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ROLL NUMBER

DESCRIPTION

2294

2007 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2294

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2294**

Senate Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: **January 22, 2007**

Recorder Job Number: **1562**

Committee Clerk Signature



Minutes:

Senator Dave Nething – State Senator from Dist. #12 - In Favor

In an effort to ease requirement to open claims that are presumed closed. The bill is straightforward in the wording. Substitute "sole cause" and insert "related" instead.

Dave Kemnitz – ND AFLCIO – In Favor

TESTIMONY #1 Went over Testimony. Covered his personal experience. It is virtually impossible to close a case.

Sebald Vetter – CARE - In Favor

Bill is a good bill. If the injury is caused from work, it is right to reopen it.

Before it was 4 years and they never opened it even if you did have evidence.

Leroy Volk – General Public – In Favor

[Gave examples of past injuries]

Deb Bale – Injured Worker from Jamestown – In Favor

Nursing background. Injuries are lifelong. Didn't know about the 4 year case. Feels unlevel field. Injury from 2001. If it weren't for the nursing background, I wouldn't have made it this far in the process. For those of us who do not have a legal background, you can easily get lost

in the system. I would not have known I would have a 4 year window, it becomes overwhelming. This bill would give more people back to the injured worker and level the field.

Darrell Gronfur – Halliburton Injured Worker - In Favor

[Gave examples of how case on WSI and how they challenged WSI]

Dan Finniman – CARE -In Favor

Favor, the language should be changed to: "related to" to "associated to" because, [had experience with Mayo clinic]

OPPOSITION

Rob Forward – Staff Attorney Workforce Safety and Insurance – Opposition

TESTIMONY # 2 Covered Testimony.

Told that they opened 30% of the requests.

S Klein: with the 30% figure that you laid out, 30% cases are opened because the "sole cause" is ___ how does this relate to the current legislation?

R Forward: If someone requests we open their file, medical bill will come in, 30% of those cases, we will open the file.

S Andrist: The "sole cause" is pretty arbitrary and at the same time, "related to" is pretty loose, is there something in the middle, like "major contributing factor" or something like that?

R Forward: There are two extremes, whose financial burden is it? If it is "related to" it is less than any standard.

S Potter: How do you open cases for review?

R Forward: 2 step process: 1. You apply to open, and if that passes, 2. Managed from there.

S Potter: You're not in reopening the case, are you opening to review it?

R Forward: We are reopening and paying clients.

S Potter: If it has a clear and convincing case.

R Forward: That is correct.

S Hacker: Do you have any idea what kind of impact this will have on WSI?

R Forward: Not with good certainty. It will depend on how we handle our reserves.

In 1995 the standard was changed so that we could eventually close the claims. Don't know how we would handle reserves if this passed. It would be a material impact.

S Hacker: Do you have certain reserves for each case?

R Forward: yes

S Heitkamp: Language: "sole cause" – [reads from bill 24:17] "For clear and convincing evidence." How is that going to open Pandora's box?

R Forward: I understand your point. My explanation is doesn't matter whether you have clear and convincing evidence or beyond a reasonable doubt, We believe a doctor would be able to meet that standard by making a statement.

S Heitkamp: the "clear and convincing evidence" standard if it's washed away, it's washed away by YOU. If the doctor relates it to current symptoms and links it to a previous injury and you have to respond to that. 1. I'm going to take it the doctor knows what he's doing. 2. The balls still in your court.

R Forward: I disagree.

S Andrist: You say you open 30% of your claims, what are your numbers.

R Forward: The numbers are from 2002, and 1003. In 18 months we had 300 requests to reopen the cases and 30% we reopened.

S Klein: I understand that there is something coming up this afternoon that will provide the committee with this information. Some sort of report. Can you get those numbers?

R Forward: No, sorry we can't. The report we're expecting has to do with the next bill.

Bill Shalhoob – ND Chamber of Commerce - Opposition

TESTIMONY # 3 *covers testimony*

S Heitkamp: Walk me through the process have the ND CofC comes to the decision that they had to speak out against this bill. What if any involvement, if any, the people in my district who pay money in to support the Chamber, what role they have in voicing a concern on these WSI bills that the Chamber's speaking to.

B Shalhoob: [explains committee process 30:50m] Review for recommendation,

S Heitkamp: The mom-and-pop business in downtown Oaks, doesn't have veto power or anything like that over what the Chamber might come out and say in regards to this or any piece of legislation, but they do have the opportunity to know what you're doing about this.

B Shalhoob: It would be a fair assessment. We would hope through all our processes, emails, newsletters, newspapers, hopefully all members who are aware of the process...

S Heitkamp: Could you provide us with a list of those individual business owners who serve on the subcommittee that looked at all of these?

B Shalhoob: Absolutely

CLOSE

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2294 B**

Senate Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: **January 24, 2007**

Recorder Job Number: **1743**

Committee Clerk Signature

Minutes:

S Klein: The bill would say, "primarily" related to the current ...

S Behm: Instead of "related to."

S Andrist: I'll move the amendment just to get it on the table.

S Wanzek: [seconded the motion]

S Heitkamp: What's the difference?

S Klein: Listened to the rhetoric, S Andrist had some verbiage, I ran that past him. I'm hoping this will fly.

S Potter: I think it's an improvement over the current law. I thought the bill opened it up dramatically.


S Andrist: I think the "sole cause" is too high a standard. At the same time "related to"... practically anything can be related to something. I think we've improved it with "primarily."
Good middle ground.

S Klein: Committee call to a **DO PASS** on the amendment to **SB 2294**

VOTE: 7 – 0 Amendment passes

MOTION DO PASS AS AMMENDED by S Hacker

Second by S Wanzek

 **Carrier – S Behm**

FISCAL NOTE
 Requested by Legislative Council
 02/08/2007

Amendment to: SB 2294

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 engrossed bill provides for the reopening of a claim after 4 years of no payment activity in the event that clear and convincing evidence is presented that the work injury is "the primary cause of" the current symptoms versus "the sole cause of" the current systems.

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: Engrossed SB 2294

BILL DESCRIPTION: Closed Claim Presumption

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 engrossed bill provides for the reopening of a claim after 4 years of no payment activity in the event that clear and convincing evidence is presented that the work injury is "the primary cause of" the current symptoms versus "the sole cause of" the current systems.

FISCAL IMPACT: We do not have access to sufficient data to permit a comprehensive evaluation of the potential rate level and reserve impact of the engrossed bill. However, WSI anticipates that, if passed in its present form, the legislation will act to increase costs. The introduction of a clear standard for reopening claims was an important element of the workers' compensation reform package that was passed in the mid 1990's. Since then, time loss claim frequency has declined from prior levels. Though many factors contributed to the observed decrease in claim frequency, 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 very old injuries.

DATE: February 8, 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:	02/08/2007

FISCAL NOTE
Requested by Legislative Council
01/18/2007

Bill/Resolution No.: SB 2294

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 changes the standard for reopening closed claims.

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: SB 2294

BILL DESCRIPTION: Closed Claim Presumption

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 provides for the reopening of a claim after 4 years of no payment activity in the event that clear and convincing evidence is presented that the work injury is "related to" the current symptoms versus "the sole cause of" the current systems.

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 costs, possibly by a material amount. The introduction of a clear standard for reopening claims was an important element of the workers' compensation reform package that was passed in the mid 1990's. Since then, time loss claim frequency has declined from prior levels. Though many factors contributed to the observed decrease in claim frequency, 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 very old injuries.

DATE: January 21, 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.

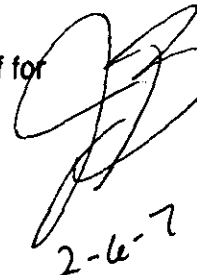
C. **Appropriations:** Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates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

Name:	John Halvorson	Agency:	WSI
Phone Number:	328-3760	Date Prepared:	01/21/2007

70739.0101
Title.0200

Prepared by the Legislative Council staff for
Senator Klein

January 24, 2007



Handwritten signature and date: 2-6-7

PROPOSED AMENDMENTS TO SENATE BILL NO. 2294

Page 1, line 12, remove the overstrike over "~~the~~", after "~~eele~~" insert "primary", remove the overstrike over "~~cause of~~", and remove "related to"

Renumber accordingly

Date: 1.24-07

Roll Call Vote : 2

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2294

Senate INDUSTRY BUSINESS & LABOR Committee

Check here for Conference Committee

Legislative Council Amendment Number DO PASS. A.A.

Action Taken _____

Motion Made By Hacker Seconded By Wanzek

Senators	Yes	No	Senators	Yes	No
Chairman Jerry Klein	✓		Senator Arthur Behm	✓	
Vice Chair Nicholas Hacker	✓		Senator Joel Heitkamp	✓	
Senator John Andrist			Senator Tracy Potter	✓	
Senator Terry Wanzek	✓				

Total Yes 7 No 0

Absent _____

Floor Assignment Behm

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

REPORT OF STANDING COMMITTEE

SB 2294: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, ABSENT AND NOT VOTING). SB 2294 was placed on the Sixth order on the calendar.

Page 1, line 12, remove the overstrike over "~~the~~", after "~~sole~~" insert "primary", remove the overstrike over "~~cause of~~", and remove "related to"

Renumber accordingly

2007 HOUSE INDUSTRY, BUSINESS AND LABOR

SB 2294

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2294

House Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: 02-28-2007

Recorder Job Number: 4061

Committee Clerk Signature

Lisa M Thomas

Minutes:

Chairman Keiser opened the hearing on SB 2294. All Representatives were present.

Senator Nething introduced the bill.

Sen. Nething: SB 2294 has a single word change in it that has quite a bit of significance and I just, for your background on it, it was brought to my attention that the current law, which talks about the sole cause of the current symptoms to be considered when reopening a claim. When we introduced it in the Senate, we had "related to" and then the IBL committee changed it to "primary". The reason the bill is here is because when you go to the sole cause as being the basis for opening, it is a very high level of proof that is difficult to show. This is an effort to try to find a more fair way to determine whether or not, or what level of cause you would have to have. It is one of those things; you don't see many bills with just one word change in them. There are other people here that will testify as to the problems.

Renae Pfenning, North Dakota Building and Construction Trades Council, spoke in support of the bill.

Pfenning: We lend our support and urge a DO PASS on the change from "sole cause" to "primary". The burden of proof that a claimant in other statutes is by clear and convincing

evidence so we still feel that this would be a good change, that it is not opening up flood gates and claims being turned over.

Rep. Keiser: If I understand your point, clear and convincing evidence is required to be used whether we have "sole" or "primary"?

Pfenning: Yes, and in other instances, it is pretty much the standard burden of proof.

Sebald Vetter, CARE, spoke in support of the bill.

Vetter: I go along with this bill. It makes a little sense there that one word is quite a bit difference. I don't have too much to say on this, but I think it's something that we have to look at.

David Kemnitz: AFL-CIO, spoke in support of the bill.

Kemnitz: This bill is close to us for quite a few different reasons. The primary cause vs. the sole cause is important relationship between being able to open a claim and never getting that attention again. One of the things that can happen, for instance myself, in 1976 I injured myself and in 1978 there was a serious accident smashing the shoulder cartilage and tendons, but not the bone, and it is hard to if there is recurring conditions after the claim was closed, it is hard to reassert that. That is the sole cause of the pain, which might be five or six years or longer. We struggled with different languages and words to try and open that some without being accused of throwing the barn doors open. The word "primary" appears to be a compromise between too far for some and "sole" being too closed for others. I think that is fair in that people sat down and deliberated over a particular word and it's amazing what a word can do. On the Senate side, Sen. Andrist came up with the change. **See Handout A.**

Rep. Johnson: What was the initial reason permitted by the Senate and the second question is how long is this window?

Kemnitz: The original term was "related to" so that if the work injury is related to, they felt it was too open. The bureau felt it was too far. "So cause of" is very strict and very tightly written.

Rep. Johnson: That would be, if it is closed after four years and then it could go on forever after that?

Kemnitz: Nothing changes in the way the law says now in that a claim for benefits under this title are presumed closed if the organization has not paid any benefit or received a demand for benefit. Nothing changes there. If they had reopened it and had a big adjustment or surgery or some other medical procedure then for four years nothing else happened, if I read it correctly, the claim was again reserved purposes was closed.

Rep. Johnson: After those four years of no activity it is closed, then this part would come in sometime after that four years?

Kemnitz: Correct.

Rep. Ruby: I am trying to figure out what this change would do in application with an example. I am wondering for instance, if somebody injured a knee and after four years everything was no payments so it is considered closed. Ten years down the road or maybe twenty years down the road there is some problem with that knee again under "sole" is it correct that first of all it would have to be the sole problem of that injury and under "primary" if there is some affects due to aging, now that could be somewhat figured in. It could be reopened because even though there are some effects of aging, the sole purpose isn't the injury, just primary, so they would have to determine what percentage of what was related to the injury and what was related to age. It seems like it could open it up to be pretty ambiguous, how do you tell that?

Am I correct on the scenario of how that could be applied?

Rep. Keiser: If you look at it, "related to" would be one percent or more. With "primary" it's fifty-one percent or more. That is the only way it can be primary. "Sole" is basically one hundred percent.

Kemnitz: Thank you. That is the way I would view it also.

Alvin "Butch" Brandt, ND AFL-CIO, spoke in support of the bill.

Brandt: I am a retired Bobcat employee. I worked there thirty-two years and ten months. I feel that this bill was written by me. I am an injured worker. I will not go into the details of my injury or how I was treated because I find that most people's eyes gloss over because they don't care. I have my thumb practically ripped off of my hand. I had surgery on it. When I went back to the medical doctor after a year I was called back in for a re-evaluation. I asked for nothing other than I wanted my hand fixed the way it was. Pain is a relative thing. People don't understand pain unless they have it. I am the only person in this room that knows every second, every minute, every hour or every day that I have a right thumb. People don't realize that they have right thumbs. I know I have a right thumb. The pain is not that I can't live with. I have a very high threshold of pain. I was union officer for twenty-eight of the thirty-two years and I am used to having bumps and bruises. When I went to this last evaluation, I asked the doctor I said, I have constant pain there. What is going to happen five or ten years down the road if I can't stand the pain anymore? He said you can always come back and your claim can always be reopened and you will receive treatment. Well, from what I have been hearing, that is not true. It says in here that if they haven't paid any benefits or received a demand for payment for a period of four years, my case is closed. I didn't ask for this to happen to me. It happened at work through no fault of mine. I would really like to get into what happened to me and the way I was treated but I just won't take up your valuable time but I'm very concerned about if something happens. I don't know what is going to happen to me. I am getting older, I

know that. I just don't know what is going to happen if five or six years down the road, I need more help, I don't know why I should have to pay for that. I didn't ask for it.

I would also like to say one thing, being a first timer down here at the legislative session and being here for over a month and watching and observing and listening, I am extremely impressed by the process. I am extremely impressed by the chairman in this committee. His professionalism is outstanding. His treatment of people that aren't used to being public speaker is to be commended. Thank you.

Rep. Ruby: If you came to me with your problem and you asked that it be reopened and I called WSI, I would be arguing with them that was the sole, your pain is the sole cause of that injury. I would be making a strong argument for you that they continue to pay because under the guidelines here, I truly think you with your thumb, if in the future you couldn't take it, I don't know what else would have caused that pain, other than the injury, so I think that regardless of what we do with this bill, I understand what you are saying about your finger, but would make a strong case for you to them.

Butch: Your name is in my brain for if I have a problem in the future.

Rep. Thorpe: The reason we are looking at this bill is we are striking "sole" and putting "primary" in, would you feel more comfortable going forward with the word "primary" over "sole"?

Butch: I would, yes.

Opposition to the bill was heard at this time.

Rob Forward, Staff Attorney for WSI, spoke in opposition to the bill. See written testimony.

Rep. Kasper: Can you share with us when an injured worker makes the decision to have a claim reopened, the process that is used and then the method that is used to determine whether or not that will be allowed to be reopened and how this bill would impact that?

Forward: Either we get a bill saying six years after there has been no activity on a claim and we get a bill from usually the treating doctor and that makes it's way through our utilization review people and then into our claims process. The question is then asked of the treating doctor, we've got a very short letter and it has one sentence basically asking the doctor if the patient's current symptoms are, if it is a work injury of let's say 2000, the sole cause of the patients current symptoms, yes or no. The doctor answers yes and the claim is reopened and if the doctor answers no we may stop it internally with the claims people in our own medical director to make sure. It's possible that the injured worker is contacted and questions are asked and then a decision is made. The second way is if an injured worker before the medical bill comes in they say the injured worker is taken off of work by his doctor and that happens a lot of times before the medical bill gets sent to us, we contact his claims adjuster and ask to have the claim reopened.

Rep. Kasper: The worker can initiate the process, it's not the department initiating the process? And then, who determines what doctor the worker goes to and is there an appeal for the worker if the claim reopens and is denied?

Forward: WSI does not initiate the process. The injured worker or their treating provider does. If the reopening is denied, we issue a notice of decision which has a thirty day appeal language on it. They can appeal that and we go through the appeal process.

Rep. Kasper: Is the doctor selected by the injured worker?

Forward: Yes. The doctor is selected by the injured worker.

Rep. Ruby: Are these claims reopened for just medical or are they eligible later?

Forward: The whole ball of wax. All benefits if they are reopened, all benefits are on the table again.

Rep. Nottestad: As we look at the people that are in the situation with injuries previously and we are not able to gain benefits because of the terminology, do you see this bill as perhaps helping some people that were not able to receive help now?

Forward: Yes.

Rep. Amerman: You said the ways it is reopened if an injured worker goes to the doctor and the doc calls WSI and WSI says is this the sole cause and the doctor says yes, then the case is reopened? Does it work that simply or can you ask the claimant to go another doctor of your choice before you reopen it and that type of thing?

Forward: If the doctor says yes, there is always a possibility that there will be an internal review. Internally I see most of these. What happens internally is the claims department is required to staff these with a legal department. What I see personally, and I realize this is not backed up by statistics, I see usually is the treating doctor has said yes this is solely related and the medical notes that the doctor sent in back that up. He is not talking about arthritis or things that we know are as a result of aging, then it are reopened.

Rep. Amerman: Prior to 1995 there was no clear standard for claims that should have been closed and so on. Am I right in thinking prior to 1995 was there a "related to" or "primary" or nothing and we went from nothing to the highest level of "sole"?

Forward: There was something. As a fact of the matter, it didn't really make any difference.

The original language read that the claim is presumed inactive and they changed that to closed, may not be reopened for payment of any further benefits unless the presumption is rebutted by proponent of the evidence and at a minimum, an employee shall present expert medical opinions that there is a causal relationship between the work injury and the current symptoms. So that standard was the one percent that the chairman was referring to.

Rep. Amerman: So we went from a one percent to a reopened claim to proof of clear and convincing evidence at one hundred percent to reopen the claim, would that be true?

Forward: That is correct. We went from a very low standard to a very high standard. Keep in mind, I qualify that with the numbers that we have and we do reopen about thirty percent of our claims.

Rep. Gruchalla: I am trying to think of a more egregious case. There is a guy that was accident prone. He has been in several car crashes on and off duty, he's a state trooper. The last time it was on the interstate by a car going about seventy miles an hour and busted up pretty bad and he was in Intensive Care for a long time. The doctor initially told him that can't go back to work and he wanted to work so he is back on the job. Let's just say that sooner or later he's not going to be able to work because he's in a lot of pain and has a special seat and all this stuff, but eventually he is not going to be able to work. Now I don't know how a doctor would ever say that is the sole cause because he has had so many injuries in his life, now it seems like that would be an ideal example, this change would work for him. You can't say that he can't work just because of that crash because he has had so many.

Forward: Yes, I would have to agree with you. When you take a step back and look at legislation like this, you are drawn into the philosophy of WSI and the farther away you get from the date that you were injured, more than likely, the more your body has deteriorated and it becomes a question of do we want our work comp system to pay for the deterioration or do we want private insurers or the injured worker to pay for it. I would agree with you that in his situation he's got a work injury that some point down the line, when he is older, begins to combine or act with the degenerative changed in his body, there probably is some responsibility on the worker's comp system to help pay for that. It becomes a question of policy

and philosophy and how far out you want to do that and where you want to set the bar. Setting the bar at "primary" probably would help gentlemen like that.

Rep. Ruby: The bottom of the fiscal note says that "the change may also actually increase the level of uncertainty and any actuarial estimates because the injury's potential for loss is developing a due process and is associated with, actuarially couldn't they estimate a certain percentage that they could open up and put into the formula?"

Forward: I am not sure that this has been changed since the amendment was done in the Senate. I will say that there is a level of uncertainty within the bureau because we are not entirely sure how many claims will be reopened under the primary cause standard as opposed to what we have now. I guess standing here right now I don't understand the actuary information better than anybody else does. I think there is some question in our mind as to how many will be reopened.

Rep. Boe: When this was amended in the Senate to primary, were you part of that conversation?

Forward: No, I was not. I don't know if anybody else at WSI was, but I wasn't.

Rep. Keiser: This change deals with the section of code that addresses simply reopening the claim. It does not address that this claim will be covered.

Forward: Correct. That step is just kind of combined. Theoretically it is two steps.

Rep. Clark: Do you know how other states handle this situation?

Forward: I do not. I did at one time, I remember researching this.

Rep. Ruby: Let's say fifty five percent of the injury is work related, does WSI pay fifty-five percent of the medical cost and the insurance pay the rest?

Forward: Nine times out of ten we pay one hundred percent. There are certain circumstances let's say if, depending on when the other problem, the non-work related problems were thrown

in there, depending on when that occurred there could be a reduction for those. We get into our aggravation statute and it will then be a portion payment.

Sen. Andrist: I just thought I could make two comments that might help you. The bill originally came to the Senate IBL committee and it said that the injury would have to be 'related to' and we felt that was a little bit too loose. On the other hand we thought 'sole cause' is really a hard threshold to prove. Particularly as bones begin to calcify in the aging process and that is why we arrived at the compromised term of 'primary', which WSI embraced. The only other comment I wanted to quickly make is I don't think its work related injury when you get your bird finger caught in the ceiling fan.

The hearing was closed.

Rep. Amerman moved a DO PASS. Rep. Gruchalla seconded.

Rep. Ruby: My last question is, I don't have a problem with us reopening and WSI paying for a portion that is work related, it just seems like at some point, much further down that should be some shared cost with health insurance company or something that would be responsible for normal aging. I am struggling with the percentage that would have to be assumed that isn't the liability of the work injury.

Rep. Kasper: How do you determine the percentage above fifty-one percent? My finger, if down the road, on the nail that I am going to lose, something occurs that might be pretty obvious that it is one hundred percent. What happens if I start getting pains in my knuckle and how do we determine if it was fifty-one or more percent? I think once we get to the WSI position where they determine that it is a primary then rather than splitting hairs you just simply say that's what WSI is for is to take care of that claim. It's more than half.

Rep. Zaiser: It's an interesting discussion we are having here on threshold of pain, but from my perspective, that doesn't relate to this bill in terms of reopening or not and the cause. I can

understand your arguments and I think that is a good discussion to have, but I don't know if that relates to reopening like you indicated.

There was no further discussion.

Roll Call Vote: 14 yes 0 no 0 absent.

Carrier: Rep. Nottestad

Date: 2-28-07
 Roll Call Vote #: _____

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. SB 2294

House Industry Business & Labor Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Rep. Amerman Seconded By Rep. Gruchalla

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep. Amerman	X	
Vice Chairman Johnson	X		Rep. Boe	X	
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 14 No 0

Absent 0

Floor Assignment Rep Nottestad

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

REPORT OF STANDING COMMITTEE

SB 2294, as engrossed: Industry, Business and Labor Committee (Rep. Kelser, Chairman) recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2294 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

SB 2294

Reopening Requests on Closed Claims

A closed industrial insurance claim can be reopened if the accepted condition objectively worsens. As an examiner you may be asked to perform reopening examinations.

"Aggravation" or "worsening" of the industrial condition has a specific meaning in workers compensation. It refers to a worsening of the industrial injury or occupational disease that results in a temporary or permanent increase in impairment or results in the need for further treatment. Industrial insurance does not cover conditions when that worsening is caused by other factors, such as an intervening injury, natural progression of a pre-existing condition, etc. The opinion that the condition has worsened must be based at least in part on objective evidence (*Wilber v. Department of Labor and Industries*, 1963), except that mental health conditions need not show objective findings (*Phillips v. Department of Labor and Industries*, 1956).

Worsening (aggravation) has occurred, and an injured worker may be entitled to further treatment or additional compensation, if:

- The causal relationship between the injury and the worker's impairment is established by medical evidence on a more-probable-than-not basis;
- The medical evidence, substantiated in part by objective findings, demonstrates that the worker's condition has worsened; and
- The medical evidence, substantiated in part by objective findings, shows that the worker's condition worsened since the last previous closing order. (If you are not sure of the date from which you are measuring whether worsening has occurred, contact the claim manager.)

A condition need not worsen enough to increase the impairment rating. Reopening depends on evidence of worsening, regardless of whether or not the impairment rating has changed.

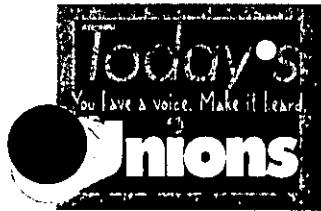
The insurer may arrange for a reopening examination to:

- Determine whether the accepted condition has worsened;
- Assess if treatment is needed to reduce the level of impairment to the prior level, or;
- Rate the increased permanent impairment by documenting objective signs or findings.

In a reopening examination, it is important that you document the findings which substantiate any worsening of the worker's condition and the reason for the worsening. Describe the activity, if any, that caused the change in objective findings. For example: Did symptoms start after loading firewood? After bending over to tie a shoe? Where did the activity occur? Also, be sure to review the worker's medical records at the time of last claim closure or last denial of reopening.

Compliments of
North Dakota AFL-CIO

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Mark Froemke

NORTHERN VALLEY LC

Mark Froemke

GREATER NORTHWEST LC

Mark Hager

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.

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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.

SB-2294 → 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.


David L. Kennitz
President/Secretary-Treasurer
ND AFL-CIO 1-8-07

2007 Senate Bill No. 2294
Testimony before the Senate Industry, Business, and Labor Committee
Rob Forward, Staff Attorney
Workforce Safety and Insurance
January 22, 2007

Mr. Chairman and Members of the Committee:

My name is Rob Forward and I am a staff attorney for Workforce Safety and Insurance (WSI). I am here to testify in opposition to SB 2294. The WSI Board of Directors opposes this bill.

Legislation establishing the current standard to reopen a closed workers' compensation claim was passed in 1995 to provide a clearer standard of when a claim should be deemed closed as well as provide for greater accuracy in the claim reserving process. Prior to 1995, there was no clear standard of when a claim was actually closed and if/when future costs would be incurred. Today, there is a clear standard in place and under this standard, WSI has historically reopened approximately thirty percent of the filed requests.

There are certainly instances when an injured worker should receive benefits after long periods of claim inactivity; however, there must be a measured approach to assessing the causal relationship between a previous work injury and conditions that have developed years later. As each of us ages, degenerative changes are continuously occurring in our bodies. These changes can preexist, overlay, and follow a work injury to create medical conditions that doctors understandably have difficulty assessing causation.

For example, is a low back strain in a 2000 claim --in which there have been no medical or wage benefits paid in four years-- sufficiently linked to a ruptured disc in 2007 in order to reopen the claim? The work injury in 2000 may have contributed to the condition, but it was almost certainly joined by other factors such as non-work related sprains and strains and simple degeneration in the seven years that have passed. A doctor assessing the situation might give the opinion that in fact the 2000 injury is slightly or otherwise "related to" the current symptoms. This example illustrates that under the proposed change, claims would have to be reopened and reviewed in situations when an old work injury plays only a small part of a medical condition that develops years later. This example also illustrates that the heart of this discussion is over degrees of causation.

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The proposed change to the term "related to" provides a degree of causation that is too relaxed. It would be so relaxed that the closed claim statute would be rendered meaningless—almost as if the entire statute were repealed.

Without a clear filter, a claims adjuster will most likely be placed in a position to simply reopen and manage the claim. Ultimately, there will be no effective filter in place to separate medical conditions that are caused by an old work injury and those that are caused by natural aging and degeneration.

The current statute provides an effective filter; consequently WSI requests a "do not pass" recommendation for SB 2294. I would be happy to answer any questions at this time.

Testimony of Bill Shalhoob
North Dakota Chamber of Commerce
SB 2294
January 22, 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. A list of the specific members is attached. As a group we stand in opposition to SB 2249 and urge a do not pass vote from the committee on this bill.

This bill reverts to language that was in place prior to 1995. The change in language from "the sole cause of" to "related to" in a four year period has the effect of allowing every claim to be kept open indefinitely. One could argue every latent effect, however vague, could be "related to" an injury. Laws such as this led Workforce Safety to an unfunded liability of \$250 million dollars and premiums that, in my experience, were triple today's rate. Today WSI has a healthy balance sheet, claims benefits that rank 26th in the United States and rates that are competitive for our employers. Looking at then and now, why would we want to regress to a model that simply did not work.

Thank you for the opportunity to appear before you today in opposition to SB 2294. I would be happy to answer any questions.

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**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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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

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2007 Engrossed Senate Bill No. 2294
Testimony before the House Industry, Business, and Labor Committee
Rob Forward, Staff Attorney
Workforce Safety and Insurance
February 28, 2007

Mr. Chairman and Members of the Committee:

My name is Rob Forward and I am a staff attorney for Workforce Safety and Insurance (WSI). On behalf of WSI and its Board of Directors, I am here to testify in a neutral position on engrossed SB 2294.

This bill changes the test for reopening closed claims. Currently, if an injured worker's claim is to be reopened the worker must prove by clear and convincing evidence that his or her work injury is the sole cause of his or her current physical ailments. Under the change, the standard would be lessened because the word "sole" would be replaced with the word "primary". When this bill was introduced in the Senate, WSI opposed it because originally it would have replaced the word "sole" with the phrase "related to", creating a very relaxed standard. WSI was concerned that this "related to" standard would have had the effect of completely reversing the reform of this statute that was necessary in 1995.

Legislation establishing the current standard to reopen a closed workers' compensation claim was passed in 1995 to provide a clearer standard for when a claim should be deemed closed as well as to provide for greater accuracy in the claims reserving process. Prior to 1995, there was no clear standard for claims that should have been closed and consequently it was difficult to gauge if future costs would be incurred. The reformed standard has given WSI more stability and accuracy in this area and, under it, WSI has historically reopened approximately thirty percent of requests to reopen.

When this bill was amended to its present form last month in the Senate, the WSI Board of Directors voted to change its position from oppose to neutral because they believed that a "primary cause" standard does not present the same concern as a "related to" standard. In other words, the bill in its present form will not have the effect of completely reversing the 1995 reform. While WSI believes that more claims would be reopened under a "primary cause" standard than under the current "sole cause" standard, the change is not expected to create claims closure unknowns or reserving difficulties.

I'd be happy to answer any of your questions.