep. Stefonowicz					

Total (Yes) 14 No 0

Absent 1

Floor Assignment Kempenich

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1330: Industry, Business and Labor Committee (Rep. Berg, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1330 was placed on the Sixth order on the calendar.

Page 3, line 12, remove the overstrike over "~~at any time~~" and remove "is not prevented by the doctrines of res judicata or collateral estoppel"

Page 3, line 13, remove "from reviewing the claim and" and remove the overstrike over "~~may review the award,~~"

Page 3, line 17, after "and" insert "specifically", replace "prior hearing" with "formal hearing under subsection 8 of section 65-01-16", and remove "or"

Page 3, line 18, remove "information not previously considered "

Renumber accordingly

1999 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1330

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1330

Senate Industry, Business and Labor Committee

❑ Conference Committee

Hearing Date March 1, 1999

Tape Number	Side A	Side B	Meter #
2	x		2180-end
Committee Clerk Signature			

Minutes:

Senator Mutch opened the hearing on HB1330. All senators were present.

David Thiele testified in support of HB1330. His testimony is included.

Chris Runge testified in support of HB1330. Her testimony is included.

Dave Kemnetz, ND AFLCIO, testified in support to HB1330.

Renee Phenning, North Dakota Buildings and Trades Council, testified in opposition to HB1330.

Senator Mutch concluded the hearing on HB1330.

Committee discussion took place on March 2, 1999.

Senator Sand motioned for a do pass committee recommendation on HB1330. Senator Klein seconded his motion. The motion carried with a 4-3-0 vote.

Senator Sand will carry the bill.

Date: 3/1 SR-3898
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HOUSE 1330

Senate INDUSTRY, BUSINESS AND LABOR COMMITTEE Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken DO PASS

Motion Made By SAND Seconded By KLEIN

Senators	Yes	No	Senators	Yes	No
Senator Mutch	X				
Senator Sand	X				
Senator Krebsbach	X				
Senator Klein	X				
Senator Mathern		X			
Senator Heitkamp		X			
Senator Thompson		X			

Total (Yes) 4 No 3

Absent 0

Floor Assignment SAND

REPORT OF STANDING COMMITTEE

HB 1330, as engrossed: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **DO PASS** (4 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1330 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

HB 1330

Fifty-sixth
Legislative Assembly
of North Dakota

Engrossed House Bill 1330

PROCEDURES FOR DISPUTED DECISIONS, CONTINUING JURSIDICTION OF THE WORKERS COMPENSATION BUREAU

Testimony
Before the House Industry, Business, and Labor Committee

January 20, 1999

David Thiele, Senior Litigation Counsel
North Dakota Workers Compensation Bureau

Mr. Chairman, Members of the Committee:

My name is David Thiele and I am the senior litigation counsel for the Workers Compensation Bureau. I am here today to testify in support of House Bill No. 1330. This bill amends sections 65-01-16 and 65-05-04 of the North Dakota Century Code dealing with procedures for disputed decisions and the continuing jurisdiction of the Bureau.

This bill amends section 65-01-16 of the North Dakota Century Code dealing with procedures for disputed decisions. To prevent unnecessary expense and delay the bill clarifies that a notice of decision does not need to be "served," a legal term which could imply that a formal affidavit of mailing is required. Requiring an affidavit of mailing would mean that a Bureau employee would have to sign a statement on each document stating that it was about to be put in the mail. With new technology the Bureau can track by computer all mailings that are sent; requiring that each document be pulled out of the automated system to be signed by a mail clerk will only add unnecessary expense and delay.

This bill also provides that a request for a hearing must contain a statement of the errors in the Bureau order. This makes requests for hearing and requests for reconsideration consistent. Requiring the employer or worker requesting a hearing to state what they think is wrong with the order, in non-legalistic plain English terms, will enable the Bureau to efficiently review the file to see if the issues can be resolved without the need for a hearing. It will also be easier for claimants to request a hearing since "alleged errors of fact and law" is confusing to non-lawyers.

The bill requires the Bureau to act on a recommended decision by an administrative law judge (ALJ) within 30 days instead of the 60 days allowed under the current law and adds language that the time period may be extended for good cause to accommodate the cases in which further review or investigation is required. In most cases, the Bureau quickly adopts the ALJ's recommended order, regardless of whether the recommendation affirms or reverses the Bureau's

position. In the small number of cases in which the Bureau needs to more carefully review the recommendation, the Bureau must order a transcript of the hearing and carefully review the record. By policy the Bureau rarely amends or rejects a recommended ALJ decision in its entirety as it is felt that adopting the recommended decisions, unless clearly wrong, promotes the credibility and effectiveness of the hearing process. The most recent statistics from the Office of Administrative Hearings (OAH) indicate that since 1995 the Bureau has rejected only 32 recommended decisions out of 599. When amending or rejecting a decision is contemplated, the time period will necessarily exceed the 30-day limit. The bill will make N.D.C.C. § 65-01-16 effective for all Bureau decisions or orders regardless of the date of injury or claim filing.

Section 2 of the bill relates to the continuing jurisdiction of the Bureau. The North Dakota Supreme Court in *Cridland v. NDWCB*, 1997 ND 223, 571 N.W.2d 351, held that the legal concept of res judicata, or claim preclusion, applies to administrative hearings before the Bureau. The impact of the *Cridland* decision on the Bureau hearing process is dramatic. The decision requires the Bureau and the claimant to address "any" issue that may be in the claim file at the time of a hearing, regardless of whether the issue had been raised previously and whether it is truly ready to be decided. This will add delay and confusion to a hearing process that has improved dramatically in the past three years.

Res judicata is a legal principal that is intended to prevent re-litigation of matters that should have been raised in a previous trial. Part of the basis for the Court's decision was their conclusion that an administrative hearing was a "trial-type" process (in *Cridland* the entire administrative hearing, from start to finish, was only 45 minutes long). The court's decision goes beyond just limiting reopening to those issues that were actually presented at a hearing. The court stated that if an issue "could have been litigated" it is forever barred. The result of this decision is to incorporate a civil litigation theory from the court system into the workers' compensation administrative hearing process. The Bureau has attempted to create a process that is fair, efficient, and timely; civil litigation is typically lengthy, expensive and legalistic.

A good example of the problems created by *Cridland* is the case of *McCarty v NDWCB*. At hearing McCarty lied and the Bureau was subsequently able to gather additional information to prove his sworn testimony was false. The hearing officer ruled in favor of McCarty and the Bureau ultimately approved the decision but simultaneously issued a decision directing forfeiture of benefits due to the false statements. On appeal the Supreme Court, citing *Cridland*, held that the issue was precluded since the issue could have been raised at the hearing. McCarty was awarded benefits by the court despite his false statements.

If *Cridland* stands as the law, the Bureau will have to revamp its entire adjudication and hearing process. For example, each claim filed is screened initially to determine if it is within the Bureau's jurisdiction. An out of state injury that does not meet certain legal standards is dismissed quickly and efficiently on that basis, allowing the injured worker to file a timely claim for benefits in the appropriate state. Most of these decisions are not contested. If the claimant or employer request a rehearing, under the Bureau's new (post 1995) hearing process the hearing will be scheduled as promptly as possible, because in the interim the claimant will not be receiving any benefits. The issue framed at hearing will be whether the injury is within the Bureau's jurisdiction.

Under *Cridland*, however, if any medical records arrived with the claim form, the scope of the hearing must be broadened to include all areas of compensability. If one of the medical records contained a mention of a prior injury the Bureau would be required to have the claimant complete a prior injury questionnaire, seeking information as to prior medical records. The Bureau would then gather those records from various treating physicians, and would have to talk to prior employers or other possible witnesses regarding whether any preexisting medical condition of the claimant impaired or disabled the claimant. Medical opinions as to the relatedness of any preexisting condition and the percentage to be used in applying the aggravation statute would be required. Investigation of any false statements that might have been made on any of the claim forms or to treating physicians would have to be conducted. All of these investigations would require many months and would delay the decisions accordingly and in the interim, of course, the claimant would be receiving no benefits.

This bill will allow the Bureau to properly adjudicate claims and ensure that hearings are conducted quickly and efficiently on any specific decision that is disputed. During the life of a claim, a claims analyst makes countless decisions regarding what benefits should be paid and in what amount. The vast majority of these decisions are never disputed. When the claimant or employer dispute a decision they are entitled to an administrative hearing, to be conducted as quickly as possible, on that disputed issue.

The Bureau has made dramatic improvements in the timeliness and quality of claims adjudication. The Bureau accepts 93% of the 20,000 new claims filed per year and processes 82% of all claims filed within 21 days. 98% of all claims filed are processed within 60 days. The length of time for a hearing to be conducted has also improved dramatically (7.6 months under the old system to 3.4 in 1997). Through a better adjudication process and with the assistance of the Workers Advisor Program the Bureau has reduced the number of requests for rehearing, from 1,400 and 1,338 in 1994 and 1995 respectively, to 455 in 1998. This has occurred while the satisfaction of claimants with the processing of their claims is at an all time high. The Bureau is still looking to improve in all of these areas, but the impact of the *Cridland* decision will lead to a significant increase in the processing times for adjudication of claims and the hearing process.

All Bureau decisions are still subject to judicial review by both a District Court judge and, if necessary, the Supreme Court just as they always have been. In actuality, the net impact of this bill on Bureau practice is minimal since the Bureau had, prior to the *Cridland* decision, interpreted N.D.C.C. § 65-05-04 as expressly providing the Bureau with the authority to modify or amend decisions as the information in the file required. The bill even adds a limitation regarding the Bureau's ability to reopen an issue not previously contained in N.D.C.C. § 65-05-04. The bill will allow the Bureau to reopen an issue only based on new information or information not previously considered.

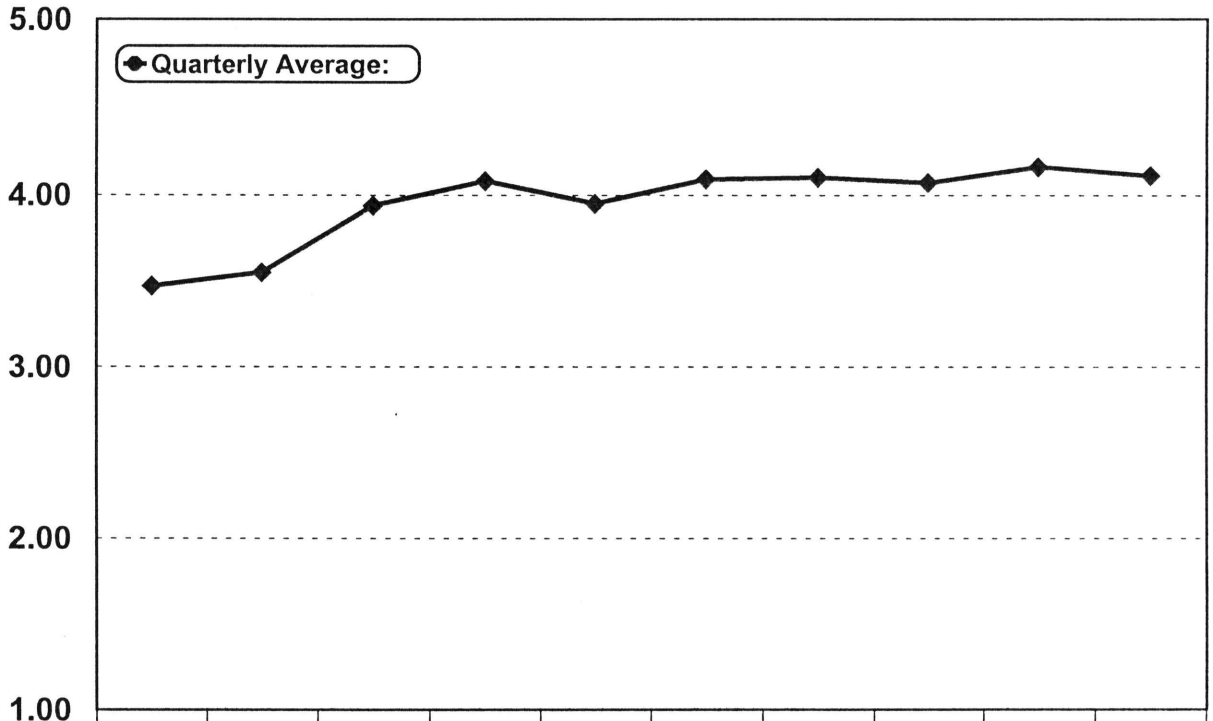
Thank you for your consideration. I will be glad to answer any questions you might have about House Bill No. 1330.

North Dakota Workers Compensation Bureau

QUICK FACTS AND FIGURES	1994	1995	1996	1997
Covered workforce	255,000	265,000	273,000	281,000
Employer premiums ($million)	$104.6	$120.9	$133.1	$125.8
Rate level changes	+10%	-8.5%	-3.0%	-8.5%
Funding status ($millions)	-$228	-$154	-$87	$1
Contingency reserve ($millions)	none	none	$35	$62
Investments ($millions)	$245	$328	$415	$600
Administrative costs ($millions)	$7.6	$10.3	$8.9	$10.4
Number of claims filed	19,628	20,302	20,428	20,448
Wage-loss claims	3,745	3,459	3,218	2,966
Indemnity benefits paid ($millions)	$40.3	$39.6	$37.8	$33.1
Medical benefits paid ($millions)	$33.8	$32.0	$30.2	$33.2
Weekly wage-loss benefit (maximum)	$366	$376	$387	$402
Risk management program employers	67	545	718	926
Claims pending over 60 days	**N/A**	**629**	**237**	**46**
Claims processed within 21 days	**N/A**	**43%**	**61%**	**82%**
Claims processed within 60 days	**N/A**	**80%**	**93%**	**98%**
Dispute resolution time (months)	**7.6**	**4.6**	**4.1**	**3.1**
Claim received to date paid (days)	N/A	58.7	43.9	31.4
Callers' average time on hold (seconds)	N/A	143	73	23
Bureau employee turnover rate	N/A	N/A	22%	11%

Claimant Customer Satisfaction Survey

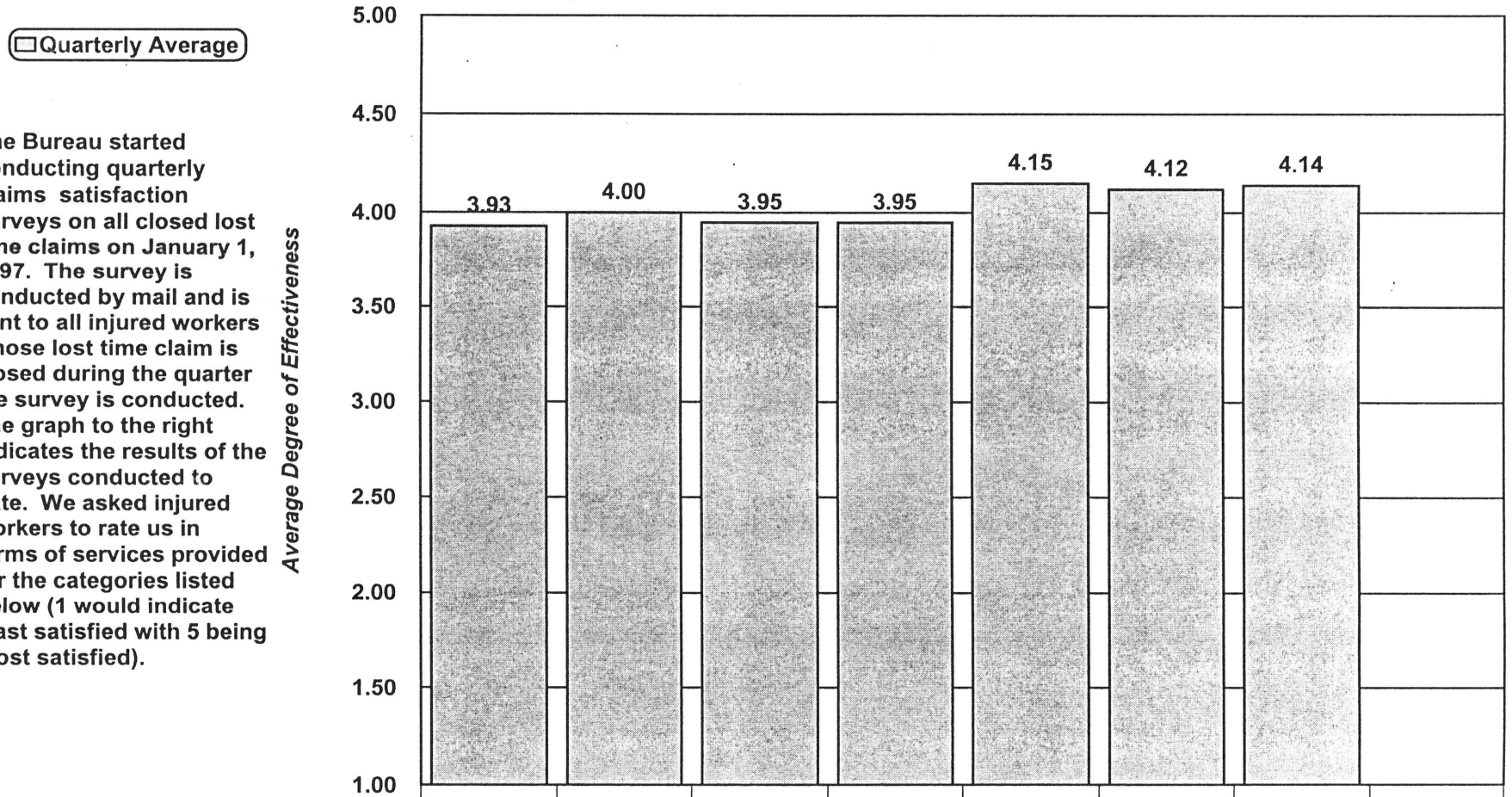
The Bureau started conducting quarterly surveys on July 1, 1996. Each quarter we randomly select 500 claimants who experienced work related injuries and were 60 to 90 days post claim acceptance. The graph to the right indicates the results of the surveys conducted to date. We asked claimants to rate us in terms of services provided for the categories listed below (a 1 would indicate least satisfied with a 5 being most satisfied).



	3rd Qtr '96	4th Qtr '96	1st Qtr '97	2nd Qtr '97	3rd Qtr '97	4th Qtr '97	1st Qtr '98	2nd Qtr '98	3rd Qtr '98	4th Qtr '98
Accepting/Denying Claim in Timely Manner:	3.36	3.41	3.94	4.06	3.93	4.11	4.19	4.09	4.15	4.25
Paying Benefits in a Timely Manner:	3.31	3.29	3.79	3.93	3.71	3.90	3.92	3.89	4.03	4.03
Providing Polite and Helpful Assistance:	3.63	3.88	4.16	4.32	4.23	4.30	4.33	4.38	4.29	4.44
Returning Phone Calls in a Timely Manner:	3.55	3.62	3.83	4.01	4.01	4.08	3.85	3.91	4.11	3.43
Overall Handling of Claim:	3.49	3.56	3.98	4.07	3.89	4.07	4.21	4.09	4.20	4.42
Quarterly Average:	3.47	3.55	3.94	4.08	3.95	4.09	4.10	4.07	4.16	4.11

December 1998

Closed Claims Satisfaction Survey



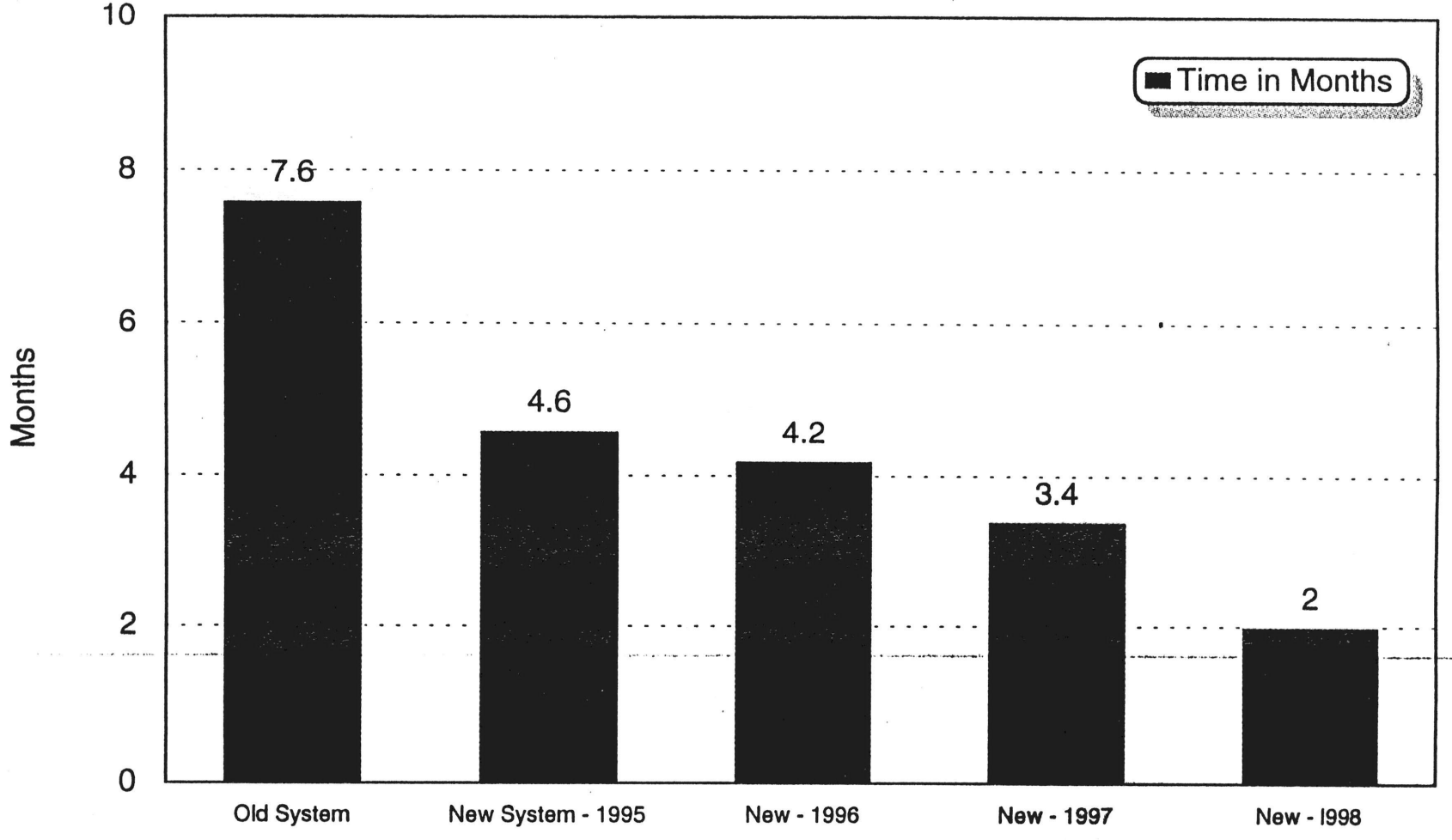
The Bureau started conducting quarterly claims satisfaction surveys on all closed lost time claims on January 1, 1997. The survey is conducted by mail and is sent to all injured workers whose lost time claim is closed during the quarter the survey is conducted. The graph to the right indicates the results of the surveys conducted to date. We asked injured workers to rate us in terms of services provided for the categories listed below (1 would indicate least satisfied with 5 being most satisfied).

	1st Qtr '97	2nd Qtr '97	3rd Qtr '97	4th Qtr '97	1st Qtr '98	2nd Qtr '98	3rd Qtr '98	4th Qtr '98
Did Bureau staff understand your needs:	3.94	4.00	3.96	3.92	4.13	4.07	4.17	
Services provided in a prompt & efficient manner:	3.73	3.83	3.88	3.86	4.04	4.06	4.06	
Providing polite and helpful assistance:	4.20	4.29	4.20	4.21	4.38	4.32	4.33	
Were procedures easy to understand:	3.96	3.98	3.88	3.85	4.12	4.07	4.02	
Overall handling of claim:	3.82	3.91	3.82	3.89	4.07	4.09	4.13	
Quarterly Average	3.93	4.00	3.95	3.95	4.15	4.12	4.14	

October 31, 1998

Workers Compensation Bureau
Legal Department

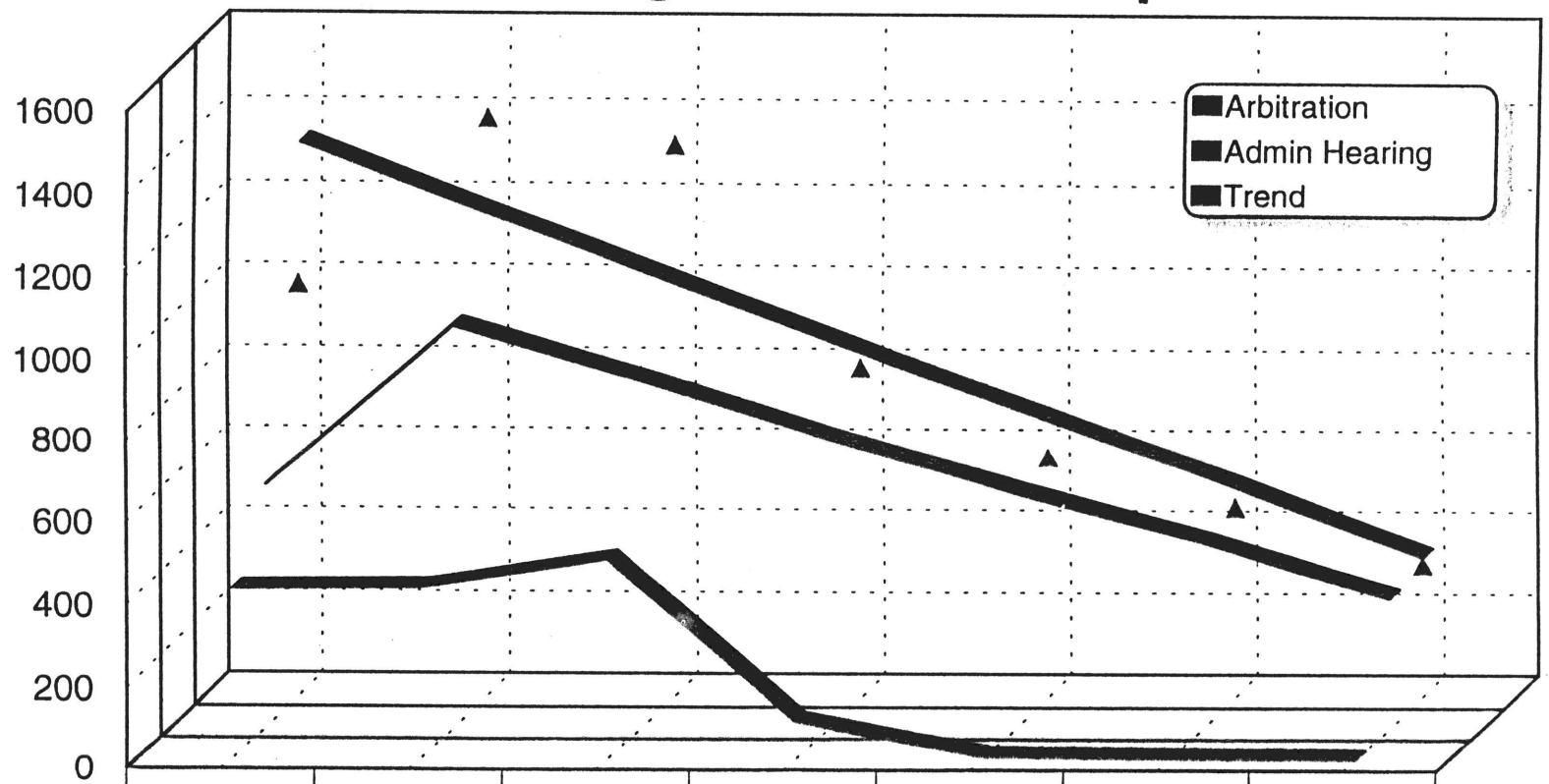
Request for ALJ to Closure Date - Old vs New System



As Of: 28 Apr 98

Workers Compensation Bureau
Legal Department

Formal Hearing/Arbitration Request Trend



	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999 Proj
Trend	998	1400	1338	801	577	455	318
Admin Hearing	584	982	850	705	571	454	318
Arbitration	414	418	488	96	6	1	0

As Of: 5 Nov 98

NDPEA NORTH DAKOTA PUBLIC EMPLOYEES ASSOCIATION

AMERICAN FEDERATION OF TEACHERS LOCAL 4660 AFL-CIO

3333 EAST BROADWAY AVE, SUITE 1220
BISMARCK, NORTH DAKOTA 58501-3396

701-223-1964
1-800-472-2698

EMAIL: ndpea@btigate.com
WEBSITE: www.ndpea.org

TESTIMONY IN OPPOSITION TO HOUSE BILL 1330

Before the House Industry, Business and Labor Committee
North Dakota Public Employees Association, AFT Local 4660, AFL-CIO
January 20, 1999

Chairman Berg, members of the House Industry, Business and Labor Committee, my name is Chris Runge and I am the Executive Director of the North Dakota Public Employees Association and Secretary-Treasurer of the North Dakota AFL-CIO and I am here to testify in opposition to HB 1330.

We are opposed to Section 1 of this bill, which allows notice of a decision by "regular mail," rather than by certified mail (which shows proof that it was actually received by the injured worker). The North Dakota Supreme Court has recently observed that the Bureau's **"... statutes governing informal decision making, finality, and requests for reconsideration have become a virtual incomprehensible quagmire. We suggest the legislature clean up this labyrinthian procedural morass that ensnares unsuspecting workers and their lawyers."** *Gregory v. North Dakota Workers' Compensation Bureau,* 578 NW 2d 101,106, n. 4 (ND 1998). If the Bureau sends decisions that will otherwise become "final" within 30 days, by "regular mail," there simply is no way an injured worker can ever prove that they did not receive the order or did not receive it in a timely fashion, (i.e., at a date much later than the date of the order itself.)

Testimony

Let's move on to page 2 lines 19 and 20. Requiring the employee to "state what they think is wrong" sounds appropriate but it is really a pitfall for the unwary. Particularly, an injured worker may not know what is legally wrong with the order but may wish to preserve his/her rights by appealing it within the narrow 30 day "window" for appeals. The Bureau has consistently attempted to issue "informal" decisions denying benefits under the excuse that the worker has not specifically stated what was wrong with the order. These "informal" decisions become "final" if not appealed within 30 days. Again, this is the type of quagmire that the North Dakota Supreme Court talked about in the Gregory case. The Workers Compensation Act was passed for the benefit of the injured worker, so there simply is no place to set pitfalls for injured workers that would deprive the worker of his day in court.

On line 30, reducing to 30 days the time the Bureau must act on a recommended decision is a good change. However, the language that the time may be extended for good cause leaves an "open end" for the Bureau to sit on a case as long as it wants. This language should be amended to state that the Bureau must issue a decision within 30 days unless they have "good cause" for an extension but that the total amount of time to act shall not exceed 60 days.

Section 2 of this bill pertains to NDCC 65-05-04, which provides continuing jurisdiction over claims properly filed by the Bureau. Please bear with me on my comments on the legal concept of res judicata as I believe this is probably one of the most important bills this committee will consider for injured workers this legislative session. We are opposed to the changes in Section 2 of this bill. The Bureau's agenda here, pure and simple, is to state that it can relitigate an injured worker's without any regard to the principles of finality or the "sure and certain relief" otherwise promised in the Act and promised to injured workers.

"Res Judicata" or "claim preclusion" stands for the proposition (that works for the benefit/detriment of **both** employers and employees) that once the Bureau has had an opportunity to issue

an order that neither the employer or employee has appealed from, that order is **final**. Obviously, if the order was against the employee, the employee has no cause to complain because he/she did not timely appeal. By the same token, if the employee **did** prevail, that employee has the **absolute right** to rely upon that **unappealed order** as establishing the Bureau's obligations to him/her because of that injured worker's injury.

The North Dakota Supreme Court's decision in Cridlund v. North Dakota Workers Compensation 571 NW 2d 351 (ND 1998) is not the first time the court has applied res judicata to the Bureau. I didn't have to look very far, just to the little green book that you received yesterday. In 1987 in the Lass decision the North Dakota Supreme Court applied res judicata, so for the Bureau to state that this is something new that the court is applying to them for the first time is simply erroneous. In Lass, the ND Supreme Court found that the res judicata effect of a workers compensation bureau decision extends only to matters adjudicable at the time of that decision; thus absent a reopening, an unappealed decision on an employee's present medical condition is final and res judicata of his medical condition at that time; such a decision, however, is not res judicata of his future medical condition, which was not adjudicable at the time of that decision. Lass v. North Dakota Workers Compensation Bureau, 415 NW 2d 796 (ND 1987). The Cridlund decision didn't make any new law. Cridlund is perfectly consistent with the Lass decision and with other cases where the North Dakota Supreme Court has applied res judicata. The Bureau is attempting to argue that it "is trying to create a process that is fair, efficient, and timely; civil litigation is typically none of these." The assertion that res judicata exists only "in the context of civil litigation" is simply not true. The North Dakota Supreme Court has pointed out in numerous cases that the doctrine of res judicata exists both in a civil litigation and in the administrative sense. Also, it **is** the doctrine of res judicata that creates a process that is fair, efficient, and timely. Without res judicata, the same issues will be relitigated again and again without any finality. The premise of res judicata is to "promote the finality

of judgments that increases certainty, discourages multiple litigation, conserves judicial resources, and avoids wasteful expense and delay." K and K Implement, Inc. v. First Nat'l Bank, 501 NW 2d 734,738 (ND 1993).

Even the United States Supreme Court has weighed in on the concept of res judicata and administrative agencies. The Court stated: "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata. (Cite omitted). such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on a issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, imposes unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution . . . the principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency . . . which acts in a judicial capacity."

The Bureau is an administrative agency that acts in a quasi-judicial capacity and because it does there must be substantive and procedural safeguards. The Bureau is attempting to insulate itself from judicial review. To the extent that the Bureau would say that the finality doctrine runs only one way, i.e., that the bureau determines when it's final, would obviously create even more "civil litigation" that the Bureau so rails against. I urge a **DO NOT PASS ON HB 1330**. Thank you and I am available to answer any questions you may have.

NDPEA NORTH DAKOTA PUBLIC EMPLOYEES ASSOCIATION
AMERICAN FEDERATION OF TEACHERS LOCAL 4660 AFL-CIO
333 EAST BROADWAY AVE. SUITE 1220
BISMARCK, NORTH DAKOTA 58501-3396
701-223-1964
1-800-472-2698
EMAIL: ndpea@btigate.com
WEBSITE: www.ndpea.org

TESTIMONY IN OPPOSITION TO HOUSE BILL 1330

Before the Senate Industry, Business and Labor Committee
North Dakota Public Employees Association, AFT Local 4660, AFL-CIO
March 1, 1999

Chairman Mutch, members of the Senate Industry, Business and Labor Committee, my name is Chris Runge and I am the Executive Director of the North Dakota Public Employees Association and Secretary-Treasurer of the North Dakota AFL-CIO and I am here to testify in opposition to HB 1330.

We are opposed to Section 1 of this bill, which allows notice of a decision by "regular mail," rather than by certified mail (which shows proof that it was actually received by the injured worker). The North Dakota Supreme Court has recently observed that the Bureau's **"... statutes governing informal decision making, finality, and requests for reconsideration have become a virtual incomprehensible quagmire. We suggest the legislature clean up this labyrinthian procedural morass that ensnares unsuspecting workers and their lawyers."** *Gregory v. North Dakota Workers' Compensation Bureau,* 578 NW 2d 101,106, n. 4 (ND 1998).

If the Bureau sends decisions that will otherwise become "final" within 30 days, by "regular mail," there simply is no way an injured worker can ever prove that they did not receive the order or did not receive it in a timely fashion, (i.e., at a date much later than the date of the order itself.)

Let's move on to page 2 lines 19 and 20. Requiring the employee to "state what they think is wrong" sounds appropriate but it is really a pitfall for the unwary. Particularly, an injured worker may not know what is legally wrong with the order but may wish to preserve his/her rights by appealing it within

Testimony

the narrow 30 day "window" for appeals. The Bureau has consistently attempted to issue "informal" decisions denying benefits under the excuse that the worker has not specifically stated what was wrong with the order. These "informal" decisions become "final" if not appealed within 30 days. Again, this is the type of quagmire that the North Dakota Supreme Court talked about in the Gregory case. The Workers Compensation Act was passed for the benefit of the injured worker, so there simply is no place to set pitfalls for injured workers that would deprive the worker of his day in court.

On line 30, reducing to 30 days the time the Bureau must act on a recommended decision is a good change. However, the language that the time may be extended for good cause leaves an "open end" for the Bureau to sit on a case as long as it wants. This language should be amended to state that the Bureau must issue a decision within 30 days unless they have "good cause" for an extension but that the total amount of time to act shall not exceed 60 days.

Section 2 of this bill pertains to NDCC 65-05-04, which provides continuing jurisdiction over claims properly filed by the Bureau. The House Industry, Business and Labor Committee amended this section and while it is definitely better than the original language, we remained extremely concerned about the Bureau's ability to reopen cases when an injured has relied on a previous Bureau decision. We are opposed to the changes in Section 2 of this bill. The Bureau's agenda here, pure and simple, is to state that it can re-litigate an injured worker's claim without any regard to the principles of finality or the "sure and certain relief" otherwise promised in the Act and promised to injured workers.

The Bureau is an administrative agency that acts in a quasi-judicial capacity and because it does there must be substantive and procedural safeguards. The Bureau is attempting to insulate itself from judicial review and in so doing will only create more litigation in the process. We would respectfully

request that if the Senate is so inclined to pass this bill that the effective date be changed. The Bureau should not be allowed to reach back to claims already decided and on which injured workers are relying.

I urge a **DO NOT PASS ON HB 1330**. Thank you and I am available to answer any questions you may have.

Fifty-sixth
Legislative Assembly
of North Dakota

Engrossed House Bill 1330

PROCEDURES FOR DISPUTED DECISIONS, CONTINUING JURSIDICTION OF THE WORKERS COMPENSATION BUREAU

Testimony
Before the Senate Industry, Business, and Labor Committee

March 1, 1999

David Thiele, Senior Litigation Counsel
North Dakota Workers Compensation Bureau

Mr. Chairman, Members of the Committee:

My name is David Thiele and I am the senior litigation counsel for the Workers Compensation Bureau. I am here today to testify in support of Engrossed House Bill No. 1330. This bill was approved by the Workers Compensation Board of Directors and passed the house with a unanimous 97-0 vote. This bill amends sections 65-01-16 and 65-05-04 of the North Dakota Century Code dealing with procedures for disputed decisions and the continuing jurisdiction of the Bureau.

This bill amends section 65-01-16 of the North Dakota Century Code dealing with procedures for disputed decisions. To prevent unnecessary expense and delay the bill clarifies that a notice of decision does not need to be "served," a legal term which could imply that a formal affidavit of mailing is required. Requiring an affidavit of mailing would mean that a Bureau employee would have to sign a statement on each document stating that it was about to be put in the mail. With new technology the Bureau can track by computer all mailings that are sent; requiring that each document be pulled out of the automated system to be signed by a mail clerk will only add unnecessary expense and delay.

This bill also provides that a request for a hearing must contain a statement of the errors in the Bureau order. This makes requests for hearing and requests for reconsideration consistent. Requiring the employer or worker requesting a hearing to state what they think is wrong with the order, in non-legalistic plain English terms, will enable the Bureau to efficiently review the file to see if the issues can be resolved without the need for a hearing. It will also be easier for claimants to request a hearing since "alleged errors of fact and law" is confusing to non-lawyers.

The bill requires the Bureau to act on a recommended decision by an administrative law judge (ALJ) within 30 days instead of the 60 days allowed under the current law and adds language that the time period may be extended for good cause to accommodate the cases in which further

review or investigation is required. In most cases, the Bureau quickly adopts the ALJ's recommended order, regardless of whether the recommendation affirms or reverses the Bureau's position. In the small number of cases in which the Bureau needs to more carefully review the recommendation, the Bureau must order a transcript of the hearing and carefully review the record. To ensure quick action the existing statute, notwithstanding provisions to the contrary in chapter 28-32, allows the bureau to communicate with its lawyers regarding the recommended decision. By policy the Bureau rarely amends or rejects a recommended ALJ decision in its entirety as it is felt that adopting the recommended decisions, unless clearly wrong, promotes the credibility and effectiveness of the hearing process. The most recent statistics from the Office of Administrative Hearings (OAH) indicate that since 1995 the Bureau has rejected only 32 recommended decisions out of 599. When amending or rejecting a decision is contemplated, the time period will necessarily exceed the 30-day limit. The bill will make N.D.C.C. § 65-01-16 effective for all Bureau decisions or orders regardless of the date of injury or claim filing.

Section 2 of the bill relates to the continuing jurisdiction of the Bureau. The North Dakota Supreme Court in *Cridland v. NDWCB*, 1997 ND 223, 571 N.W.2d 351, held that the legal concept of res judicata, or claim preclusion, applies to administrative hearings before the Bureau. The impact of the *Cridland* decision on the Bureau hearing process is dramatic. The decision requires the Bureau and the claimant to address "any" issue that may be in the claim file at the time of a hearing, regardless of whether the issue had been raised previously and whether it is truly ready to be decided. This will add delay and confusion to a hearing process that has improved dramatically in the past three years.

Part of the basis for the Court's decision was their conclusion that an administrative hearing was a "trial-type" process (in *Cridland* the entire administrative hearing, from start to finish, was only 45 minutes long). The court's decision goes beyond just limiting reopening to those issues that were actually presented at a hearing. The court stated that if an issue "could have been litigated" it is forever barred. The result of this decision is to incorporate a civil litigation theory from the court system into the workers' compensation administrative hearing process. The Bureau has attempted to create a process that is fair, efficient, and timely; civil litigation is typically lengthy, expensive and legalistic.

A good example of the problems created by *Cridland* is the case of *McCarty v NDWCB*. At hearing McCarty lied and the Bureau was subsequently able to gather additional information to prove his sworn testimony was false. The hearing officer ruled in favor of McCarty and the Bureau ultimately approved the decision but simultaneously issued a decision directing forfeiture of benefits due to the false statements. On appeal the Supreme Court, citing *Cridland*, held that the issue was precluded since the issue could have been raised at the hearing. McCarty was awarded benefits by the court despite his false statements.

If *Cridland* stands as the law, the Bureau will have to revamp its entire adjudication and hearing process. For example, each claim filed is screened initially to determine if it is within the Bureau's jurisdiction. An out of state injury that does not meet certain legal standards is dismissed quickly and efficiently on that basis, allowing the injured worker to file a timely claim for benefits in the appropriate state. Most of these decisions are not contested. If the claimant or employer request a rehearing, under the Bureau's new (post 1995) hearing process the hearing

will be scheduled as promptly as possible, because in the interim the claimant will not be receiving any benefits. The issue framed at hearing will be whether the injury is within the Bureau's jurisdiction.

Under *Cridland*, however, if any medical records arrived with the claim form, the scope of the hearing must be broadened to include all areas of compensability. If one of the medical records contained a mention of a prior injury the Bureau would be required to have the claimant complete a prior injury questionnaire, seeking information as to prior medical records. The Bureau would then gather those records from various treating physicians, and would have to talk to prior employers or other possible witnesses regarding whether any preexisting medical condition of the claimant impaired or disabled the claimant. Medical opinions as to the relatedness of any preexisting condition and the percentage to be used in applying the aggravation statute would be required. Investigation of any false statements that might have been made on any of the claim forms or to treating physicians would have to be conducted. All of these investigations would require many months and would delay the decisions accordingly and in the interim, of course, the claimant would be receiving no benefits.

This bill will allow the Bureau to properly adjudicate claims and ensure that hearings are conducted quickly and efficiently on any specific decision that is disputed. During the life of a claim, a claims analyst makes countless decisions regarding what benefits should be paid and in what amount. The vast majority of these decisions are never disputed. When the claimant or employer dispute a decision they are entitled to an administrative hearing, to be conducted as quickly as possible, on that disputed issue.

The Bureau has made dramatic improvements in the timeliness and quality of claims adjudication. The Bureau accepts 93% of the 20,000 new claims filed per year and processes 82% of all claims filed within 21 days. 98% of all claims filed are processed within 60 days. The length of time for a hearing to be conducted has also improved dramatically (7.6 months under the old system to 3.4 in 1997). Through a better adjudication process and with the assistance of the Workers Advisor Program the Bureau has reduced the number of requests for rehearing, from 1,400 and 1,338 in 1994 and 1995 respectively, to 455 in 1998. This has occurred while the satisfaction of claimants with the processing of their claims is at an all time high. The Bureau is still looking to improve in all of these areas, but the impact of the *Cridland* decision will lead to a significant increase in the processing times for adjudication of claims and the hearing process.

All Bureau decisions are still subject to judicial review by both a District Court judge and, if necessary, the Supreme Court just as they always have been. In actuality, the net impact of this bill on Bureau practice is minimal since the Bureau had, prior to the *Cridland* decision, interpreted N.D.C.C. § 65-05-04 as expressly providing the Bureau with the authority to modify or amend decisions as the information in the file required. The bill even adds a limitation regarding the Bureau's ability to reopen an issue not previously contained in N.D.C.C. § 65-05-04. The bill will allow the Bureau to reopen an issue that has been specifically litigated only based on new information.

Thank you for your consideration. I will be glad to answer any questions you might have about Engrossed House Bill 1330.