

2009 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1561

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1561

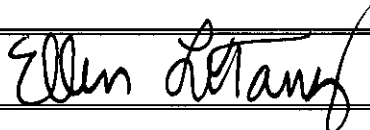
House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: January 28, 2009

Recorder Job Number: 8078

Committee Clerk Signature



Chairman Keiser: Opened the hearing on HB 1561 relating to the treating doctor's opinion in worker's compensation decisions & appeals.

Jasper Schneider: Representative from District 21. Introduces the bill and goes over the changes. What the bill is to recognize the unique relationship between treating physician and a patient what it says that all things being equal, than WSI should follow the treating physician's in determining the medical claim status. So long as it is supported by clinical and laboratory diagnostic techniques and is not inconsistent. In the second section, when they make a decision, they make it more clear and explain why. My goal was to safe guard WSI but also reduce litigation. Subsection was added by Legislative Session and I would be open to amending that out.

Vice Chairman Kasper: You said that one of the goals was to reduce litigation, how do you see this accomplished in this bill?

Representative Schneider: There is so much gray area in a medical diagnosis. I think it will force WSI to build their case before they deny. They need to give more comprehensive reasons why the decision was denied.

Vice Chairman Kasper: On section two, where you outline the points a-f, if WSI met those standards going down the line starting with a, is it you opinion that they would have met the

standards of bill so that there could be no action taken by the injured worker. Would the injured worker with this bill be able to still move forward with some type of litigation?

Representative Schneider: Certainly, the injured worker could still litigate. The reality is that it would be less likely.

Chairman Keiser: In the previous bill, Representative Schneider, the liberal construction was adopted and became law and then this were adopted, would we not have to get the treating physician's opinion?

Representative Schneider: Not necessarily.

Chairman Keiser: But generally.

Representative Schneider: I think what it would do is allow, if both laws were passes, this would still remain the general rule as long as they laid down the reasons why. The injured worker would still have the burden on appeal but what it does is allow the judges to weigh all the evidence.

Chairman Keiser: Of the claimants we've seen, there is one physician that is present in 80% of the claims and it's being challenged solely.

Representative Schneider: What this bill does is fill in all the safe guards for WSI to still deny the claim. This bill accomplishes everything I was trying to do and follow the treating physician's but still built in for WSI to deny the claim.

Vice Chairman Kasper: If the committee were not inclined to go along with item number one, but go along with number two requiring WSI to lay out the item you outlined there. Would you still have a bill you would still move forward?

Representative Schneider: Certainly, but I think the two go hand in hand.

Sylvan Leogering~North Dakota Injured Workers Support Group. See testimony attachment 1.

Dave Kemnitz~President of North Dakota AFL-CIO and representing Ron Schmidt~Vice President of the Professional Firefighters of North Dakota. Provides testimony for Ron Schmidt attachment 2. I also support HB 1561.

Chairman Keiser: This bill does not change any WSI current policies relative to what doctor you go to. This bill says the claimant can go to any treating doctor.

Loeering: As I understand it, WSI decides who the treating physician is.

Representative Schneider: Correct, Mr. Chairman, it doesn't.

Sebald Vetter: I for HB 1561.

Dean Haas~General Counsel to the North Dakota Medical Association & North Dakota Society of Orthopaedists. See testimony attachment 3.

Vice Chairman Kasper: Yesterday we heard testimony with glowing remarks, but on the second page "hiring an expert for the expressed of obtaining an adverse opinion to counter a standard medical opinion, is it you declaration or opinion that that's what happens or you just citing as a potential?

Haas: I've been out of the Worker's Compensation for the past nine years. That was my opinion back then.

Vice Chairman Kasper: Your opinion is based on 10 year old evidence. Is that correct?

Haas: I don't practice Worker's Compensation at the present. I'm not going to speculate on it, but that's what I believe.

Chairman Keiser: Having been there, do you see WSI of a managed health care delivery system or is it an open system?

Haas: There are some statues that allow choosing physicians.

Chairman Keiser: Is it a managed system or an open system?

Haas: WSI does manage the medical.

Chairman Keiser: So it is a managed health care delivery system. Would you define to me treating physician?

Haas: The physician who was initially consulted by the injured worker under the rules of the system.

Chairman Keiser: So if somebody two years later, that's not a treating physician?

Haas: I believe it's the physician who initially took them under the care. Once there is a referral away from the treating.

Chairman Keiser: So a doctor has to refer them, but what if a doctor doesn't refer them?

Haas: Worker's Compensation has the statute allows Worker's Compensation to redirect the care.

Chairman Keiser: It's not defined in code?

Haas: No it isn't. The treating physician would be the physician and there is only one at a time, is recognized by WSI as being repositioned who is treating that worker for that injury, rather than some consultant.

Chairman Keiser: So they really can't shop for a physician because WSI would have to approve as treating physician initially and approve any change?

Haas: I don't think injured workers are able to doctor shop.

Chairman Keiser: My question is what is treating physician?

Haas: At the time of injury, there is a medical consultation.

Chairman Keiser: So the first physician and WSI approved, and then if they want it deferred, WSI has to approve that referral? Is that what you are saying?

Haas: I believe you identified a good issue that I have not thought through.

Chairman Keiser: So you don't know what is treating physician.

Representative Schneider: My definition for treating doctors is really under subsection 2A, the length of treating relationship and the frequency of the examinations.

Representative Clark: Could the treating physician be defined as the emergency room doctor?

Haas: I'm not sure the ER doctors will be involved. Generally, the ER doctor is not the treating doctor.

Representative Schneider: Given all the factors, easier to rebut.

LeRoy Volk~Self. Every time I go to the doctor, I have to have written permission from Worker's Compensation to go over and do it. I support this bill.

Anyone here in opposition in HB 1561?

Rob Forward~Staff Attorney with WSI. See testimony attachment 4.

Chairman Keiser: What's the definition from the bureau of treating physician?

Forward: Statutorily, you don't have one but functionally the doctor who is seeing the person the most.

Chairman Keiser: What time frame?

Forward: You have to have written permission to switch but, that nullified if you ask for a referral.

Chairman Keiser: It's time but the referral.

Representative Schneider: On the last page, the amount of involvement in the expected of treating physicians would increase, this claim process would slow down, what do you mean by that?

Forward: I mean just what it says. We struggle sometimes with the medical community because they don't want to be involved. They are not interested in answering any of the questions that are important to the claims process. Some doctors have even said, "go away, we don't want to deal with you". Those doctor usually that are telling us, don't send us your

paperwork, we won't fill it out. If HB1561 passes, we will be forced to ask those questions and hound the treating doctor for those answers.

Representative Schneider: You make my point why this bill is necessary. You are basically saying, are you making decisions now without any consulting the treating physician now? With this bill document the reasons.

Forward: I disagree, in practice we have to follow the Supreme Court standard.

Representative Schneider: I think WSI is looking for more of a boogie in this bill.

Forward: That's not accurate, unfortunately what happens is that the treating physician's punt in the beginning and we go through the unnecessary problem of denying the claim. Than an attorney can get an opinion at the 11th hour that's in the injured worker's favor. It would be nice to have on the front end.

Representative Schneider: That what I had hopefully reduce litigation. We could encourage doctors to try settle these things up front.

Forward: Frankly, I don't see that happening.

Chairman Keiser: Maybe some physicians are not being engaged in the front end because they are not being listened to. If they thought their voice had more weight to it, they would be more willing to listen to it at the front end of it.

Forward: I don't think that if we gave their voice more weight, they still wouldn't fill out the paperwork.

Representative Gruchalla: Mr. Haas come up and answer that question.

Haas: I agree with Representative Schneider, I think it would encourage doctors to be forth coming.

Chairman Keiser: Rob, if this were the case, would be potential more IME's?

Forward: I suppose, this is difficult for me to answer.

Bill Shalhoob~North Dakota Chamber of Commerce. See testimony attachment 5. My testimony did not include the IME's physician as part of this. We feel all physicians should be heard.

Chairman Keiser: Closed the hearing on HB 1561.

Representative Schneider: Move to amend to remove subsection three in its entirety and under subsection two, add a new f and move current f to g and add a showing an appearance of bias.

Representative Gruchalla: Second.

Representative N Johnson: Did that change the "and/or"?

Representative Schneider: may I further amend, I would like to or on line 16. My purpose of this bill was to encourage to before they deny that claim, that they go through the motions to make it clear why they denied. I believe that will reduce litigation.

Voice roll call was taken with all aye's, no nay's.

Vice Chairman Kasper: Committee members, what thought on defining treating doctor and the treating doctor would be the doctor that WSI stipulates.

Chairman Keiser: That defeats somewhat the intention of the bill.

Vice Chairman Kasper: We've had a lot of discussion about treating doctor.

Representative Schneider: I would be open to it being more clearly defined. Maybe we could have WSI designates or who has been treating for that specific injury.

Vice Chairman Kasper: What if they are seeing two or three doctors at the same time?

Representative Vigesaa: If we are going into the definition, maybe WSI identify one of them.

Chairman Keiser: Now you get into the same situation of the IME, sole control.

Representative Schneider: Would it make sense to limit it to situations on terms of compensability?

Chairman Keiser: My own opinion, we've put ourselves in a corner.

Representative Schneider: Often times the treating physician is the treating physician and it's not often in dispute.

Chairman Keiser: Would you check with legislative council on the amendment.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1561

House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: February 2, 2009

Recorder Job Number: 8415 and 8418

Committee Clerk Signature

Ellen LeTang

Chairman Keiser: Opened the committee work session on HB 1561.

Representative Schneider: I do have amendments from Legislative Council. I have worked with WSI on the amendments. I received an email for Rob Forward Sunday night. This is with the amendments. They are going to recommend to the WSI Board that they will be supporting the bill. The board will not meet until Thursday of this week.

Chairman Keiser: We don't have a choice.

Representative Schneider: I took into account everybody's suggestions and hopefully we accomplished a better bill.

Representative Schneider: Goes over the amendments (see attachment). What the amendment does is removes section one from the bill. It does add in the amendments that we already adopted of one or more of the following factors for WSI from going through a check list of explaining why they are rebutting this presumption. It adds a new section two that addresses the concerns that this is not an applied managed care programs. It removes section three as well.

Chairman Keiser: When you say that it removes section one, you mean subsection one?

Representative Schneider: That's correct. The list of factors is does add enforce the bias as well.

Chairman Keiser: So the agency is required to establish.

Representative Schneider: Correct, applying one or more of the following factors.

Representative N Johnson: Did we ever define what a treating doctor is?

Representative Schneider: On the amendment in the new subsection two on the bottom, for the purposes of this section, the organization shall determine the doctor of the injured worker.

Chairman Keiser: How will they handle that?

Representative Schneider: I believe that it was Rob Forward's testimony. WSI has the discretion.

Keiser: Let's look for someone from WSI and get the definition of treating doctor.

Representative Vigesaa: I move the amendment.

Representative Gruchalla: Second

Chairman Keiser: We have a motion to adopt the amendment 0102. Further discussion on the amendments, see none.

Voice roll call taken with all aye's, 0 nay's.

Chairman Keiser: We have adopted the amendment you and Representative Schneider have worked on; the question the committee has is where you define "treating physician" and how is that limited?

Forward: I don't believe that "treating physician" definition is defined anywhere and I have to agree with Representative Schneider's explanation, it's usually not an issue between the injured worker and WSI.

Chairman Keiser: Do you have a fiscal note on it?

Forward: No, I don't.

Chairman Keiser: So the amendment is on the bill, now I need a fiscal note.

Vice Chairman Kasper: I'm still trying to get a handle on the treating doctor, if the doctor has been treating for three years, decides to refer to a new doctor, because the treating doctor refers to the new doctor, he can see him one time and the new doctor is the treating doctor.

Forward: That's correct.

Vice Chairman Kasper: Then according to the amended bill, the new treating doctor seen him one time and now you have to look at that recommendation and go by items a,b,c,d, e & f on page one to determine whether or not you accept that treating physician recommendation.

Forward: That correct.

Vice Chairman Kasper: If we say we do not accept his recommendation, then the injured worker can bring legal action?

Forward: Correct, they can appeal and argue that we haven't met the standard.

Vice Chairman Kasper: If we don't adopt this amended bill, under the same circumstances, could the injured worker after the treating doctor should have certain things, could he still bring legal action.

Forward: Correct, he can still appeal.

Vice Chairman Kasper: Even if in the previous history with a Supreme Court ruling, he can still bring another action.

Forward: Can you explain that a little bit better?

Vice Chairman Kasper: In prior times, this injured worker appealed all the way to the Supreme Court and they said no benefits, you get what is already been established? No, under this new amendment, will this open up that injured worker to be able to bring litigation again?

Forward: There is an application clause included into the bill that makes it retroactive. So the answer to your question is no.

Page 4

House Industry, Business and Labor Committee

Bill/Resolution No. 1561

Hearing Date: February 2, 2009

Vice Chairman Kasper: You would continue to have continued jurisdiction, only be reopened my example.

Forward: That's correct.

Chairman Keiser: Closes the work session on HB 1542.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1561

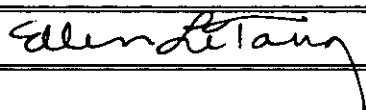
House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: February 3, 2009

Recorder Job Number: 8550

Committee Clerk Signature



Chairman Keiser: Opened the committee work session on HB 1561.

Chairman Keiser: We needed a fiscal note and it's before you. It apparently confirmed what Rob said, it's basically putting the statue with the current practices and I don't see it having a significant impact. We have HB 1561 before us as amended, what are the wishes of the committee?

Representative Schneider: Moves a Do Pass as Amended.

Representative Gruchalla: Seconded.

Chairman Keiser: Further discussion?

Representative Ruby: Someone clarify to me, Rob was saying it was similar to what they are doing now? Is that correct?

Chairman Keiser: That is what he has said. The organization currently gives an injured employee treating doctor's opinion controlling weight, but the organization can object using one or more of the following conditions. They still have the opportunity to say that they disagree but they now sent the claimant what the problem is.

Representative Schneider: One of my intents for this bill is the language is different than the original is that the intent still preserves. My goal is to make, when claimants get their determination and they get denied, give them a comprehensive explanation as possible so the

claimant and doctor is not as frustrated. They know specifically why their decision was denied.

To some extent, it is being done now.

Chairman Keiser: This also takes out subsection three on page two, which is what created the potential.

Vice Chairman Kasper: What actually changes as is?

Chairman Keiser: It cauterized current practice in current statute.

Representative Ruby: Now, initially with subsection one, it talked about how the organization gave weight to the injured treating doctor and the second part, if they do not. So, the way we have it worded, it's going to start out "if the organization does not give"? It set up how it was originally worded were you say it's going to be something and if it is not, then you have an exceptions. We are going to move into the language that says "if we don't"? Is that proper form?

Chairman Keiser: It was drafted by council.

Representative Schneider: I'm putting on my private sector hat, anything we can do to improve for the private sector, it will reduce litigation.

Voting roll call was taken on HB 1561 for a Do Pas as Amended with 12 aye's, 0 nay's, 1 absent and Vice Chairman Kasper is the carrier.

FISCAL NOTE
Requested by Legislative Council
03/23/2009

Amendment to: Engrossed
 HB 1561

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.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 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.*

2007-2009 Biennium			2009-2011 Biennium			2011-2013 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 legislation requires the organization to establish a treating doctor's opinion is not well-supported; excludes the organization's manage care programs from the proposal; and allows the organization to determine whether a doctor is an injured employee's treating doctor.

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
2009 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: Engrossed HB 1561 with Senate Amendments

BILL DESCRIPTION: Treating Doctor's Opinion

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 legislation requires the organization to "establish that the treating doctor's opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the injured employee's record" if the organization does not give an injured employee's treating doctor's opinion controlling weight. The legislation specifies the proposed change would not apply to the organization's manage care programs and provides that the organization shall determine whether a doctor is an injured employee's treating doctor.

Actuarial Impact:

Based on our understanding of the amended legislation, we don't anticipate a change to WSI's existing claim's handling practices. To the extent our understanding is correct; we don't anticipate an impact to statewide premium and reserve levels.

DATE: March 23, 2009

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:	328-6016	Date Prepared:	03/23/2009

FISCAL NOTE

Requested by Legislative Council

02/06/2009

Amendment to: HB 1561

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.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 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.*

2007-2009 Biennium			2009-2011 Biennium			2011-2013 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 legislation requires the organization to establish a treating doctor's opinion is not well-supported; excludes the organization's manage care programs from the proposal; and allows the organization to determine whether a doctor is an injured employee's treating doctor.

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 2009 LEGISLATION SUMMARY OF ACTUARIAL INFORMATION

BILL NO: Engrossed HB 1561

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The legislation requires the organization to "establish that the treating doctor's opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the injured employee's record" if the organization does not give an injured employee's treating doctor's opinion controlling weight. The legislation specifies the proposed change would not apply to the organization's manage care programs and provides that the organization shall determine whether a doctor is an injured employee's treating doctor.

Actuarial Impact:

Based on our understanding of the amended legislation, we don't anticipate a change to WSI's existing claim's handling practices. To the extent our understanding is correct, we don't anticipate an impact to statewide premium and reserve levels.

DATE: February 7, 2009

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:	328-6016	Date Prepared:	02/07/2009

FISCAL NOTE
Requested by Legislative Council
01/21/2009

Bill/Resolution No.: HB 1561

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.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 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.*

2007-2009 Biennium			2009-2011 Biennium			2011-2013 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).*

As we understand the proposed legislation, it will give controlling weight to the injured employee's treating doctor's opinion if certain criteria is met.

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
2009 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: HB 1561

BILL DESCRIPTION: Treating Doctor's Opinion

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.

As we understand the proposed legislation, it will give "controlling weight to the injured employee's treating doctor's opinion if the treating doctor's opinion on the issues of the nature and severity of the injured employee's medical condition is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the injured employee's record."

Actuarial Impact:

It would be extremely difficult to determine the rate and reserve level impact of the proposed legislation because Workforce Safety and Insurance does not have an appropriate historical base of experience to make an actuarially based estimate possible.

We note though, that some of WSI's current controls over medical treatment were introduced as part the reforms introduced in the 1990's. While it is not possible to determine how much of the decrease in costs followed in subsequent years can be attributed to medical control, we understand that WSI views the change as one of the more important included in the reform package.

We wish to emphasize that as actuaries, we are not able to comment on the degree to which medical outcomes changed with the introduction or elimination of such control. We simply wish to emphasize that the proposed change is likely to increase costs from current levels.

DATE: January 27, 2009

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:	328-6016	Date Prepared:	01/27/2009

Date: Jan 28 - 2009Roll Call Vote # 1**2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES**BILL/RESOLUTION NO. 1561House House, Business & Labor Committee☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☐ Do Not Pass ☒ As Amended

Motion Made By _____ Seconded By _____

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser			Representative Amerman		
Vice Chairman Kasper			Representative Boe		
Representative Clark			Representative Gruchalla		
Representative N Johnson			Representative Schneider		
Representative Nottestad			Representative Thorpe		
Representative Ruby					
Representative Sukut					
Representative Vigasaa					

Total (Yes) 15 No _____

Absent _____

Floor Assignment _____

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

All ayes

VR
2/4/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1561

Page 1, line 2, remove "and"

Page 1, line 3, remove "appeals"

Page 1, line 8, remove "In considering the injured employee's medical status, the organization shall give"

Page 1, remove lines 9 through 13

Page 1, line 14, remove "2."

Page 1, line 15, replace "determine the weight to give the doctor's" with "establish that the treating doctor's opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the injured employee's record based on one or more of"

Page 1, line 16, remove "opinion by applying"

Page 1, line 21, after "e." insert "Appearance of bias:"

f."

Page 1, line 23, replace "f." with "g."

Page 2, replace lines 1 and 2 with:

"2. This section does not apply to managed care programs under section 65-02-20. For purposes of this section, the organization shall determine whether a doctor is an injured employee's treating doctor."

Renumber accordingly

Date: Feb 2 - 2009

Roll Call Vote # 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1561

House House, Business & Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☐ Do Not Pass ☒ As Amended

Motion Made By _____ Seconded By _____

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser			Representative Amerman		
Vice Chairman Kasper			Representative Boe		
Representative Clark			Representative Gruchalla		
Representative N Johnson			Representative Schneider		
Representative Nottestad			Representative Thorpe		
Representative Ruby					
Representative Sukut					
Representative Vigasaa					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

all aye's, 0 nays

Date: Feb 3-2009
Roll Call Vote # 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1561

House House, Business & Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☒ Do Pass ☐ Do Not Pass ☒ As Amended

Motion Made By Schneider Seconded By Gruchalla

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	✓		Representative Amerman	✓	
Vice Chairman Kasper	✓		Representative Boe		
Representative Clark	✓		Representative Gruchalla	✓	
Representative N Johnson	✓		Representative Schneider	✓	
Representative Nottestad	✓		Representative Thorpe	✓	
Representative Ruby	✓				
Representative Sukut	✓				
Representative Vigasaa	✓				

Total (Yes) 12 No 0

Absent 1

Floor Assignment Kasper

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

REPORT OF STANDING COMMITTEE

HB 1561: Industry, Business and Labor Committee (Rep. Kelser, Chairman)
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends
DO PASS (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1561 was placed
on the Sixth order on the calendar.

Page 1, line 2, remove "and"

Page 1, line 3, remove "appeals"

Page 1, line 8, remove "In considering the injured employee's medical status, the organization shall give"

Page 1, remove lines 9 through 13

Page 1, line 14, remove "2."

Page 1, line 15, replace "determine the weight to give the doctor's" with "establish that the treating doctor's opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the injured employee's record based on one or more of"

Page 1, line 16, remove "opinion by applying"

Page 1, line 21, after "e." insert "Appearance of bias;

f."

Page 1, line 23, replace "f." with "g."

Page 2, replace lines 1 and 2 with:

"2. This section does not apply to managed care programs under section 65-02-20. For purposes of this section, the organization shall determine whether a doctor is an injured employee's treating doctor."

Renumber accordingly

2009 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1561

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1561

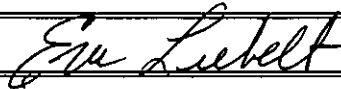
Senate Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: March 10, 2009

Recorder Job Number: 10569

Committee Clerk Signature



Minutes:

Representative Schneider: This relates to treating Doctors opinions. One of the things I found is that treating physicians are often in unique situations. Often times they've treated the injured worker prior to the injury and usually immediately after and then going forward through the process. Then we know WSI often times chooses not to follow the treating physician's opinion and often times rightfully so. There is frustration on the injured workers part on the physician's part their opinion isn't being followed. What this bill hopes to do is outline the criteria when WSI chooses not to follow the treating physician's opinion. That they have to really demonstrate why not. WSI did not agree with the bill on the house side we did amend the bill and they do support in the way it is now.

Senator Horne: Under subsection two it is not under managed care programs?

Representative Schneider: If they go under a managed care program WSI will not have to apply these factors when determining that. The intent of the bill is really the state of the claim rather than a managed care program.

Jodi Bjornson, WSI staff counsel: Written testimony in support of the bill.

Dean Hass, General Counsel to the NDMA: Written testimony in support of the bill but does not like the amendment.

Chairman Klein: We also look for that clear line. So we know what we are going to do. You're suggesting we can go back to 1997 because we need a starting point?

Dean: I still think a clear line could be established. The injury date doesn't control many things in WSI. A lot of times the statute in effect that the dispute arises apply that's often time the general rule.

Chairman Klein: We are just handling what is currently done and if there is an issue we're handling it currently and that is what we are trying to establish.

Senator Andrist: What if we attached the amendment and then put in an emergency clause on the bill?

Dean: No, that doesn't take care of my concerns.

Senator Horne: In ball park numbers how many in a percentage are unwilling to participate with WSI?

Dean: I can't give you a number but WSI have stated that themselves. We have a priority to work with WSI to get more physicians involved.

Jeb Oehlke, North Dakota Chamber of Commerce: Written testimony in support of the bill.

Dave Kemnitz, President of AFL-CIO: In support of the bill but not the amendment.

Leroy Volk: Testifies about the bill. Feels workers comp does not follow up what the rules state.

Tom Balzer, ND Carriers Association: In support of the bill. He felt it wasn't in the original engrossment. In the litigation side there are people who will re-litigate it because the door has been opened. There needs to be an effective date.

Senator Potter: You and the chamber are both in support of the bill?

Tom Balzer: When we looked at the bill we didn't know about the amendment.

Sylvan Loegering, ND Injured Workers Support Group: In favor of the bill. A few concerns about the bill and discouraged the amendment.

Seibald Vetter, President C.A.R.E: In support without the amendment.

Chairman Klein: Closed the hearing.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1561

Senate Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: March 18, 2009

Recorder Job Number: 11215

Committee Clerk Signature

Eva Lett

Minutes:

Chairman Klein: Alright committee let's take a look at House Bill 1561. So what we have is an amendment before us.

Senator Andrist moved a do pass on the amendment.

Senator Wanzik seconded the motion.

Roll call vote: 7-0.

Senator Wanzek moved a do pass as amended.

Senator Andrist seconded the motion.

Row call vote: 7-0.

Senator Andrist to carry the bill.

++

Date: 3/18/09Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1561

Senate

Committee

Industry, Business and Labor

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken

☒ **Pass**☐ **Do Not Pass**☒ **Amended**
 Motion Made By Senator Andrist Seconded By Senator Wanzek

Senator	Yes	No	Senator	Yes	No
Senator Jerry Klein - Chairman	✓		Senator Arthur H. Behm	✓	
Senator Terry Wanzek - V.Chair	✓		Senator Robert M. Horne	✓	
Senator John M. Andrist	✓		Senator Tracy Potter	✓	
Senator George Nodland	✓				

Total (Yes) 7 No 0Absent 0

Floor Assignment _____

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

++

Date: 3/18/09Roll Call Vote #: 2

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1561

Senate

Committee

Industry, Business and Labor

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken

☒ **Pass**☐ **Do Not Pass**☐ **Amended**Motion Made By Senator Wanzek Seconded By Senator Andrist

Senator	Yes	No	Senator	Yes	No
Senator Jerry Klein - Chairman	✓		Senator Arthur H. Behm	✓	
Senator Terry Wanzek - V.Chair	✓		Senator Robert M. Horne	✓	
Senator John M. Andrist	✓		Senator Tracy Potter	✓	
Senator George Nodland	✓				

Total (Yes) 7 No 0Absent 0Floor Assignment Senator Andrist

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

REPORT OF STANDING COMMITTEE

HB 1561, as engrossed: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1561 was placed on the Sixth order on the calendar.

Page 1, line 2, after "decisions" insert "; to provide for application; and to declare an emergency"

Page 1, after line 22, insert:

"SECTION 2. APPLICATION. This Act applies only to claims filed on or after the effective date of this Act.

SECTION 3. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

2009 TESTIMONY

HB 1561

REMARKS FOR IBL COMMITTEE re HB1561

Sylvan Loegering, Volunteer Coordinator, ND Injured Workers Support Group

January 28, 2009

I recognize that WSI, like any other large organization, must constantly balance two goals- to achieve its purpose and to control its budget. I submit to you that HB 1561 provides an approach that helps do both. We all know that the purpose of a workers compensation system is to provide sure and certain relief to workers injured on the job. That relief starts with the physical relief provided by proper, efficient medical care. The problems this bill would address start in the first minutes after an injury. Time is of the essence. I am not a doctor, but I have been to doctors. I have been told by doctors that the most effective way to deal with bodily injury is to get it properly diagnosed quickly, decide on the proper course of action and treat. To do anything different opens the door to the possibility of a condition worsening which can make it more difficult and expensive to treat and can even lead to chronic conditions, possibly including lifetime problems that could have been prevented. When treatment is delayed while waiting for approval from someone who hasn't seen the patient the clock is ticking. The patient is suffering and the body is dealing with the injury. It may be healing or it may be setting up reactions to the injury including the development of scar tissue or automatically controlling range of motion to prevent pain. Scar tissue can lead to chronic, painful conditions that may never be reversed. Controlling normal body motion like, for example altering your normal walking motion, can cause pain in parts of the body that weren't originally affected. This can lead to more doctor visits for conditions that may not be obviously related to the initial injury but are still caused or aggravated by the initial injury. (This can open another whole can of worms- is the secondary condition work-related or not?) I submit to you that an effective way for WSI to save money and provide sure and certain relief is to limit Utilization Review, especially in the early post-injury period. The licensed, experienced doctor is using his best medical judgment to decide which diagnostic tools are appropriate. He is using that judgment, based on his intimate knowledge of the patient's condition to choose a course of treatment. Will this lead to payment for X-rays and/or MRI's or similar diagnostic techniques that may not have been necessary? Almost certainly. Will it lead to diagnosis of conditions that would only get worse if left untreated? Just as certainly. I believe that many patients would be better off with this approach and could avoid a lifetime of pain and suffering. WSI will be better off because it's not having to pay for years of treatment and/or disability. Both would be better off because they could have avoided years of heart-breaking struggle over proper treatment, both physically and financially. I know very well an injured worker who quotes himself as saying to Mr Furness, "If I had been treated properly from the beginning you and I wouldn't be having this conversation." I might add that if that worker were treated properly from the beginning the North Dakota Injured Worker Support Group wouldn't exist.

Relying on a qualified, caring physician who has physically examined a patient and followed the course of an injury simply makes sense. HB 1561 does not remove the organization's right to review, object to or stop paying for particular treatments. It simply asks that it does not do so without valid reason. HB 1561 also asks that in cases of legitimate disagreement between the treating doctor and others who have had no or only cursory contact with the patient the organization comes down on the side of the treating physician.

I suspect the biggest objection to this bill was mentioned in this committee recently- "doctor shopping". Frankly, I believe the organization has far more opportunity to "doctor shop" than the injured worker will ever have. Many workers are told by the organization which doctors they can initially go to during the first 60 days by 65-05-28.1 and 65-05-28.2 of the statute which allows the employer to choose a preferred provider and requires the injured worker to seek treatment only from that provider. If the injured worker wants to see another doctor his employer can object and the final decision to approve the new doctor lies with the organization. If an employee is not covered by the preferred provider statute, he can choose his own doctor. However, once the injury is deemed compensable, WSI can require that injured worker to go to a doctor chosen from a list provided by WSI. If the injured worker changes doctors without approval from WSI the new doctor is not considered the treating doctor for certifying temporary disability and will not be paid by WSI. On the other hand, the organization can, and rightfully does, have doctors hired by itself to evaluate diagnostic tests and treatment and make recommendations. Under present law the organization can refuse payment or deny treatment and the injured worker has no recourse but to go along or to go down the long road of appeals while his or her condition goes untreated. Also, the organization can and does shop two states to find doctors to do Independent Medical Exams. The injured worker has no say in that choice. I personally do not accept doctor shopping as a valid reason to vote against this bill.

I recognize this hearing is not about IME's but a couple of numbers are pertinent to this discussion. This committee heard a report yesterday on the 2008 performance evaluation by BDMP. That report says that **IME's disagree with the treating physician 65% of the time**. Related to that is the set of numbers given to the interim IBL committee on 8/21/08 which shows a review of 193 IME's conducted over an 18 month period. The IME results were favorable to WSI the majority of the time and were **unfavorable to WSI only 26% of the time**. A copy of that page is in the handout I just gave you.

Members of the committee, HB 1561 does not ask for an end to IME's, it does not ask WSI to roll over and agree with everything a treating physician says. It simply asks that WSI give that physician the respect that is due to him considering his training, his experience and his knowledge of the patient's condition and treatment. It simply asks that the organization work with the physician unless it has a very good reason to override his opinion.

I respectfully to vote "do pass" on this measure

Mr. Chairman and members of the Committee,

My name is Ron Schmidt and I am the Vice President of the Professional Firefighters of North Dakota (PFFND). I am here to speak on behalf of the Officers and the 400 members of the PFFND who provide protection to over 45% of the population of the great State of North Dakota.

We are here in total support of House Bill 1561.

It is our understanding that this bill will create a "treating physician" rule that would be followed by WSI. , and all things being equal, the treating physician would determine the status of the injured worker.

We believe that if this bill is enacted it will reduce litigation as it will make it more difficult for WSI to deny claims based on the second opinion of a doctor who quite possibly has never seen the injured worker. When the injured worker is seen, it is usually a brief encounter, and not the thorough work-up you would expect from the physician who has been treating you for the course of your illness or injury. The bill also provides that when WSI does have stronger evidence, the IME/IMR doctors opinion would prevail thus making an appeal less likely.

As a group who has stood up for injured workers in the past, and will continue to do so in the future, we understand the sacred relationship between a patient and their physician. This bill recognizes that relationship and the value of it.

In conclusion, we would also like the committee to recognize the fact that this language is based on current, and well established Social Security law.

Based on all of the information that I have articulated this afternoon, the PFFND would request that the committee vote a "DO PASS" on House Bill 1561.

On behalf of the Professional Firefighters of North Dakota, I would like to take the opportunity to thank you for your time and the chance to address you all this morning.

Results of WSI, IME Data Sweep and Review

Presented to Interim IB&L Committee 8/21/08

Results for period 7/06-12/07 (18 months)

- The data was accessed reviewed and compiled manually
- This is not necessarily a comprehensive listing

For this time frame we identified 193 IME's completed

Location of the Examination:

Within North Dakota:	60	(31%)
Within 10 miles of North Dakota:	<u>82</u>	
	142	(74%)
All other Locations:	51	(26%)

Results of the Examination:

Favorable to WSI:	113	(58%)
Unfavorable to WSI:	50	(26%)
Mixed Response:	30	(16%)

COPY PREPARED FOR IBL COMMITTEE re HB1561

Sylvan Loegering, Volunteer Coordinator, ND Injured Workers Support Group

January 28, 2009



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Dean Haas
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Learn Tschider
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Annette Weigel
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**Testimony before the
House Industry, Business and Labor Committee
House Bill 1561
January 28, 2009**

Good afternoon Chairman Keiser and members of the House Industry, Business and Labor Committee. I'm Dean Haas, General Counsel to the North Dakota Medical Association and North Dakota Society of Orthopaedists. We support House Bill 1561, which provides that the opinion of an injured worker's physician must be give "controlling weight," if the opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques," and "is not inconsistent with the other substantial evidence in the injured employee's record."

Physicians are an integral part of the state's worker's compensation system. Not only are medical services the largest benefit component, but doctor's opinions are essential to most claims determinations, including whether the injury or disease is work-related, the nature of the need for medical care and course of treatment, the extent of the worker's permanent partial impairment, and the disability (i.e., the work restrictions—both its extent and duration).

Fewer physicians are willing to provide medical care to injured workers because such care is accompanied by a significant administrative burden, including answering a large number of questions regarding causation, return to work, and more. WSI is especially prone to interfere in the physician-patient relationship, questioning the physician's opinions, and referring their patients to 'defense-minded' doctors to perform Independent Medical Examinations or Evaluations ("IME's"), and reviews of the injured employee's medical records. Affording the treating physician's opinions controlling weight will serve to lessen interference in the physician-patient relationship, and encourage physicians to provide the medical care and bear the administrative burdens that treating WSI patients requires.

While treating physicians may be prone to patient advocacy to some degree, the opposite result—hiring an expert for the express purpose of obtaining an adverse opinion to counter what appears to be a standard medical opinion—is the more pernicious. Moreover, truth-telling is an important ethical standard that grounds physician opinions to reality, so minimizes the incidence of patient advocacy.

Treating physicians have more credibility than doctors who see a patient—or her records only—for a few minutes during an IME.¹ Thus, a statute recognizing that greater weight should be afforded to the opinions of the treating physician makes sense. While this bill serves the beneficial purpose of reducing the incidence of IME's, it will not preclude WSI from obtaining such an opinion where it believes that the opinion of the treating physician is not "well-supported by medically acceptable clinical and laboratory diagnostic techniques," or isn't consistent with other substantial evidence. This important control provides ample protection for WSI to rebut unfounded and unscientific opinions. Our membership, believes, as you do, that evidence-based medicine is good medicine. So, enacting this "presumption" (with such evidence-based protections) will not only encourage more physicians to offer medical services to injured workers, but reduce the incidence of adverse IME's that interfere in the doctor-patient relationship, and does so much to antagonize workers.

Finally, North Dakota is not the only jurisdiction that has considered weighing the treating physician's opinions more heavily than those of an IME doctor. For example, in social security cases—after which this bill is patterned—"greater weight should be given to the findings of a treating physician than to a physician who has examined the claimant as a consultant." *Adorno v. Shalala*, 40 F.3d 43, 47 (3rd Cir. 1994); *see also Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir.1993) (benefits under Black Lung Benefits Act, 30 U.S.C. §§ 901-945). As an additional example, Oklahoma law provides that "[t]here shall be a rebuttable presumption in favor of the treating physician's opinions on the issues of temporary disability, permanent disability, causation, apportionment, rehabilitation or necessity of medical treatment." Okla. Stat. tit. 85, § 17(A)(2)(a) (Supp. 2007).

For these reasons, we urge a "Do Pass" on HB 1561.

¹ In my experience—as a generality of course—most Administrative Law Judges have found the opinions of treating physicians to be more credible than those of IME's.

2009 House Bill No. 1561
Testimony before the House Industry, Business, and Labor Committee
Presented by: Rob Forward, Staff Attorney
Workforce Safety & Insurance
January 28, 2009

Mr. Chairman, Members of the Committee:

My name is Rob Forward and I am a Staff Attorney with WSI. WSI's Board of Directors opposes this bill.

There is concern over HB 1561's effect on two areas: claims adjudication and medical provider billings.

First, this bill seeks to accomplish statutorily what our North Dakota Supreme Court has refused to do judicially, which is to grant a treating physician's opinion "controlling weight." The phrase "controlling weight" is fairly interpreted as an automatic presumption of superiority. In other words, the opinion of an injured worker's treating doctor would, by law, automatically outrank all others and cannot be questioned unless a new list of factors is applied:

- a. The length of the treatment relationship and the frequency of examinations;
- b. The nature and extent of the treatment relationship;
- c. The amount of relevant evidence in support of the opinion;
- d. How consistent the opinion is with the record as a whole;
- e. Whether the doctor specializes in the medical issues related to the opinion; and
- f. Other relevant factors.

Currently, the opinions of treating physicians are already given much more than a token nod. In fact, WSI cannot make a claims decision that is contrary to a treating doctor's opinion without first having a supported and defensible reason for doing so. This has been the standard for 28 years. Bromley v. N.D. Work Comp, 304 N.W.2d 412 (N.D. 1981). The North Dakota Supreme Court has set the rules:

WSI has the responsibility to weigh the credibility of medical opinions. Confronted with a classic "battle of the experts," a factfinder may rely upon either party's expert witness. However, although WSI may resolve conflicts between medical opinions, the authority to reject medical evidence selectively does not permit WSI to pick and choose in an unreasoned manner. WSI must consider the entire record, sufficiently address the evidence, and adequately explain its reasons for disregarding the evidence presented to it by the [claimant]. Swenson v. WSI, 738 N.W.2d 892, 901 (N.D. 2007) (citations omitted).

This litigation standard was never part of those much talked about reforms of the nineties---probably because it was, and is, an area of claims processing and litigation that functioned appropriately under the Supreme Court's guidance.

Under the current process, when conflicting medical opinions are considered by an administrative law judge or the Supreme Court, the judges are allowed to weigh the medical opinions on their face value and they decide the ones that are credible and have the "controlling weight." In any given case, if WSI's medical opinion does not stack up, an administrative law judge will rule that it does not control and the same is true for opinions of treating physicians. Each opinion is judged on its merits. WSI suggests that this approach has more logic behind it than what is being proposed.

Also, it is unclear whether this bill is intended to apply to WSI's managed care programs authorized under section 65-02-20 of the Century Code. WSI's Utilization Review and Bill Review programs were created under this statute and they were designed "to effect the best medical solution for an injured employee in a cost-effective manner." This is achieved by pre-authorization requirements for certain treatments, surgeries, and procedures, and also by vigilant review of medical billings for accuracy and to curb abuse. If this bill's "controlling weight" standard were to apply within this sphere, it would make highly effective cost-containment programs meaningless.

Another point that I will make is that over the past two to three years the North Dakota medical community has raised concerns about the amount of correspondence and interaction they must endure from WSI claims and rehabilitation staff. They understandably bemoan the questions we ask about the causes of injured workers'

ailments, the suitability of modified work assignments, job goals, apportionment, and a host of other inquiries. WSI has heard these complaints and while it is impossible to cease all inquiries, WSI has made a conscious effort to lessen them. If HB 1561 were to pass, the amount of involvement expected of treating physicians would increase because claims processing would slow down without it.

Finally, WSI is unsure about the last sentence of the bill—what does it mean and what is the effect?

WSI requests a “do not pass” recommendation on HB 1561.

This concludes my testimony. I would be happy to answer any questions at this time.

WORKFORCE SAFETY & INSURANCE
2009 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: Amended HB 1561

BILL DESCRIPTION: Treating Doctor's Opinion

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 amended legislation requires the organization to "establish that the treating doctor's opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the injured employee's record" if the organization does not give an injured employee's treating doctor's opinion controlling weight. The amended legislation specifies the proposed change would not apply to the organization's manage care programs and provides that the organization shall determine whether a doctor is an injured employee's treating doctor.

Actuarial Impact:

Based on our understanding of the amended legislation, we don't anticipate a change to WSI's existing claim's handling practices. To the extent our understanding is correct; we don't anticipate an impact to statewide premium and reserve levels.

DATE: February 3, 2009



Testimony of Bill Shalhoob
 North Dakota Chamber of Commerce
 HB 1561
 January 28, 2009

Mr. Chairman and members of the committee, my name is Bill Shalhoob and am here today representing the ND Chamber of Commerce, the principle business advocacy group in North Dakota. Our organization is an economic and geographical 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 representing seven local chambers with total membership over 7,000 members and ten employer associations. A list of those associations is attached. As a group we stand in opposition to HB 1561 and urge a do not pass from the committee on this bill.

HB 1561 requires WSI to give controlling weight to the injured worker's treating physician under certain conditions. The premise seems to be that the treating physician knows more than a consulting physician who in fact may be a specialist. We are saying we would give our family physician's opinion more weight than that of a cardiologist or heart surgeon when we develop a heart problem or oncologist if a cancer problem occurs. Both opinions are just that, opinions. Individually we make judgments on conflicting treatment options and WSI should be free to make a decision based on the facts in each individual case. The opinion of both the treating and consulting physician or physicians should be considered.

Thank you for the opportunity to appear before you today in opposition to HB 1561. I would be happy to answer any questions.

THE VOICE of NORTH DAKOTA BUSINESS

2009 Engrossed House Bill No. 1561
Testimony before the Senate Industry, Business, and Labor Committee
Presented by: Jodi Bjornson, General Counsel
Workforce Safety & Insurance
March 10, 2009

Mr. Chairman, Members of the Committee:

My name is Jodi Bjornson and I am General Counsel with WSI. I am here to testify in support of Engrossed HB 1561 and offer an application amendment. WSI's Board of Directors supports the engrossed version of this bill.

WSI opposed the original version of the bill because of how it would have negatively affected claims management and WSI's medical utilization review process.

After testimony and discussion in the House Industry Business and Labor Committee hearing, the bill was amended. WSI no longer has concerns with the legislation.

In its current form, HB 1561 lists out the factors that WSI is required to consider when disagreeing with the opinion of an injured worker's treating doctor. These factors would ensure that the agency adequately explains the medical aspect of a claims decision, and would provide guidance to the agency's Claims Department.

For the sake of this discussion, it should be recognized that the opinions of treating physicians are already given much more than a token nod. In fact, WSI cannot make a claims decision that is contrary to a treating doctor's opinion without first having a supported and defensible reason for doing so. This has been the standard for 28 years. Bromley v. N.D. Work Comp, 304 N.W.2d 412 (N.D. 1981). The North Dakota Supreme Court has set the rules and they are:

WSI has the responsibility to weigh the credibility of medical opinions. Confronted with a classic "battle of the experts," a factfinder may rely upon either party's expert witness. However, although WSI may resolve conflicts between

medical opinions, the authority to reject medical evidence selectively does not permit WSI to pick and choose in an unreasoned manner. WSI must consider the entire record, sufficiently address the evidence, and adequately explain its reasons for disregarding the evidence presented to it by the [claimant].

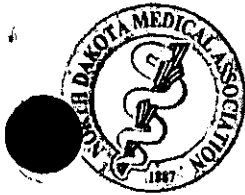
Swenson v. WSI, 738 N.W.2d 892, 901 (N.D. 2007) (citations omitted).

These guidelines have protected the integrity of treating doctors' opinions and the changes suggested in HB 1561 would provide further guidance. In other words, claims adjusters, injured workers, and administrative law judges would be aided by a more defined process.

The amendment that I am offering is stapled to the written testimony that I have handed out. It spells out that the proposed change in HB 1561 would apply to all claims filed on or after the bill's effective date. This amendment is being offered to alleviate any confusion over which claims decisions are going to be subject to the factors; it gives us a clear line of demarcation so that this change does not subject the agency to litigation over claims that have already been decided.

WSI requests a "Do Pass" recommendation on Engrossed HB 1561 with the amendments proposed today. Thank you.

This concludes my testimony. I would be happy to answer any questions at this time.



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Bruce Levi
Executive Director

Dean Haas
General Counsel

Leann Tschider
Director of Membership
Office Manager

Monette Weigel
Administrative Assistant

**Testimony in support of House Bill 1561
Senate Industry, Business and Labor Committee
March 10, 2009**

Good morning Chairman Klein and members of the Committee. I'm Dean Haas, General Counsel to the North Dakota Medical Association and North Dakota Society of Orthopaedists. We support House Bill 1561, which provides that the opinion of an injured worker's physician must be give "controlling weight," if the opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques," and "is not inconsistent with the other substantial evidence in the injured employee's record."

Physicians are an integral part of the state's worker's compensation system. Not only are medical services the largest benefit component, but doctor's opinions are essential to most claims determinations, including whether the injury or disease is work-related, the nature of the need for medical care and course of treatment, the extent of the worker's permanent partial impairment, and the disability (i.e., the work restrictions—both its extent and duration).

Fewer physicians are willing to provide medical care to injured workers because such care is accompanied by a significant administrative burden, including answering a large number of questions regarding causation, return to work, and more. WSI is especially prone to interfere in the physician-patient relationship, questioning the physician's opinions, and referring their patients to 'defense-minded' doctors to perform Independent Medical Examinations or Evaluations ("IME's"), and reviews of the injured employee's medical records. Affording the treating physician's opinions controlling weight will serve to lessen interference in the physician-patient relationship, and encourage physicians to provide the medical care and bear the administrative burdens that treating WSI patients requires.

While treating physicians may be prone to patient advocacy to some degree, the opposite result—hiring an expert for the express purpose of obtaining an adverse opinion to counter what appears to be a standard medical opinion—is the more pernicious. Moreover, truth-telling is an important ethical standard that grounds physician opinions to reality, so minimizes the incidence of patient advocacy.

Treating physicians have more credibility than doctors who see a patient—or her records only—for a few minutes during an IME.¹ Thus, a statute recognizing that greater weight should be afforded to the opinions of the treating physician makes sense. While this bill serves the beneficial purpose of reducing the incidence of IME's, it will not preclude WSI from obtaining such an opinion where it believes that the opinion of the treating physician is not "well-supported by medically acceptable clinical and laboratory diagnostic techniques," or isn't consistent with other substantial evidence. This important control provides ample protection for WSI to rebut unfounded and unscientific opinions. Our membership, believes, as you do, that evidence-based medicine is good medicine. So, enacting this "presumption" (with such evidence-based protections) will not only encourage more physicians to offer medical services to injured workers, but reduce the incidence of adverse IME's that interfere in the doctor-patient relationship, and does so much to antagonize workers.

Finally, North Dakota is not the only jurisdiction that has considered weighing the treating physician's opinions more heavily than those of an IME doctor. For example, in social security cases—after which this bill is patterned—"greater weight should be given to the findings of a treating physician than to a physician who has examined the claimant as a consultant." *Adomo v. Shalala*, 40 F.3d 43, 47 (3rd Cir. 1994); see also *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036 (6th Cir.1993) (benefits under Black Lung Benefits Act, 30 U.S.C. §§ 901-945). As an additional example, Oklahoma law provides that "[t]here shall be a rebuttable presumption in favor of the treating physician's opinions on the issues of temporary disability, permanent disability, causation, apportionment, rehabilitation or necessity of medical treatment." Okla. Stat. tit. 85, § 17(A)(2)(a) (Supp. 2007).

For these reasons, we urge a "Do Pass" on HB 1561.

¹ In my experience—as a generality of course—most Administrative Law Judges have found the opinions of treating physicians to be more credible than those of IME's.



Testimony of Jeb Oehlke
North Dakota Chamber of Commerce
HB 1561
March 10, 2009

Mr. Chairman and committee members my name is Jeb Oehlke. I represent the North Dakota Chamber of Commerce, the voice of North Dakota business. Our organization is an economic and geographical cross section of the state's private sector and also includes statewide associations, local chambers of commerce, development organizations, convention and visitors bureaus and public sector organizations. For purposes of this hearing we are also representing sixteen local chambers with total membership over 7,200 members, and ten employer associations. As a group we stand in support of HB 1561 as amended and ask the committee for a favorable recommendation.

When the agency decides whether to give the treating doctor's opinion controlling weight it is likely that they already follow an analysis similar to the one laid out in this bill. They currently make judgments on conflicting treatment options and WSI should remain free to make decisions based on the facts in each individual case. The opinions of both the treating and consulting physician or physicians should be considered. This legislation ensures the agency shows, in writing, the analysis and the reasons the decision came out the way it did. In addition to showing injured workers why certain decisions are made it may also lead to a more thoughtful review initially and fewer disputes in the future.

Thank you for the opportunity to appear before you today in support of HB 1561. I am happy to answer any questions.

THE VOICE OF NORTH DAKOTA BUSINESS

Proposed Amendment to Engrossed House Bill No. 1561

Page 1, line 3, after "appeals" insert "; and to provide for application"

Page 2, after line 2, insert:

"SECTION 2. APPLICATION. This Act applies only to claims filed on or after the effective date of the Act."

Renumber accordingly