MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1283

2007 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1283

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1283**

House Industry, Business and Labor

☐ Check here for Conference Committee

Hearing Date: **5 February 2007**

Recorder Job Number: **2759**

Committee Clerk Signature Jan Prindle

Minutes:

Chairman Keiser called opened the hearing of HB 1283.

Representative Bill Amerman, District 26, introduced the bill. This would add liberal construction under WSI that was taken away in HB 1217 back in 1995. He distributed Rules of Interpretation (Attachment A) Liberal construction applies mostly to the courts. If someone goes through a worker's comp situation that gets to the Supreme Court, the courts had to come down liberally on the side of the injured worker to assure they would get sure and certain relief. It is also my understanding that liberal construction applies pretty much across the board in the court system and that WSI is probably the only entity that doesn't have to adhere to liberal construction. When liberal construction was taken away in 1995, it put WSI in a pretty strong position as far as denying claims. An injured worker could go through the system as far as the Supreme Court and WSI knew that liberal construction no longer applied and it had to be based on clear and convincing evidence. There used to be a preponderance of evidence which was a lower standard than clear and convincing. It was definitely harder for an injured worker to get justice in the court system once it got that far. I was looking at the fiscal note, and there is none because there is no way we could judge this. In reading this it says that WSI anticipates that if passed in its present form, the legislation will act to increase the uncertainty of outcomes to claims subject to judicial review. Right now, with low liberal

construction when I read this, they are certain they are going to win because the claimants will not be able to prevail in a court proceeding. If you put liberal construction back in, they are uncertain. It goes on to say, "And since then the overall funds and status has improved significantly." I don't disagree with that at all, but I'm not sure that's the right thing. If you look at the handout with the definition of the Rule of Construction, ". . . with a view to effecting its objects and to promoting justice." That is lacking. We are not promoting justice anymore.

Representative Ruby: The language that is struck in this bill concerns me because it is basically saying on line 15 that a review must be reviewed solely on the merits of the action or claim. Merits of the claim would be the sensible thing to make a judgment on. Don't you think that if it's not based on merit, that possibly it could just be by individual judges depending on their views more than the merits of the claim?

Representative Amerman: As most of us know when you have these drawn up, that's how it is drawn up. All I can assume is that what was taken away in 1995 is being restored by taking this back out.

Representative Kasper: What evidence or case histories have been aware of that have suffered because this language is now in the statute?

Representative Amerman: To be honest, I haven't reviewed any cases. All I can go by and why I brought this bill forward is that liberal construction has been there from 1919 to 1995. I believe the only reason it was taken out was because of the difficulties that WSI was having at that time and I can't perceive that this was the great savior of it. I think the only thing it did was take out justice in the court system.

Representative Kasper: To clarify—you are not aware of any workers that have brought forth any allegations or claims saying that because of this language they have not been treated fairly. You are not aware of any circumstances where people have said, "if that would have been in there, my case might have been different or it might have had different results."

Representative Amerman: Through my years at Bobcat and positions I have held there, I've talked to many people that went through the system and have not prevailed. I can only anticipate that the courts can no longer construe liberally on the side of the claimant and there is not a good chance that they would win their claim.

Representative Zaiser: In our Pledge of Allegiance the final words are "and justice for all." By giving away the right to sue and having laws that prevent that, are we contradicting?

Representative Amerman: That goes to interpretation. I think there has been justice lost because this part of the law has been taken out.

David Kemnitz, president of the ND AFL/CIO, testified in favor of the bill. Hopefully we can answer some of the questions that have arisen today. I will try my best. I confess that I am not a law trained individual, only self trained. Like many of you, we rely on counsel in an effort to better understand the things that are happening around us. **He distributed Handouts labeled B, C, D, E, F, and G.)** He explained the AFL/CIO believes the term "liberal construction" has changed how the bureau adjudicates claims within its purview. He discussed the report of the Legislative Council and claimant's plea to that Committee as to their problems within the system and what they would like to see done or changed.

Representative Thorpe: In the about the 1995 session we were wrestling with getting this organization back in the black. It was severely in the red for a few years. Some of these things were done at that time to facilitate that. I don't know if it was a promise or a quote, but I recall hearing that when we get this back in the black again maybe we can start moving the other way.

Kemnitz: I do have the minutes from that session that added the language. Speaking from that record, Mr. Carlson in his testimony as recorded indicated that we need to do something about the unfunded liabilities and get to the black of the balance sheet and later as things progress we can adjust.

Chairman Kaiser: On the green handout on page 3 where you talk about the courts ruling on liberal construction, I point out to you that the first one is 1922, the second is 1977, the third is 1967, the fourth is 1987, the fifth is 1990 and the sixth is 1992. That's all pre 1995. If the court is doing its job, they are not advocating liberal construction they are ruling in favor of it because that was what was in place at the time.

Kemnitz: The best I can do in answer to that is in the first handout we had, it shows it comes from common law and an application of statute to all laws. In the yellow handout it shows all remedial legislation should receive a liberal construction.

Chairman Kaiser: The courts ruled and based their ruling on the fact that this language wasn't in the law at that time. Wouldn't you agree?

Kemnitz: I would respectfully disagree because of conversations with others that I am not at liberty to speak for them and would hesitate to quote.

Chairman Kaiser: Let me give you a factual case pre 1995. An employee comes to work Monday morning. This is in days when everybody was going crazy for wood burning stoves in their house. He spent 12 hours on Saturday cutting wood down on the river bottom. Sunday he spent 8 hours. He was very proud of it and said he never worked harder in his life. Then on Monday he's driving to Dickinson in the car, felt a twinge in his back, went to the doctor and had surgery. Liberal construction says that's a work related injury. That's what the three commissioners ruled. Do you agree?

Kemnitz: If that individual was able to assert that there may have been, and probably was, a pre condition from an injury from work.

Chairman Kaiser: That was not the assertion. The assertion was that the pain occurred while driving. I'm telling you the facts; there was no pre existing condition. Do you think that's a good claim?

Kemnitz: I don't have enough information. If I were able to review the case as you have and understand all of the ramifications, and I can't. I would assert that a pre existing condition from a job related injury, which many of us have, may have triggered it. If you could prove that at least 50% of that pain is from a pre existing injury or condition that is job related. . .

Chairman Kaiser: I would agree with that, but there was nothing. No pre existing condition. Zero.

Ed Christiansen: I would like to ask the Chairman if you were out working on a construction job, you were carrying stuff down into the hole, and you fell down and broke your leg and the bone was sticking out of it and you were hauled into the hospital for surgery, would you say that kind of injury is on the job.

Chairman Kaiser: Yes.

Christiansen: The gentleman's wife had to haul him to the job. After 9 weeks he had not heard anything from Workforce Safety. They were investigating to see if he did it on the job site. Should there be any question about it? There was to them. I just wanted to point out that isn't always cut and dried because that was cut and dried too. When they read that report it should have been starting to be processed don't you think. This guy had something and they still do it so I just wanted to point that out to you. It isn't always cut and dried on either side.

Sebald Vetter, representing an organization called Concerned Advocates for Rights for Employees, testified in favor of the bill. I support this bill. I think this bill does support us.

Dan Finneman, Concerned Advocates for Rights of Employees, testified in favor of the bill. I would like to first address the striking of the language in that law. I had a case that if they had taken the evidence that wasn't able to be exhibited and would have taken the doctor's medical evidence that supported it and in my case the district court system would have been able to hear all the evidence, it would have been overturned. Even today when I try to submit

medical findings they are rejected because I have already had my hearing and it is settled. I would like you to ponder upon what President Thomas Jefferson said, "The care of human life and happiness and not their destruction is the first and only legitimate objective of government." We are not to destroy people in creating laws. We try to help them along through life. You are pretty much tying the hands of injured workers.

Anne Jorgenson Green, staff attorney, WSI, testified in opposition to the bill.

(Testimony Attached.)

Representative Amerman: Would you say that every court case is uncertain and there is no sure outcome as far as where the judge may rule.

Green: If the law is applied as the Legislature wrote the law, it increases the certainty of the court system

Amerman: Then after 1995 as the Legislature took away liberal construction, then there was pretty certainty that the claimant didn't have much of a chance.

Green: No, I disagree. Prior to 1995, liberal construction was not statutory. It was not something this Legislature created. It was created by the ND Supreme Court when they determined through a series of cases that they would decide what you meant by the law that you wrote. In other words, we're not going to apply the law as it's written, as you the Legislature passed it, but rather we're going to decide what we believe that you meant. As a response the Legislature said we wrote the law a certain way. We wrote the law for you the courts and the agencies to apply the statute as written. You said in 1995 "apply the law as written."

Amerman: Since 1995, as far as claimants being in the position to go to the Supreme Court, are there other laws that have helped or hindered as far as being able to retain counsel, paying counsel, and that type of thing. Are there any other laws that have been written that make it more difficult for the claimant?

Green: No, I don't believe so. It is my belief that claims are analyzed on the facts. Sometimes that takes a bit of time. It is the organization's position that the laws as they stand today give the injured worker every opportunity for a compensable work injury.

Representative Thorpe: Going back to where we were in 1995 I think somewhere along the way in reading the reams of documentation, I read someplace that decisions rendered should be on the preponderance of the evidence to weighing to the claimant. Wouldn't that cover what Representative Amerman is proposing in this bill?

Green: Currently, the injured worker's burden for a compensable injury is that it's more likely than not that the injury occurred during the course of his employment. It's more than 50% likely that it occurred during the course of employment. It is the injured worker's burden to prove it.

Representative Thorpe: I'm aware of that. I've listened to a lot of that testimony here. I would certainly be amiss to sit on a hearing or committee that is going decide for or against the injured. As I understand there is even conflict within the doctor's giving testimony. It seems like it's almost impossible to make a solid decision.

Green: I agree that there are areas that are difficult. It is particularly difficult the further away we get from date of injury.

Chairman Kaiser: This is a complicated issue. If I understand you correctly, you are saying that current practice is more likely than not the injury was related to a work situation. That means 51% of the evidence. Help me understand clear and convincing versus preponderance of evidence. What is the position of the WSI?

Green: Correct. Preponderance is 51%. Clear and convincing is one step above that. If you would go one step beyond that you be at beyond a reasonable doubt. WSI is at preponderance.

Chairman Kaiser: How do those three things fit in with liberal construction?

Green: Liberal construction says that although the agency might take a claim based on the law at the time, apply the law, determines the claim is not compensable, that claim would be appealed by the injured worker to the district court and maybe all the way to the ND Supreme Court. Liberal construction is a judicial determination. It is not based on the law as you wrote it. It is the determination of the court. Rather than apply what is written in the law, the court will tell you what we think you meant by the law.

Chairman Kaiser: If this language wasn't in there before 1995, how does WSI take this language and apply preponderance and not liberal interpretation? How did you take this language and apply it.

Green: WSI took the language, took the facts of the case and if it was more likely that the injured worker's injury happened during the course of his employment, that how we compensated. That's the same standard that applies to many adjudications.

Chairman Kaiser: This language says the claim arising is subject to judicial review and must be reviewed solely on the merits of the action or claim. So they can't go willy nilly. They have to go on the merits of the claim just as you did. That's what ties their hands from being liberal.

Green: That's correct.

Representative Thorpe: This pretty much takes out of the decision of the judges to liberally construct.

Chairman Kaiser: That's correct. What we are saying is that the bureau has to apply 51% or greater standards and the court has to apply those same standards. They can't just arbitrarily subjectively say we disagree. They have to go on the merits of the case.

Representative Thorpe: I'm not sure I'm comfortable with that.

Green: Removing this language would resurrect all that line of cases where the court says, Legislature we're not concerned with what you wrote. We're going to legislate from the bench.

If that's the case and the Legislature wishes to abrogate that law making authority by passing 1283, the court will become the law of the land.

Representative Thorpe: I've always had great respect for the legal system with the protection you get through the juries and judges and that's the part I don't get.

Representative Amerman: If someone is arguing before the Supreme Court, am I wrong in thinking that a lot of the laws we pass here are up for interpretation. They are not unanimous because someone interprets the law differently. That's nothing unusual.

Green: When the Supreme Court makes a determination they are applying a very narrow area of the law. What this bill proposes is to remove the requirement of the court to apply the law as written.

Chairman Kaiser: If we go to a civil court or criminal court whether we have a judge or a jury, we have different standards: preponderance, clear and convincing, and beyond reasonable doubt. If I'm in a murder trial, I can't use liberal construction interpretation. I have to use a strict interpretation. Is that correct? I couldn't just decide that the intent of the Legislature was to do something else despite what they said.

Green: Correct. As a member of the jury you would be instructed on the law.

Representative Amerman: I want to read this to you. "The purpose of the Worker's Compensation Act is remedial and should be construed liberally in favor of the injured worker. Liberal construction resolves reasonable doubt in favor of the injured worker because it was for the worker's benefit the act was passed." That's the way it was before '95. That's the way the act was passed—for the benefit of the injured worker. Does that apply anymore?

Green: No, that law doesn't apply. Recall that worker's comp law was written to provide sure and certain relief to injured workers at a time when workers were not necessarily given anything. They gave up the opportunity to sue their employers for "sure and certain relief" that paid them expeditiously and without litigation and without the burden of proving negligence on

the part of their employer. That language arises out of a set of conditions that was very different than it is in 2007.

Bill Shalhoob, ND Chamber of Commerce, testified in opposition to the bill. (Testimony Attached.) If people talk about a pendulum and say we have gone too far, let's talk about an incremental change.

J. Volentor, testified neutral on the bill. I am a carpenter. In 1964 I got hurt on the job—in my back. I went to chiropractor and he said he could fix me. Needless to say, he didn't. This has been with me all my life. My quality of life has been going downhill because I live with a lot of pain. I paid for a lot of the bills myself. I was injured on the job and as I got older it bothered me more and more. I started filing claims with Worker's Comp. We are laborers, we work hard, and we get hurt bad. Who do we go to? We have to hire a lawyer to fight workman's comp. We don't want to fight you guys. We just want what we have coming to us. Can't you people understand right and wrong? Either we have insurance with workman's comp or we don't.

There being no further testimony, Chairman Kaiser closed the hearing of HB 1283.

Representative Zaiser: I move Do Pass.

Representative Thorpe: I second.

Representative Amerman: This is something that deals with justice and I don't think it will make or break Workman's Comp. It puts justice back in to the system. It's very difficult for injured workers to get to the point where they have to go the courts. Liberal construction is used throughout the law. I don't know why WSI has to be exempt from it.

Representative Zaiser: I am of the same opinion. It's very difficult to take on City Hall and I think this is even larger than City Hall. Can you imagine having essentially no money and then have to hire an attorney to take on a team of attorneys. This enables the individual to have a fighting chance.

Representative Kasper: I look at the language being struck on line 15 where we say everything must be reviewed solely on the merits of the action or the claim. That's the way the law ought to be. We want to strike that. It goes further to say and I think this is key, "the title may not be liberally on behalf of any party. The merits of the claim are where our law ought to be and the way all courts ought to be. I will resist the Do Pass.

Representative Thorpe: Apparently with the language that was in prior to 1995, we got along with it. Worker's Comp originated somewhere around 1918. We got along with it for a while. I don't see a claim for WSI is in the same category.

Representative Ruby: I don't see any train coming here. I think it's got a fair hearing. I see this as there were some problems where things were legislated from the bench in a way that usurps what the Legislature does. We all complain about things worded correctly. While it is written precisely and with great detail, it does leave a lot of interpretation for the courts. Unfortunately that can work for you or against you depending on the case and the person that's sitting there. I think it's upon us to make sure that law is written precisely.

Chairman Kaiser: I've looked at the pre language and I'm assuming that liberal construction is not appropriate and that you would go on the merits of the case. In all our courts we use those standards of preponderance, clear and convincing, and beyond reasonable doubt and they are not construed liberally. If you want liberal construction why not delete this language and say the court and all parties must use liberal construction. Would you support that? Then you would be setting the policy. You will use liberal construction. Forget what the facts are. Use your own mind. I don't think that's a position that you really support.

Representative Thorpe: There is no way I feel my capability is on the bench as a legislator so I'm supporting the bill.

Representative Zaiser: The term, we don't want to legislate from the bench is getting overused and has been for the last ten years. It has become something to rally against. I

just think that's not there. To defend this bill is not to say we must use liberal construction. That's not a fair argument. I think this is one of those things that the worker right now, as the law is, is at a disadvantage. You said you would move towards giving some of those protections back to the worker. As Representative Amerman said, the workers would give up their right to sue if we go this way. I think that right to sue and the possibility to sue is very difficult and I don't think these guys would litigate. I couldn't litigate. I think this moves it a little bit. I think it's the right way to go.

A roll call vote was taken: Yes: 4, No: 9, Absent: 1 (Boe).

The do pass motion failed.

Representative Ruby: I move Do Not Pass

Representative Kasper: I second.

A roll call vote was taken: Yes: 9, No: 4, Absent: 1 (Boe).

The Do Not Pass prevailed.

Representative Kasper will carry the bill.

FISCAL NOTE

Requested by Legislative Council
01/18/2007

Bill/Resolution No.: HB 1283

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The proposed legislation eliminates the requirement that civil actions or claims subject to judicial review must be reviewed solely on the merits of the action or claim and not be construed liberally on behalf of any party.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

WORKFORCE SAFETY & INSURANCE
2007 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: HB 1283

BILL DESCRIPTION: Workers Compensation Law Construction

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with 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 eliminates the requirement that civil actions or claims subject to judicial review must be reviewed solely on the merits of the action or claim and not be construed liberally on behalf of any party.

FISCAL IMPACT: We do not have access to sufficient data to permit a comprehensive evaluation of the potential rate level and reserve impact of this proposed legislation. However, WSI anticipates that, if passed in its present form, the legislation will act to increase the uncertainty of outcomes for claims subject to judicial review as the courts will have greater latitude when issuing decisions. The introduction of a clear standard for judicial review was an important element of the workers' compensation reform package that was passed in 1995. Since then, the overall fund status has improved significantly. Though many factors contributed to the improvement, WSI believes that the proposed legislation could act to partially reverse the trend.

The proposed change may also act to increase the level of uncertainty of any actuarial estimates because of the increased potential for upward loss development (increases in cost estimates) associated with adverse court opinions.

DATE: January 26, 2007

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

Name:	John Halvorson	**Agency:**	WSI
Phone Number:	328-3760	**Date Prepared:**	01/26/2007

Date: 2-5-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1283

House **Industry Business & Labor** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Rep. Zaiser Seconded By Rep Thorpe

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser		X	Rep. Amerman	X	
Vice Chairman Johnson		X	Rep. Boe		
Rep. Clark		X	Rep. Gruchalla	X	
Rep. Dietrich		X	Rep. Thorpe	X	
Rep. Dosch		X	Rep. Zaiser	X	
Rep. Kasper		X			
Rep. Nottestad		X			
Rep. Ruby		X			
Rep. Vigesaa		X			

Total Yes 4 No 9

Absent 1

Floor Assignment Rep. Kasper

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

Date: 2-5-07
Roll Call Vote #: 2

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1283

House **Industry Business & Labor** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Not Pass

Motion Made By Rep Ruby Seconded By Rep Kasper

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep. Amerman		X
Vice Chairman Johnson	X		Rep. Boe		
Rep. Clark	X		Rep. Gruchalla		X
Rep. Dietrich	X		Rep. Thorpe		X
Rep. Dosch	X		Rep. Zaiser		X
Rep. Kasper	X				
Rep. Nottestad	X				
Rep. Ruby	X				
Rep. Vigesaa	X				

Total Yes 9 No 4

Absent 1

Floor Assignment Rep Kasper

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

REPORT OF STANDING COMMITTEE

HB 1283: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **DO NOT PASS** (9 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING). HB 1283 was placed on the Eleventh order on the calendar.

2007 TESTIMONY

HB 1283

#1

2007 House Bill No. 1283
Testimony before the House Industry, Business and Labor Committee
Anne Jorgenson Green, Staff Attorney
Workforce Safety and Insurance
February 5th, 2007

Mr. Chairman, Members of the Committee:

Good Morning. My name is Anne Jorgenson Green and I am staff counsel for Workforce Safety and Insurance (WSI). I am here to testify on HB 1283 which eliminates the provisions that a claim "must be reviewed solely on the merits of the action or claim" and that the "title may not be construed liberally on behalf of any party to the action or claim." The WSI Board of Directors opposes this bill.

In a series of decisions from the 1970's and 1980's, the North Dakota Supreme Court held that the provisions of the Workers' Compensation Act were to be construed in favor of the injured worker to afford benefits and avoid forfeiture. Although WSI applied the law as written by the legislature, the Court ruled otherwise resulting in the payment of benefits where there was no entitlement under workers' compensation law.

An example of these rulings occurred in 1989 when the North Dakota Supreme Court ruled in White v. North Dakota Workers Compensation Bureau, 441 N.W.2d 908 (1989), that despite medical treatment for and awareness of a work-related injury in 1984, Mr. White did not file his claim until December of 1986. The Bureau applied the law that the date of the slip and fall triggered the one-year period for filing, barring Mr. White's claim.

The Supreme Court subsequently held that "under the circumstances of this case, we do not believe that a reasonable basis existed for the Bureau to conclude that, given his education and intelligence, White knew or should have known that he suffered a compensable injury on April 27, 1984." The Supreme Court also asserted in White that, "We do not believe that the Legislature intended to go that far. We believe that the Legislature intended that any doubt about whether a claimant can determine the actual date of a compensable injury with certainty must be resolved by testing the claimant's knowledge under the reasonable person standard."

In response to White and similar rulings, the 1995 North Dakota Legislature established statutory language to assure a claim is reviewed based solely on its merits and without favor to either the injured worker or the employer. Additionally, Arkansas, Florida, Maine, Minnesota, Montana, Nevada, Wyoming, and most recently Ohio, have all eliminated the liberal construction application in workers' compensation cases.

While WSI does do not have access to sufficient data to permit a comprehensive evaluation of the potential rate level and reserve impact of this proposed legislation, the organization does anticipate that the level of uncertainty would increase actuarial estimates.

For these reasons, WSI requests a "do not pass" on HB 1283. I am happy to answer any questions that you might have at this time.

#2

NORTH DAKOTA
CHAMBER of COMMERCE

Testimony of Bill Shalhoob
North Dakota Chamber of Commerce
HB 1283
February 5, 2007

Mr. Chairman and members of the committee, my name is Bill Shalhoob and I am here today representing the ND Chamber of Commerce, the principle business advocacy group in North Dakota. Our organization is an economic and geographic cross section of North Dakota's private sector and also includes state associations, local chambers of commerce, development organizations, convention and visitors bureaus and public sector organizations. For purposes of this hearing we are also specifically representing sixteen local chambers with a total membership of 7,236 and eleven employer associations. Lists of the specific members and associations are attached to my testimony. As a group we stand in opposition to HB 1283 and urge a do not pass vote from the committee on this bill.

The change eliminating the requirement to consider a claim solely on its merits is a reversion to pre 1995 standards. What other construction is fair. We don't think a liberal construction or bias for the employer, employee or bureau is desirable in these disputes. A comparison to then and now is useful. In 1992 we had the bureau had an unfunded liability of $250 million. Under the leadership of Gov. Schafer and with the consent of the legislature a number of reforms were passed in the 1995 session including this one. By June 30, 1996 the unfunded liability was down to $87 million and has continued to gain each year. Some of these gains were achieved through the management initiatives

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led by Gov. Schafer, some by system reforms and some by premium rates that were triple today's structure. Employer co-pays of $250.00 per incident were added and still exist at this time. Today premiums are competitive with other states and North Dakota ranks 26th in benefits paid to injured workers. For once we are leaders on both ends of state rankings, those for injured workers and employers, and passage of this bill would start to erode that position and the changes we made in 1995.

Thank you for the opportunity to appear before you today in opposition to HB 1283. I would be happy to answer any questions.

NORTH DAKOTA
CHAMBER of COMMERCE

The following chambers are members of a coalition that support our 2007 Legislative Policy Statements:

Beulah Chamber of Commerce - 107

Bismarck - Mandan Chamber of Commerce - 1080

Cando Area Chamber of Commerce - 51

Chamber of Commerce Fargo Moorhead - 1800

Crosby Area Chamber of Commerce - 50

Devils Lake Area Chamber of Commerce - 276

Dickinson Chamber of Commerce - 527

Greater Bottineau Area Chamber of Commerce - 153

Hettinger Area Chamber of Commerce - 144

Langdon Chamber of Commerce - 112

Minot Chamber of Commerce - 700

North Dakota Chamber of Commerce - 1058

Wahpeton Breckenridge Area Chamber of Commerce - 293

Watford City Area Chamber of Commerce - 84

Williston Chamber of Commerce - 401

West Fargo Chamber of Commerce - 400

Total Businesses Represented = 7236 members

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Web site: www.ndchamber.com E-mail: ndchamber@ndchamber.com

Associated General Contractors of North Dakota

Independent Community Banks of ND

Johnsen Trailer Sales Inc.

North American Coal

North Dakota Auto/Implement Dealers Association

North Dakota Bankers Association

North Dakota Healthcare Association

North Dakota Motor Carriers Association

North Dakota Petroleum Council

North Dakota Retail/Petroleum Marketers Association

Utility Shareholders of North Dakota

North Dakota Hospitality Association

A

CHAPTER 1-02

RULES OF INTERPRETATION

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1-02-01. Rule of construction of code. The rule of the common law that statutes in derogation thereof are to be construed strictly has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be construed liberally, with a view to effecting its objects and to promoting justice.

Source: C. Civ. P. 1877, § 3; R.C. 1895, §§ 2682, 5147; R.C. 1899, §§ 2682, 5147; R.C. 1905, §§ 3255, 6724; C.L. 1913, §§ 4319, 7321; R.C. 1943, § 1-0201.

Derivation: Wait's (N.Y.) Code, 467; Hewston's (Cal.) Practice, 4.

Construction of Specific Words and Terms.

The term "cause of action" in the statute of limitations is not used in a technical but in a special sense according to which a cause of action accrues when the holder thereof first

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B

ND Workers Compensation
Changes Needed in North Dakota's Worker's Compensation as recommended by ND AFL-CIO Convention August 26, 2006

WHEREAS: The North Dakota Workers Compensation system now known as Workforce Safety and Insurance or WSI has been changed significantly

WHEREAS: The control of WC/WSI has been removed from the executive branch and placed in the hands of a board of directors, and

WHEREAS: The system's ability to provide sure and certain relief to injured workers has come under question, now, therefore, be it

RESOLVED: That the following ' be provided to the 2007 legislative session.

1) Require that WC/WSI use hearing officers and that the hearing officers' finding be final.

2) Fraud. Require that the bureau use the same standard for fraud that is used in all other fraud cases. Equal standards would apply, no harm-no foul.

3) Permanent Partial Impairment (PPI). A PPI award is a one-time payment for job related injuries that result in permanent loss of use of bodily functions(s). Because of the use of weeks, rather than a dollar amount within the formula, Social Security unfairly offsets about 80% of that award. Change the formula for calculating PPI from a "weeks" calculation to a "dollar amount" calculation.

4) Executive Director. The Governor should have sole power to appoint the executive director of the bureau/WSI.

5) Office of Independent Review. Place the control of the OIR with the Governor.

6) Independent Medical Exam (IME). Require that independent medical examinations be conducted in state unless the specific specialty is not available. The IME should be conducted with a physician picked from a panel of all physicians licensed in and practicing in North Dakota.

7) Independent Medical Review (IMR). Give greater weight to the opinion of the claimant's treating physician when the claimant undergoes an independent medical review.

8) Physician. Eliminate the requirement that an employee choose his/her own doctor at the time of hire or 30 days prior to an injury. The injured claimant should be allowed to pick the treating physician.

9) Permanent Partial Impairment (PPI) awards. Presently, an individual must have 16 % whole body impairment to obtain a PPI award. If a person has 16%, in effect, they are getting 1 percent in an award. Although the Bureau/WSI does pay for the more catastrophic impairments, this still does not justify the denial of an award for 5% to 15% impairment. Exclusions for pain, disfigurement, loss of range of motion etc. need to be addressed.

10) Liberal Construction. The loss of the "liberal construction" of the Worker's Compensation Act has made it very difficult for the employee to establish an otherwise legitimate claim.

11) Definition of Compensable Injury. There is no specific definition of what is "objective medical evidence." Before 1995, the doctor's notations that the person has sustained an injury and has subjective complaints of pain sufficed. The argument is that the doctor's notations no longer meet the requirements of "objective medical evidence". Injury should be any need for treatment arising out of and as a result of any incident, event or cumulative trauma arising from work.

12) Pre-existing condition. The Bureau now denies claims because the claimant has a pre-existing condition. The language should be changed back to what it was before 1997, thereby requiring that if there is a pre-existing condition that it must be "active" at the time of the injury to allow an offset. Burden of proof should be on the employer to prove that the pre-existing condition would have caused the disability absent the work event.

13) Disability benefits. Changes made to 65-05-08.1, NDCC (1995), make it more difficult for employees to receive disability benefits and demands more from the doctor as to what the doctor is required to do in order for the employee to obtain disability benefits. Presently, the doctor is required not only to say that the person is disabled but also to exclude other types of employment, for example, light or sedentary. The doctor is also to list specifically what the restrictions are. If these are not all included in the doctor's letter, the person is not eligible for disability benefits. Expert vocational evidence by those experienced in job ergonomics is preferable.

14) Closed Claim Presumption. Once again, the 1995 legislature made it much more difficult for an individual to receive benefits that they were clearly entitled to. 65-05-35, NDCC (1995) states that an individual's claim is "presumed closed" if there has not been a payment of any benefit for four years on the claim. The Bureau/WSI maintains that this can be rebutted, however, the only way to rebut this is to establish that the employee proves by "clear and convincing evidence" the work injury is the sole cause of the later symptoms. Virtually throughout the Workers Compensation Act the employee is required to show "more likely than not" or by a preponderance that the claim is compensable. This standard of "clear and convincing evidence" and "sole cause" makes it virtually impossible for a claimant to have their case reopened or any medical bill paid if it has been more than four years since any activity on that claim. It should go back to the old standard of simply preponderance of the evidence rather than clear and convincing evidence.

15) Vocational Rehabilitation Services. Over the past 10 years, vocational rehabilitation services have been virtually eliminated. There are very few people being retrained and/or offered assistance back to work. Vocational Rehabilitation Services reform must address the needs of the claimant and the employers willing to hire people with special needs.

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President/Secretary-Treasurer
ND AFL-CIO 1-8-07

C

Remedial Legislation.

The statute relating to the giving of notice of intention to redeem from a chattel mortgage sale was designed to enable persons interested in the property to protect themselves against unfair dealings; and, since its purpose was highly beneficent, like all **remedial** legislation, it should receive a **liberal** construction. Brown v. Smith, 13 N.D. 580, 102 N.W. 171 (1904), distinguished, Kusma v. Citizens State Bank, 62 N.D. 562, 244 N.W. 26 (1932).

A **remedial** statute was to be **liberally** construed, even without this section. Scott v. District Court, 15 N.D. 259, 107 N.W. 61 (1906).

North Dakota Century Code

CHAPTER 1-02
RULES OF INTERPRETATION

HB 1283

Compliments of North Dakota AFL-CIO

D

1-02-01. Rule of construction of code. The rule of the common law that statutes in derogation thereof are to be construed strictly has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be construed liberally, with a view to effecting its objects and to promoting justice.

1-02-02. Words to be understood in their ordinary sense. Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained.

1-02-03. Language - How construed. Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language. Technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or as are defined by statute, must be construed according to such peculiar and appropriate meaning or definition.

1-02-04. Conflict in expression of numbers. Whenever there is a conflict between a number expressed in a statute both by figures and written words, the latter shall prevail unless such words obviously are contrary to the legislative intent.

1-02-05. Construction of unambiguous statute. When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

1-02-06. Clerical and typographical errors. Clerical and typographical errors shall be disregarded when the meaning of the legislative assembly is clear.

1-02-06.1. Journal entry rule - Presumption of validity of legislation. A bill or resolution passed by the senate and the house of representatives of the legislative assembly as evidenced by the journals of the senate and house is presumed to be the bill or resolution that is signed by the presiding officers of the senate and house, presented to the governor, and filed with the secretary of state. If there is a difference between versions of a bill, the legislative council staff shall direct the publisher of the code to publish the law according to this section. The law as published must be presumed valid until determined otherwise by an appropriate court.

1-02-07. Particular controls general. Whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail.

1-02-08. Conflicting provisions found in the same statute. Except as otherwise provided in section 1-02-07, whenever, in the same statute, several clauses are irreconcilable, the clause last in order of date or position shall prevail.

1-02-09. Irreconcilable statutes or constitutional amendments passed during the same session.

1. Whenever the provisions of two or more statutes passed during the same session of the legislative assembly are irreconcilable, the statute latest in date of final passage by the legislative assembly, irrespective of the date on which it was approved or allowed to become law by the governor or of its effective date, prevails from the time it becomes effective. However, whenever a provision of one or more statutes

E

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HB 1283

Standing to Sue.
Suit for Wrongful Discharge.
True Intentional Injury.

In General.

It was purpose of legislature to ensure relief to an employee injured in course of his employment in all cases where he would have had right of action at common law, and in addition thereto to extend his rights to recover in other cases, regardless of questions of negligence, contributory negligence, or assumption of risk. Pace v. North Dakota Workmen's Comp. Bureau, 51 N.D. 815, 201 N.W. 348 (1924).

Workers' compensation fund is not health or life insurance fund, nor accident insurance fund, except to limited degree. Sandlie v. Workmen's Comp. Bureau, 70 N.D. 449, 295 N.W. 497 (1940).

The Workers' Compensation Act is to be construed liberally with the view of extending its benefit provisions to all who can fairly be brought within them. Syverson v. North Dakota Workmen's Comp. Bureau, 406 N.W.2d 688 (N.D. 1987).

See also Page 3

Liberal Construction

Constitutionality.

Workers' compensation act is valid exercise of police power. Federal Farm Mtg. Corp. v. Berzel, 69 N.D. 760, 291 N.W. 550 (1939).

Actions Abolished.

Title 65 does not provide for an action against an employer or fellow employee by an injured worker where the employer has contributed premiums to the workers' compensation fund. Olson v. AMOCO, 474 F. Supp. 560 (D.N.D. 1978), aff'd, 604 F.2d 26 (8th Cir. 1979).

Attack on Constitutionality.

Once claimant has asserted rights based solely on workers' compensation act, he may not challenge constitutionality of provisions authorizing the relief obtained. Ethen v. North Dakota Workmen's Comp. Bureau, 62 N.D. 394, 244 N.W. 32 (1932).

Comprehensive Nature of Act.

It is significant that section 32-03-10 is not part of this title. The courts have previously said that "the North Dakota work[ers'] compensation program is mandatory, comprehensive, and exclusive. All rights and obligations under the program are determined by Title 65, N.D.C.C." Because the Workers' Compensation Act is comprehensive, the courts do not look to other portions of the Century Code when defining rights and obligations pursuant to it or when construing its provisions. Effertz v. North Dakota Workers' Comp. Bureau, 481 N.W.2d 218 (N.D. 1992).

Conflict of Laws.

Rights conferred on employers and employees under workers' compensation statutes are controlled by statutes of state of primary employment. Breitwieser v. State, 62 N.W.2d 900 (N.D. 1954).

Coverage of Act.

Where there is a question as to whether an employer should be exempt from workers' compensation coverage, the doubt should be resolved in favor of the laborer, since it was for him that the workers'

compensation act was passed. Morel v. Thompson, 225 N.W.2d 584 (N.D. 1975).

Disability Benefits.

The continuing right to disability benefits under the Workers' Compensation Act is a "property" right protected by the due process clause. Beckler v. North Dakota Workers Compensation Bureau, 418 N.W.2d 770 (N.D. 1988).

The decision in Beckler v. North Dakota Workers Compensation Bureau, 418 N.W.2d 770 (N.D. 1988), should be applied retrospectively only to those claims that were pending in the appeal process as of the date of that decision, and in which the issue was raised before the bureau and on appeal either by the specifications of error or trial by agreement of the parties. Forster v. North Dakota Workers Comp. Bureau, 447 N.W.2d 501 (N.D. 1989).

Election of Remedies.

Where workman injured in the course of his employment elects to proceed under workers' compensation act, he is thereby precluded from maintaining an action at law against his employer. Nyland v. Northern Packing Co., 56 N.D. 624, 218 N.W. 869 (1928).

Generally, when an employer complies with the workers' compensation statutes, the employee's exclusive remedy against the employer is limited to recovery under the workers' compensation statutes. Barsness v. General Diesel & Equip. Co., 422 N.W.2d 819 (N.D. 1988).

Exclusive Remedy Doctrine.

Employee who along with his son was employed by same employer, and who was injured in the course of employment in a one-vehicle accident while riding as a passenger in his own vehicle, which was being driven by his son, could not recover under the general liability and under insurance provisions of his own automobile insurance policies where the policy language clearly and unambiguously provided that he was entitled to benefits only if he was "legally entitled to recover" or his son was "legally liable to pay," since his son was statutorily immune under the exclusive remedy provisions of the Workers' Stuhlmiller v. Nodak Mut. Ins. Co., 475 N.W.2d 136 (N.D. 1991).

Exclusive Remedy Doctrine Not Applicable.

An employer foregoes the protections of the exclusive remedy doctrine when he enters into an indemnity contract with someone other than the employee who is later injured. Sorensen v. Tenneco Oil Co., 609 F. Supp. 838 (D.N.D. 1985).

The exclusive remedy rule prohibiting a third-party tortfeasor from getting contribution from the employer does not prohibit enforcement of an employer's contractual agreement to indemnify a third-party tortfeasor. Barsness v. General Diesel & Equip. Co., 422 N.W.2d 819 (N.D. 1988).

Exclusivity Generally.

The exclusivity provisions of the Workers' Compensation Act are embodied in this section and section 65-01-08. Westman v. Dessellier, 459 N.W.2d 545 (N.D. 1990).

Independent Contractor.

A person who is an independent contractor rather than an employee does not fall within the scope of this act. Schaefer v. North Dakota Workers Comp. Bureau, 462 N.W.2d 179 (N.D. 1990).

Insurance.

The workers' compensation fund is like an accident insurance fund in that it is a fund made available when an injury occurs. However, the workers' compensation fund is unlike an accident insurance fund in that (1) it is governmentally created and administered, (2) the injury must be work-related, and (3) because it is work-related questions of fault are irrelevant. Thus the workers' compensation fund is not a health or accident insurance fund. Beyer's Cement, Inc. v. North Dakota Ins. Guar. Ass'n, 417 N.W.2d 370 (N.D. 1987).

Liability of Employer.

To hold an employer liable for contribution in an action by the injured employee against a negligent third party, based on common-law liability, would be contrary to the expressed purpose to remove the common-law liability of the employer. White v. McKenzie Elec. Coop., 225 F. Supp. 940 (D.N.D. 1964).

While leaving open issue of whether or not an employee may institute civil action against his employer for an intentionally caused injury, an employee covered by workmen's compensation may not institute civil action against his employer for an accidental injury resulting from an intentional tort. Schreder v. Cities Serv. Co., 336 N.W.2d 641 (N.D. 1983).

Liability of Third Persons.

Final clause of this section abolishes liability of third persons for injuries in course of employment, except as set forth in act. Tandsetter v. Oscarson, 56 N.D. 392, 217 N.W. 660 (1928).

In situations where an employer and a third-party tortfeasor both negligently cause an employee's injuries, liability is imposed on the third-party tortfeasor for the negligence of the third party and the employer without permitting the third-party tortfeasor to get contribution from the employer. Barsness v. General Diesel & Equip. Co., 422 N.W.2d 819 (N.D. 1988).

Liberal Construction.

Provisions of workers' compensation act will be construed, if possible, so as to avoid forfeiture and afford relief. Bordson v. North Dakota Workmen's Comp. Bureau, 49 N.D. 534, 191 N.W. 839 (1922).

The workers' compensation act must be liberally construed to promote the ends intended to be secured by its enactment. Erickson v. North Dakota Workmen's Comp. Bureau, 123 N.W.2d 292 (N.D. 1963), distinguished, State v. Lange, 255 N.W.2d 59 (N.D. 1977).

In accordance with policy set forth in this section, act must be liberally construed to promote ends intended to be secured by its enactment. Brown v. North Dakota Workmen's Comp. Bureau, 152 N.W.2d 799 (N.D. 1967).

The purpose and intent of this title is to protect the injured worker and ensure the prosperity of the state by protecting its wage workers; as such, the provisions of this title should be liberally construed in favor of the worker. Lawson v. North Dakota Workmen's Comp. Bureau, 409 N.W.2d 344 (N.D. 1987).

The purpose of workers' compensation is to protect workers from the hazards of employment by providing sure and certain relief for workers injured in their employment. To that end, the provisions of this title are construed liberally, with the view of extending its benefit provisions to all who can fairly be brought within them. Holmgren v. North Dakota Workers Comp. Bureau, 455 N.W.2d 200 (N.D. 1990).

The Workers' Compensation Act is to be liberally construed with the view of extending its benefit

provisions to all who can fairly be brought within them. However, liberal construction does not mean the court can ignore the terms of the intent of the provisions with the Act. Effertz v. North Dakota Workers' Comp. Bureau, 481 N.W.2d 218 (N.D. 1992).

Loss of Consortium.

This section and section 65-05-06 bar the recovery of damages for loss of consortium by the spouse of an injured worker in an action against the injured worker's employer. Wald v. City of Grafton, 442 N.W.2d 910 (N.D. 1989).

Medical Evidence.

Because the adversary concept has only limited application to claims for workers' compensation benefits, the workers compensation bureau may not rely only upon that part of inconsistent medical evidence which is favorable to the bureau's position without attempting to clarify the inconsistency. Syverson v. North Dakota Workmen's Comp. Bureau, 406 N.W.2d 688 (N.D. 1987).

Power of Legislature.

All rights and obligations under the North Dakota Workers' Compensation Act are wholly statutory. The legislature may change those rights and obligations and the legislature may afford remedies for violations of workers' compensation statutes or may not. At any rate, common-law contract principles cannot be used to expand either the statutory rights of the claimant or statutory obligations of the Bureau. Effertz v. North Dakota Workers' Comp. Bureau, 481 N.W.2d 223 (N.D. 1992).

Standing to Sue.

Workers' compensation statutes contain no provisions authorizing the bureau to pay contribution or indemnification to an insurance company that provides coverage for an out-of-state workmen's compensation program; insurance company which provided benefits to claimant under the Minnesota compensation program did not have standing to sue the North Dakota bureau for contribution or indemnification on grounds that North Dakota was the primary situs of employment and primarily liable. United States Fid. & Guar. Co. v. North Dakota Workmen's Comp. Bureau, 275 N.W.2d 618 (N.D. 1979).

Suit for Wrongful Discharge.

Under former section 32-03-07, a suit for wrongful discharge in retaliation for seeking workers' compensation is the kind of tort claim which allows exemplary damages. Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987).

The statutory references to insurance in the workers' compensation laws do not make the protections provided by a workers' compensation board into insurance as contemplated in chapter 26.1-42, governing the guaranty association. The funds provided by the workers compensation board are not insurance; they are workers compensation, and are derived from a statutorily created scheme designed to protect workers injured in the course of their employment. Beyer's Cement, Inc. v. North Dakota Ins. Guar. Ass'n, 417 N.W.2d 370 (N.D. 1987).

An employee can sue an employer for a wrongful discharge in retaliation for seeking workers' compensation. Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987).

True Intentional Injury.

The North Dakota Workers Compensation Act does not preclude recovery for true intentional injuries, and an employee can pursue a civil cause of action against his employer for a true intentional injury.

Zimmerman v. Valdak Corp., 1997 ND 203, 570 N.W.2d 204 (1997).

An employer is deemed to have intended to injure if the employer had knowledge an injury was certain to occur and willfully disregarded that knowledge. Zimmerman v. Valdak Corp., 1997 ND 203, 570 N.W.2d 204 (1997).

Collateral References. - Workers' Compensation <key> 11.

82 Am. Jur. 2d, Workers' Compensation, § 10 et seq.

99 C.J.S. Workmen's Compensation, §§ 11-19.

Workmen's compensation act as furnishing exclusive remedy for master's failure to inform servant of disease or physical condition disclosed by medical examination, 69 A.L.R.2d 1213, 1218.

Right to maintain malpractice suit against injured employee's attending physician notwithstanding receipt of workmen's compensation award, 28 A.L.R.3d 1066.

Homeowners' or personal liability insurance as providing coverage for liability under workmen's compensation laws, 41 A.L.R.3d 1306.

Workmen's compensation provision as precluding employee's action against employer for fraud, false imprisonment, defamation, or the like, 46 A.L.R.3d 1279.

Farmowners' liability insurance risks and coverage, 93 A.L.R.3d 472.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct, 96 A.L.R.3d 1064.

Modern status of effect of state workmen's compensation act on right of third-person tortfeasor to contribution or indemnity from employer of injured or killed workman, 100 A.L.R.3d 350.

Construction and application of provisions of liability insurance policy expressly excluding injuries intended or expected by insured, 31 A.L.R.4th 957.

Liability insurance: intoxication and other mental incapacity avoiding application of clause in liability policy specifically exempting coverage of injury or damage caysed intentionally by or at direction of insured, 33 A.L.R.4th 983.

Acts in self-defense as within provision of liability insurance policy expressly excluding coverage for damage or injury intended or expected by insured, 34 A.L.R.4th 761.

Criminal conviction as rendering conduct for which insured convicted within provision of liability insurance policy expressly excluded coverage for damage or injury intended or expected by insured, 35 A.L.R.4th 1063.

Workmen's compensation law as precluding employee's suit against employer for third person's criminal attack, 49 A.L.R.4th 926.

Workers' compensation: sexual assaults as compensable, 52 A.L.R.4th 731.

Workers' compensation: incarceration as terminating benefits, 54 A.L.R.4th 241.

Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 A.L.R.4th 131.

Automobile uninsured motorist coverage: "legally entitled to recover" clause as barring claim compensable under workers' compensation statute, 82 A.L.R.4th 1096.

Pre-emption by workers' compensation statute of employee's remedy under state "whistleblower" statute, 20 A.L.R.5th 677.

Uninsured and underinsured motorist coverage: validity, construction, and effect of policy provision purporting to reduce coverage by amount paid or payable under workers' compensation law, 31 A.L.R.5th 116.

Workers' compensation: law enforcement officer's recovery for injury sustained during exercise or physical recreation activities, 44 A.L.R.5th 569.

Workers' compensation as precluding employee's suit against employer for sexual harassment in the workplace, 51 A.L.R.5th 163.

Violation of employment rule barring claim for worker's compensation, 61 A.L.R.5th 375.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli — Right to compensation under particular statutory provisions, 97 A.L.R.5th 1.

Contractual waiver of exclusivity of workers' compensation remedy, 117 A.L.R.5th 441.

Postaccident conduct by employer, employer's insurer, or employer's employees in relation to workers' compensation claim as waiving, or estopping employer from asserting, exclusivity otherwise afforded by workers' compensation statute, 120 A.L.R.5th 513.

Law Reviews.

A Time for Recognition: Extending Workmen's Compensation Coverage to Inmates, 61 N.D. L. Rev. 403 (1985).

An introduction to North Dakota workers' compensation, 64 N.D. L. Rev. 173 (1988).

Summary of significant decisions rendered by the North Dakota Supreme Court in 1989 relating to workers' compensation, 65 N.D. L. Rev. 597 (1989).

Summary of significant decisions rendered by the North Dakota Supreme Court in 1990 relating to workers' compensation, 66 N.D. L. Rev. 881 (1990).

Summary of the 1991 North Dakota Supreme Court decisions on Workers Compensation, 68 N.D. L. Rev. 815 (1992).

Workers' Compensation: The Assault on the Shield of Immunity — Coming to Blows with the Exclusive-Remedy Provisions of the North Dakota Workers' Compensation Act, 70 N.D. L. Rev. 905 (1994).

Constitutional Law — Haney v. North Dakota Workers Compensation Bureau, 518 N.W.2d 195 (N.D. 1994), 71 N.D. L. Rev. 781 (1995).

Federal Pre-Emption and State Exclusive Remedy Issues in Employment Litigation, 72 N.D. L. Rev. 325 (1996).

Are Employees Obtaining "Sure and Certain Relief" Under the 1995 Legislative Enactments of the North Dakota Workers' Compensation Act?, 72 N.D. L. Rev. 349 (1996).

See noted items P. 376 and P. 381 F

WORKERS' COMPENSATION REVIEW COMMITTEE 05/07

North Dakota Century Code (NDCC) Section 54-35-22 establishes the Workers' Compensation Review Committee. The committee is directed by law to review workers' compensation claims brought to the committee for the purpose of determining whether changes should be made to the workers' compensation laws.

North Dakota Century Code Section 54-35-22 establishes the membership of the six-member committee as follows: two members of the Senate who are appointed by the majority leader of the Senate, one member of the Senate who is appointed by the minority leader of the Senate, two members of the House of Representatives who are appointed by the majority leader of the House of Representatives, and one member of the House of Representatives who is appointed by the minority leader of the House of Representatives. The chairman of the Legislative Council designated the chairman of the committee. Committee members were Representatives George J. Keiser (Chairman), Bill Amerman, and Nancy Johnson and Senators Duaine C. Espegard, Joel C. Heitkamp, and Jerry Klein.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2006. The Council accepted the report for submission to the 60th Legislative Assembly.

BACKGROUND

General Background

The state laws addressing workers' compensation in North Dakota are primarily found in NDCC Title 65. The administrative rules adopted by Workforce Safety and Insurance (WSI) are found in North Dakota Administrative Code Title 92. Additionally, Article X, Section 12, of the Constitution of North Dakota specifically addresses the state's workers' compensation agency, essentially providing for a constitutional continuing appropriation to the workmen's compensation fund for the purpose of paying workers' compensation benefits.

North Dakota Century Code Section 54-35-22 became effective August 1, 2005, and remains in effect through July 31, 2007. The committee must meet once each calendar quarter unless the committee chairman determines a meeting that quarter is not necessary because there is no claim to review. The committee is required to operate according to the laws and procedures governing the operation of other Legislative Council interim committees. The committee followed the typical interim calendar.

2005-06 Interim

Although the Workers' Compensation Review Committee was the only interim committee specifically charged with studying a workers' compensation-related issue, the following committees were charged with receiving audits and reports from WSI during the 2005-06 interim:

Legislative Audit and Fiscal Review Committee

The Legislative Audit and Fiscal Review Committee was charged with receiving annual reports from the executive director of WSI and the chairman of the WSI Board of Directors under NDCC Section 65-02-03.3 and with receiving a report from the executive director of WSI, chairman of the WSI Board of Directors, and the auditor regarding the biennial performance audit of WSI under Section 65-02-30.

Budget Section

The Budget Section was charged with receiving a biennial report from WSI on all revenues deposited in and expenditures from the building maintenance account of the WSI fund under NDCC Section 65-02-05.1 and with receiving periodic reports from WSI and the Risk Management Division of the Office of Management and Budget on the success of a single workers' compensation account for state entities covered by Chapter 32-12.2 under Section 65-04-03.1.

Industry, Business, and Labor Committee

The interim Industry, Business, and Labor Committee was charged with receiving from WSI a safety audit of the Roughrider Industries work program and performance audit of the program of modified workers' compensation coverage under NDCC Section 65-06.2-09.

Previous Interims

2003-04 Interim

The Legislative Council chairman directed the Commerce Committee to receive a report from WSI regarding the 2004 rate increase proposed by WSI and projections for future rate assignments. The committee did not recommend any bill in response to the report.

House Concurrent Resolution No. 3050 (2003) would have provided for a study of the equity of the current system for awarding workers' compensation death benefits and the feasibility and desirability of creating a death benefit investment system. The Legislative Council did not give priority to this study.

2001-02 Interim

House Concurrent Resolution No. 3064 (2001) would have provided for a study of workers' compensation fraud by employers, employees, attorneys, health care providers, and rehabilitation service providers in order to identify the financial impact of such fraud on the workers' compensation fund, the most appropriate method of addressing such fraud, and the cost of addressing such fraud. The Legislative Council did not give priority to this study.

1999-2000 Interim

Section 3 of House Bill No. 1422 (1999) provided for the Legislative Council to receive a report from the Workers Compensation Bureau regarding recommendations from the bureau's study of the awards

provided to injured employees with permanent impairments caused by compensable work injuries. The interim Commerce and Labor Committee received this report and did not recommend any bill in response to the information received.

Section 5 of Senate Bill No. 2214 (1999) provided for the Legislative Council to receive a report from the Workers Compensation Bureau regarding the recommendations from the bureau's study of the benefits available to persons receiving long-term disability or death benefits from the bureau. The Commerce and Labor Committee received this report and did not recommend any bill in response to the information received.

1995-96 Interim

Section 3 of Senate Bill No. 2403 (1995) provided for a Legislative Council study of the feasibility and desirability of the Workers Compensation Bureau establishing a system through which injured employees whose disability benefits cease upon reaching retirement age under House Bill No. 1228 (1995) would receive a pension or an annuity in lieu of further disability benefits and a review of the different methods through which the pension or annuity would be established and paid, who would be responsible for administering the pension or annuity, and to which injured employees the pension or annuity would be paid. The Commerce Committee did not recommend any bill as a result of this study.

PROCEDURE ESTABLISHED

The committee began the interim by establishing a procedure for conducting its charge. The committee designed an application packet, which included a cover letter explaining the application process and eligibility requirements, a copy of NDCC Section 54-35-22, a "Release of Information and Authorization" form, and a "Review Issue Summary" form. In preparing this application packet, the committee discussed the importance that applicants understand the case review process is not a forum for appeal. Additionally, the committee determined for purposes of the committee's activities a survivor of an injured employee would qualify as an injured employee and would be eligible to apply for case review.

The committee discussed how best to notify injured employees of the committee's activities. The application forms were made available online on the Legislative Council's web site. The committee received testimony that Concerned Advocates Rights for Employees (CARE) is an association in the state which could notify injured employees; however, this association generally works with active claims. A representative of the North Dakota AFL-CIO testified the organization would try to distribute application forms as appropriate.

The committee made an affirmative decision to attempt to hold committee hearings around the state as may be appropriate to accommodate the location of the injured employees having their cases reviewed by the committee. The committee received testimony raising the concern that once an injured employee's case becomes final, the injured employee may not have any incentive to appear before the committee.

The committee recognized the personal nature of the case reviews and made a determination that the committee members, a representative of WSI, and interested persons should not raise or discuss nonpertinent details of an injured employee's workers' compensation record.

The committee discussed whether steps could be taken to assist an injured employee in organizing and presenting the employee's case for review. The committee considered the concern that injured employees do not have the high technical level of expertise held by the lawyers and other professionals of WSI, resulting in what could turn out to be an unfair playing field for case reviews.

The committee requested $10,000 from the Legislative Council to provide $500 per injured employee for the purpose of allowing the injured employee to pay a third party for assistance in organizing and clarifying the case to be brought forward to the committee. The chairman of the Legislative Council denied this request.

In addressing the issue of how to help an injured employee summarize workers' compensation issues for a case review, the executive director of WSI offered the assistance of an employee of the WSI Office of Independent Review to serve as an ombudsman to assist injured employees in preparing their cases for review by the committee. A representative of the North Dakota AFL-CIO testified in support of having the employee of the Office of Independent Review serve as an ombudsman to assist in case preparation and suggested the committee should provide the ombudsman with specific instructions and expectations.

The committee accepted the offer of the executive director of WSI and utilized the services of this ombudsman for each of the 11 cases reviewed by the committee. The committee chairman and committee counsel worked with the ombudsman to establish a procedure that was used throughout the interim. As part of this procedure, the executive director of WSI identified an employee of WSI who would serve as the primary respondent to the workers' compensation issues raised by the injured employees.

The following procedure was followed to determine eligibility for a case review and to prepare for the committee meeting at which the case was reviewed:

1. An injured employee would submit to the Legislative Council office a complete "Release of Information and Authorization" form. In addition, the applicant could submit a "Review Issue Summary" form on which the applicant could summarize the issues the applicant wanted the committee to review.
2. Upon receipt of a completed application, the Legislative Council staff forwarded a copy of the application information to the ombudsman, who reviewed the application to make a recommendation regarding whether:
   a. The applicant was an injured employee or the survivor of an injured employee;

b. The workers' compensation claim was final; and
c. All of the administrative and judicial appeals were exhausted or the period for appeal had expired.

3. Following this review, the ombudsman contacted the Legislative Council staff to provide a recommendation regarding eligibility for review. Upon receipt of this recommendation, the Legislative Council staff contacted the committee chairman to make a determination of eligibility.
4. Upon a determination of eligibility, the injured employee was contacted by the ombudsman to begin the case preparation. Injured employees had a choice of whether to work with the ombudsman.
   a. Regardless of whether the injured worker accepted the assistance of the ombudsman, the ombudsman prepared a summary of the case to present at the committee meeting.
   b. At the injured employee's discretion, the ombudsman assisted the applicant in organizing the issues for review.
   c. The ombudsman prepared a case review packet and included this in a binder of information prepared for each committee member, committee counsel, and the representative of WSI. Although these binders were distributed at each committee meeting, they remained the property of the Office of Independent Review and were returned to the ombudsman at the completion of each committee meeting.
5. Before each committee meeting, the ombudsman met with committee counsel to review the case summary and workers' compensation issues being raised.
6. Upon receipt of these workers' compensation issues, committee counsel notified the representative of WSI of the:
   a. Identity of the injured employee who would be appearing before the committee for a case review; and
   b. Statutory cites of the basic issues being raised by the injured employee.

The committee established the following committee meeting procedure, which was followed for each of the 11 cases reviewed by the committee:

1. Committee members had an opportunity before and during each committee meeting to review the binder of case review packets and to review each injured employee's WSI electronic records. The binder also contained a copy of NDCC Title 65.
2. The ombudsman summarized the injured employee's case.
3. The committee received a list of the workers' compensation issues brought forward for review. At the discretion of the injured employee, these issues were presented by the ombudsman, the injured employee, a representative of the injured employee, or more than one of these individuals.
4. One or more representatives of WSI commented on the workers' compensation issues raised.
5. Interested persons were invited to comment on the workers' compensation issues raised as part of the case review.
6. The committee members had an opportunity to discuss the issues raised.

Each of the 11 cases reviewed was allocated a half-day, either the morning or the afternoon portion of a committee meeting, during which the initial review was conducted. Following the initial review, the committee retained the authority to continue to discuss issues raised as part of the review. Periodically, the committee would request additional information on specific issues and review this information at one or more future meetings. During each committee meeting at which cases were reviewed, a representative of WSI was available to access the injured employee's workers' compensation records electronically.

CLAIMS REVIEWED

The committee held seven meetings. The first meeting was primarily devoted to establishing the case review procedure; the second meeting reviewed the first case; the third meeting reviewed the second and third cases; the fourth meeting reviewed the fourth, fifth, sixth, and seventh cases; the fifth meeting was committed to committee work; the sixth meeting reviewed the eighth, ninth, tenth, and eleventh cases; and the seventh meeting was primarily devoted to concluding the work of considering issues raised in the case reviews, including the consideration of bill drafts.

First Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- September 1991 - The injured employee incurred a compensable work-related injury. The injured employee returned to work and experienced a worsening in her medical condition until June 2002, at which point the injured employee could no longer work due to the work-related injury incurred in 1991. In September 2003, WSI declared the injured employee was permanently and totally disabled.
- December 1, 2005 - The Workers' Compensation Review Committee reviewed the injured employee's case. At the time of review, the injured employee's monthly workers' compensation disability benefits and Social Security widow's benefits were approximately $1,684.
- December 31, 2005 - Workers' compensation disability benefits terminated due to the workers' compensation retirement presumption and workers' compensation additional benefits payable began. The injured employee's monthly additional benefits payable and Social Security widow's benefits were estimated to be approximately

$768. October 2010 is the estimated date upon which the additional benefits payable will terminate.

Issues for Review

The injured employee's workers' compensation issue was that she disagreed with the application of the retirement presumption law to her claim. Because her injury date was in 1991 and the retirement presumption law was not enacted until 1995, the 1995 law should not apply to her situation. The fact she had a break in the continuous flow of disability benefits after July 31, 1995, should not jeopardize her ongoing disability benefits as long as she remains disabled and unable to work due to the 1991 injury. The date of injury should be the deciding factor in determining which benefits structure applies.

The injured employee brought forward the following points in support of her issue:

1. The current system penalizes injured employees who are motivated and make every effort to go back and work. In a comparable case study in which there is a different outcome, a hypothetical employee was injured before the retirement presumption went into effect in 1995; however, since the date of injury, this hypothetical injured employee maintained that she was totally disabled and unable to return to work and as a result retained her disability benefits through the present date even though she is over age 65. Because this hypothetical injured employee had no break in her disability benefit payments after July 31, 1995, she will be able to qualify for ongoing disability benefits into the future and will not be impacted by the retirement presumption law.
2. Workforce Safety and Insurance should remain the responsible government entity to provide her with the necessary financial assistance that will allow her to pay her bills and maintain a reasonable livelihood. Up until her injury in 1991, the injured employee had been setting aside money for retirement; however, following her injury and the illness and death of her husband, she was forced to drain these retirement savings. Her ability to work and earn a living and to establish retirement savings has been compromised by her work-related injury. The termination of disability benefits effective December 31, 2005, puts her in a very difficult financial position. In preparation for the reduction in income that will become effective January 1, 2006, the injured employee went through bankruptcy proceedings and she will need to apply for public assistance. There will be a cost-shifting of her financial needs to other government programs.

Workforce Safety and Insurance Response

The representative of WSI provided a brief legislative and judicial history of the workers' compensation retirement presumption law. The WSI representative testified that in 1995 the workers' compensation fund was $240 million in debt. In 1995 the Legislative Assembly enacted a statutory presumption that an injured employee who becomes eligible for Social Security retirement benefits is considered retired and therefore no longer eligible for workers' compensation disability benefits. This retirement presumption is addressed under NDCC Section 65-05-09.3(2). The legislation creating this presumption became effective on August 1, 1995, and as enacted applied to all injured workers regardless of the date of injury. Legislative history indicated the retirement presumption was enacted to provide an initial savings reduction in benefits of $35 million and ongoing savings to the fund of $2 million to $5 million per year.

In 1997 the Legislative Assembly amended the retirement presumption law and created an additional benefit payable for injured employees whose disability benefits were canceled due to the retirement presumption. The additional benefits payable benefit is computed as a percentage of the workers' compensation weekly disability benefit and is based on the length of time the injured employee received these disability benefit payments.

Additionally, following the enactment of the 1995 retirement presumption law, two cases began working their way through the court system. In 1998 the North Dakota Supreme Court issued decisions in these two cases, providing that the 1995 amendments did not apply to injured employees who were receiving permanent total disability benefits before August 1, 1995. The North Dakota Supreme Court ruled there is a constitutional protection for the injured employee's expectation of ongoing benefits. It is because of these two Supreme Court cases that under the hypothetical case raised by the injured employee, the hypothetical injured employee receives full benefits even after reaching retirement age.

If an injured employee is continuously receiving workers' compensation disability benefits, the North Dakota Supreme Court determined that the retirement presumption does not apply; however, if an injured employee has been in and out of receipt of workers' compensation disability benefits, the retirement presumption under NDCC Section 65-05-09.3 applies.

The WSI representative testified WSI research indicates there is an estimated $40 million pricetag associated with granting the injured employee's request if this class of injured employees avoids the retirement presumption and continue to receive full workers' compensation disability benefits. Approximately 101 to 103 injured employees appear to be in a similar situation as the injured employee appearing before the committee.

The $40 million figure was based upon the cost to the fund projected until the time of death of the injured employees. These costs would come directly out of the WSI reserve fund and would not be charged back to the injured employees' past employers.

Comments by Interested Persons

A representative of CARE testified bills were introduced in past legislative sessions to address these retirement presumption issues but the bills were defeated. Testimony of interested persons questioned the validity of the $40 million pricetag, and there was testimony that if the $40 million pricetag is accurate, the correct response is to increase premiums to help the injured employees.

Concern was raised that although health insurance premium rates have been going up, workers' compensation premiums have not been going up in North Dakota. The explanation posed for this inconsistency was that instead of raising workers' compensation premiums, the injured employee benefits were lowered.

The committee received testimony from a representative of the North Dakota AFL-CIO stating the adversarial business of insurance impacts WSI decisions of whether to make an award. Under the state's workers' compensation system, the injured employee is put in the position of having to maximize a claim's potential by requesting the maximum amounts and types of benefits for which the injured employee may be eligible because if the injured employee does not do this, the injured employee loses and WSI wins by accomplishing its goal of limiting liability. The bottom line is that WSI works for the WSI Board of Directors, which has the goal of limiting liability.

Second Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- January 28, 2005 - The injured employee filed an application for workers' compensation benefits in connection with a heart condition. The injured employee was a full-time paid firefighter whose annual physical, required of firefighter personnel, produced results indicating she had a heart condition, the result of which made her ineligible to work as a firefighter.
- February 17, 2005 - The injured employee's physician examined her and indicated her tests did not show any heart condition. The physician cleared the injured employee to return to work without restrictions.
- February 25, 2005 - Workforce Safety and Insurance issued a notice of decision dismissing the application, indicating the injured employee did not establish that she sustained a compensable injury by accident arising out of and in the course of her employment. The injured employee requested reconsideration of the decision, but WSI did not change its decision. The injured employee filed an untimely appeal and the denial decision became final.

Issues for Review

The injured employee's workers' compensation issues were that her temporary disability should have qualified as a compensable injury by accident arising out of and in the course of her employment; if WSI denies a claim, WSI should have to provide the injured employee sufficient information regarding why the claim was denied so that the injured employee can take any necessary actions to correct any mistakes that might have been made; and she should have been given a longer period to appeal the WSI decision.

The injured employee brought forward the following points in support of her issues:

- The injured employee used 107 hours of sick leave, incurred medical expenses, and used 12 hours of family leave in order to accommodate her time off work. Until she received the medical determination that the initial test was a "false positive," she was required to behave as if she had a heart condition.
- If a firefighter ignores a bad test and it turns out to be a real heart event, that firefighter not only puts the firefighter but the firefighter's coworkers in danger. To make matters worse, if a firefighter refuses to take a physical provided by the employer, the firefighter is disqualified from the presumption clause.
- Shift work makes it difficult for firefighters to meet the 30-day appeal deadline.

Workforce Safety and Insurance Response

The WSI representative testified that although it is correct that the presumption of compensability for firefighters is addressed under NDCC Section 65-01-15.1, the issue brought forward was even more basic than this presumption clause. The real issue is whether there is an injury. In this injured employee's situation, there was a positive test but no cardiac condition and therefore a determination of no injury. Recognizing the purpose of workers' compensation, it is imperative that the system require proof of a work-related injury. If the workers' compensation system provided benefits in the case of no injury, the system would change to be something else, such as a health insurer.

The WSI representative testified that the 30-day period that is set to allow a person to appeal a notice of decision is a balancing act. Workforce Safety and Insurance needs to balance the interest of managing claims and giving a reasonable amount of time to appeal a decision. The 30-day window for appeal is specifically designed for finality. Testimony of the WSI representative was that 30 days is enough time to register an appeal, and all that is required to meet the 30-day requirement is a telephone call.

The committee received the testimony of the executive director of WSI indicating WSI would have paid the injured employee's claim if WSI could have found a way to interpret the law in her favor. However, it is the opinion of WSI that the law does not provide for payment of such claims.

Comments by Interested Persons

The committee received the testimony of a local attorney in support of providing WSI coverage of unpaid medical bills associated with a firefighter's medical

physician when this advice conflicts with the injured employee's existing workers' compensation program and there is a concern that following the physician's directions may result in a WSI finding of noncompliance, resulting in suspension or termination of benefits.

- Unnecessary spending of WSI funds, including spending of funds on unnecessary fraud investigation, forcing injured employees into retraining programs, trigger point injection limitations, and excessive litigation costs spent defending WSI decisions.
- Timeframe limitations for a claimant to recognize a workforce injury.

Workforce Safety and Insurance Response

The WSI representative testified that from a legal standpoint, he had never reviewed a more litigated claim than this injured employee's claim. The injured employee's case includes two North Dakota Supreme Court decisions. However, for purposes of the issues brought to the committee for review, the topics generally relate to reapplication. The intent of WSI in entering the settlement was to leave the most legally valuable application to go to the North Dakota Supreme Court, hoping the Supreme Court would provide some guidance in this area of reapplication.

The WSI representative testified there is a medical basis for limiting trigger point injections. WSI has addressed the issue of trigger point injections through North Dakota Administrative Code Section 92-01-02-34(5)(i). The general rule is that WSI treatments are intended to help an injured employee's medical condition improve; however, once a medical treatment stops improving the condition, it becomes palliative in that it does not improve the underlying condition. A trigger point injection is a palliative treatment.

The WSI representative reviewed the closed claim presumption that if an injured employee does not receive treatment for a period of four years, the injured employee then has the burden to prove the work injury was the sole cause of the new injury, which is a higher standard than for initial application. Although aging is usually a contributing factor to most degenerative conditions, which makes it difficult to prove the workplace injury was the sole cause of the new injury, approximately one-third of the applications for reopening are accepted by WSI.

The WSI representative testified that as it relates to retraining programs, there are social and psychological benefits to rapidly returning an injured employee to some type of employment following an injury. Generally, there is a 12-week window to successfully get an injured employee back to work, and after 12 weeks, the chance of returning to work decreases to 50 percent. Workforce Safety and Insurance does push injured employees into retraining because of the problems associated with an injured employee remaining in an unsafe job.

The WSI representative testified that as it relates to the loss of wage requirements, the statute is quite clear and the series of North Dakota Supreme Court cases have supported the interpretation of WSI. Loss of wages is necessary to give WSI the incentive to get an injured employee to return to work or undergo retraining.

The WSI representative testified the tests used to qualify for Social Security disability benefits and workers' compensation benefits are different; the basis of awarding benefits is different; and the parties involved are different. Additionally, linking the two programs could result in constitutional issues regarding improper delegation of legislative authority.

Comments by Interested Persons

The committee received testimony from a representative of the North Dakota AFL-CIO. The testimony on the issues raised by this injured employee and the rebuttal made by WSI made it clear WSI seeks to limit its liability and will not pay to relieve an injured employee's pain. This position is contrary to the statutory requirement that the workers' compensation system is designed to provide injured employees with sure and certain relief. The committee is faced with the issue of determining what is sure and certain relief. Under NDCC Section 65-01-01, as amended in 1994, the law now provides Title 65 is not to be construed liberally to any party. Under the old law, Title 65 required liberal construction in favor of the injured employee, and this liberal construction helped provide an injured employee with sure and certain relief.

Seventh Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- December 1990 - The injured employee filed a workers' compensation claim in response to a compensable work-related injury. In November 1992 the parties entered a stipulated settlement agreement through which the injured employee was paid a lump sum settlement of $15,159 as full and complete settlement of the claim for disability benefits and vocational retraining benefits. The stipulation provided the lump sum money was to be used for the sole and exclusive purpose of the injured employee becoming a residential paint contractor and establishing the self-employment venture.
- October 1995 - Workforce Safety and Insurance issued an order denying further benefits and a demand for repayment in the amount of $15,159. Workforce Safety and Insurance concluded the injured employee breached the agreement between the parties, resulting in an overpayment of benefits. The injured employee requested a hearing before an administrative law judge, and in April 1996 the administrative law judge affirmed the order and it became final.
- December 2003 - The injured employee filed a workers' compensation claim in connection with an injury incurred as a painter. Workforce Safety and Insurance denied the application for benefits, determining the injured employee was not entitled to any additional workers' compensation benefits

in connection with the December 1990 injury and that his 2003 work injury was to the same exact body part and was therefore denied. The injured employee appealed this decision and the administrative law judge affirmed the order of WSI. The injured employee appealed to the district court and the district court affirmed the decision of the administrative law judge. This order became final.

Issues for Review

The injured employee presented multiple pages of workers' compensation issues. The injured employee's primary workers' compensation issues were:

- Workforce Safety and Insurance is not abiding by its requirement to provide sure and certain relief to injured employees, regardless of question of fault.
- During the course of processing his 1990 workers' compensation claim, the claims analyst made false statements and made mistakes that were not fixed.
- Employers are not providing safe work environments for employees. More should be done to provide employees with a safer work environment.
- The Office of Independent Review is not doing the job it was intended to do and therefore should be closed.
- The North Dakota workers' compensation system should be changed from its current no-fault insurance model to a private insurance company model.
- Retraining opportunities for injured employees are inadequate.
- Injured employees in North Dakota do not have access to legal counsel. The limitations on an injured employee's attorney's fees are improper and the result of the attorney's fees limitations is that injured employees are left without legal representation.
- The district court standard of review should be changed so the district court is able to reevaluate the facts of the case.

Workforce Safety and Insurance Response

The WSI representative testified the 2003 claim filed by the injured employee centered around the 1990 claim. Following the 1990 injury, the rehabilitation evaluation found that the activity of painting was inappropriate given the injured employee's limitations; therefore, it was arranged to have the injured employee participate in rehabilitation and retraining. The injured employee and his attorney objected to the rehabilitation retraining and proposed the injured employee begin a venture as a painting contractor under which he would submit bids and hire painters to actually perform the painting.

The WSI representative testified it was brought to the attention of WSI that the injured employee was painting. Upon investigation, the injured employee reported that he was a contractor and had purchased the necessary equipment to perform this venture; however, the investigation indicated this was not the case.

The WSI representative testified the fraud case went to an administrative law judge and there was a finding the injured employee knowingly and willingly violated the terms of the stipulation. Under NDCC Section 65-05-33, the fraud provisions, the injured employee was required to forfeit any additional benefits in connection with the December 1990 injury as well as being required to repay the overpayment amount.

Eighth Case

Case Summary

The following is a chronological list of events of the injured employee's workers' compensation case:

- July 2001 - The injured employee filed an application for workers' compensation benefits in connection with a compensable workplace injury to her lower back. The injured employee participated in return-to-work activities and in July 2002 she began receiving temporary partial disability benefits.
- January 2003 - Workforce Safety and Insurance received a fraud hotline report and as a result investigative services were assigned to the injured employee's claim, and in June 2004 WSI issued a notice of intention to discontinue benefits based on the investigation results. The injured employee filed a request for reconsideration of the notice of decision.
- August 2004 - Workforce Safety and Insurance issued a fraud order against the injured employee, denying payment of any further benefits on the claim. The order included an order for repayment of disability benefits in the amount of $5,263.27. The injured employee appealed this order.
- March 2005 - Workforce Safety and Insurance offered a stipulated settlement that would have provided for the following provisions: claimant remains eligible for payment of reasonable and necessary medical expenses for treatment directly related to her lower back injury; claimant is not entitled to any further disability or vocational rehabilitation benefits in relation to this claim; WSI agrees not to collect any part of the $5,263.27 overpayment directly from the claimant, except out of any benefits resulting from a future workers' compensation claim; the claimant does not admit to any wrongdoing; and WSI will revoke its fraud order if the claimant withdraws her request for hearing regarding that issue. The injured employee rejected the proposed stipulation and the claim went on to an administrative hearing.
- November 2005 - The administrative law judge issued her findings of fact and conclusions of law, concluding the injured employee willfully misrepresented her physical condition, capabilities, and activities to WSI and her medical providers. The injured employee's statements were obviously intentional and material to an accurate determination of her work ability and for WSI's process of determining her eligibility for

WSI Flow Chart of Legal Process

November, 2005

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