

2009 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2310

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2310

Senate Industry, Business, and Labor Committee

☐ Check here for Conference Committee

Hearing Date: February 3, 2009

Recorder Job Number: 8456

Committee Clerk Signature

Minutes:

Chairman Klein: Opened the hearing on SB 2310, all members present.

Senator Nething: Introduces SB 2310, and testified in support of.

Dave Kemnitz: President of North Dakota AFL-CIO testified in support of SB 2310. (See attachment #1)

Senator Andrist: A civil action is a court action; I don't think the last 2 sections need to be in the bill. Respond to that please.

Dave Kemnitz: The statute as applied says you cannot sue the employer, but you can sue the Bureau.

Senator Andrist: If someone sues me, I deserve a fair day in court and vice versa.

Dave Kemnitz: The way it reads now, the employee cannot sue; all I can do is apply to the Bureau for relief. When that happens, the employer is left in the dark. The employer is never touched. This law protects the employer!

Senator Horne: What do you interpret line #17. What do you think forfeiture means?

Dave Kemnitz: To avoid forfeiture means the #1 thing you have to prove it happened on the job, the severity of the injury. We need to make sure that the person who fell into the system from no fault of his own doesn't fall through the system by no fault of his own.

Sylvan Loegering, representing ND Injured Workers Support Group, testified in support of SB 2310. (See attachment #2) The original agreement made in 1919 between employers and employees has never been adjusted to benefit the employers. It has been adjusted to help the employers. We need to go back to the original intent of the agreement.

Leon (Leroy) Volk: resident of ND testified in support of SB 2310, handed out claim form for WSI. Talked about the process his son had gone through when he was injured. Volk claimed these procedures are unfair.

Seibolt Vetter, President of C.A.R.E., testified in support of SB 2310.

Doug Harley, an injured worker, testified in support of SB 2310. He stated: This is not insurance, this is a monster and they run the show the way they see fit. WSI is just not right.

Anne Green, staff counsel for Workforce Safety Insurance, testified in opposition of SB 2310.

Chairman Klein: According to the fiscal note, there is no way to determine whether it will cost anything or not.

Senator Potter: You're talking about leveling the playing field between the agency and the public. I don't see a level field; see a level playing field for the public.

Anne Green: I disagree; the public includes the injured workers. The courts will decide what WSI meant. WSI and its' job is to follow the law as you write it.

Senator Potter: The way that you are suggesting this is WSI represents the employer, and it does not, it represents both the employer and employee.

Senator Potter: Do you have any historical information with regards to satisfaction surveys to see if we can tract changes?

Anne Green: I don't have those figures with me currently.

Senator Potter: I don't think we should be prejudice one way or the other.

Anne Green: I agree, that's why WSI Board of Directors opposes this law. It simply means everyone has the opportunity to prove their case.

Bill Shalhoob, representing North Dakota Chamber of Commerce, testified in opposition of SB 2310. (See attachment #5)

Senator Wanzek: Did I understand you right, say you have an employee commits an egregious act which hurts himself and others, he cannot be sued.

Bill Shalhoob: No, he can be sued, however we still have to pay his medical bills. Those employees who where unfortunate and got injured cannot sue for negligence.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2310

Senate Industry, Business, and Labor Committee

☐ Check here for Conference Committee

Hearing Date: February 3, 2009

Recorder Job Number: 8487

Committee Clerk Signature



Minutes:

Chairman Klein: Discussion hearing opened on SB 2310.

Senator Andrist: We should remove the overstrikes. So the courts should review the cases *strictly on its merits.*

Senator Andrist: Made a motion to Do Pass of amendment to SB 2310

Senator Potter: Seconded motion

Amendment passed 7-0

Senator Andrist: Made motion to Do Pass on SB 2310 and re-referred SB 2310 to Appropriation Committee.

Senator Wanzek: Seconded motion.

Chairman Klein: Senator Horne to carry.

FISCAL NOTE
Requested by Legislative Council
02/06/2009

Amendment to: SB 2310

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 engrossed bill eliminates the requirement that civil actions or claims subject to judicial review may not be construed liberally on behalf of any party.

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

WORKFORCE SAFETY & INSURANCE
2009 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: Engrossed SB 2310

BILL DESCRIPTION: Workers' Compensation Law Construction

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuary, Glenn Evans of Pacific Actuarial Consultants, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The engrossed bill eliminates the requirement that civil actions or claims subject to judicial review may not be construed liberally on behalf of any party.

FISCAL IMPACT: We do not have access to sufficient data to permit a comprehensive evaluation of the potential rate level and reserve impact of this proposed legislation. However, WSI anticipates the legislation will act to increase the uncertainty of outcomes for claims subject to judicial review as the courts will have greater latitude when issuing decisions.

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

DATE: 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.: SB 2310

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

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

WORKFORCE SAFETY & INSURANCE
2009 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: SB 2310

BILL DESCRIPTION: Workers' Compensation Law Construction

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuary, Glenn Evans of Pacific Actuarial Consultants, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

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

FISCAL IMPACT: We do not have access to sufficient data to permit a comprehensive evaluation of the potential rate level and reserve impact of this proposed legislation. However, WSI anticipates the legislation will act to increase the uncertainty of outcomes for claims subject to judicial review as the courts will have greater latitude when issuing decisions.

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

DATE: January 24, 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:	01/24/2009

February 3, 2009

PROPOSED AMENDMENTS TO SENATE BILL NO. 2310

Page 1, line 14, remove the overstrike over "~~A civil action or civil claim arising under this title,
which is subject to judicial review,~~"

Page 1, line 15, remove the overstrike over "~~must be reviewed solely on the merits of the action
or claim.~~"

Page 1, line 16, remove "To the extent possible, this title must be"

Page 1, remove line 17

Renumber accordingly

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Date: 2/3/09
Roll Call Vote #: 12009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2310

Senate

Committee

Industry, Business and Labor☐ Check here for Conference CommitteeLegislative Council Amendment Number AmendmentAction Taken ☒ Pass ☐ Do Not Pass ☐ AmendedMotion Made By Senator Andrist Seconded By Senator Potter

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:

re-refered

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

Senate

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

[illegible]

Total (Yes) 7 No 0

Absent 0

Floor Assignment Senator Horne

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

This Bill is to be re-referred to Appropriations!

REPORT OF STANDING COMMITTEE

SB 2310: 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). SB 2310 was placed on the Sixth order on the calendar.

Page 1, line 14, remove the overstrike over "~~A civil action or civil claim arising under this title, which is subject to judicial review,~~"

Page 1, line 15, remove the overstrike over "~~must be reviewed solely on the merits of the action or claim.~~"

Page 1, line 16, remove "To the extent possible, this title must be"

Page 1, remove line 17

Renumber accordingly

2009 HOUSE INDUSTRY, BUSINESS AND LABOR

SB 2310

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2310

House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: March 2, 2009

Recorder Job Number: 9986

Committee Clerk Signature

Ellen LeTang

Chairman Keiser: Opened the committee work session on SB 2310 relating to workers' compensation law.

Dave Nething~Senator from District 12, Jamestown. I introduced SB 2310 because the pendulum swung too far away from the middle ground, so the original bill, on line 14, we had deleted the civil action which is subject to judicial review, must be reviewed solely on the merits of the action of claim. This title must be construed to avoid forfeiture and to afford relief. The senate House Industry, Business and Labor committee made the changes that you have in front of you. They reinstated lines 14 & 15, but they actually took a middle ground by leaving off the overstrike.

Representative Amerman: What does this engrossed bill do?

Nething: What it basically does is it removes the language that says that the title may not be construed liberally on behalf of any party to the action and left the fact that it be reviewed solely on its merits.

Vice Chairman Kasper: The striking of may not be construed liberally, does that mean that evidentiary level would be preponderance of the evidence?

Nothing: Right, I believe that it does. Also, the guide is that it is solely on the merits of the action without giving any interpretation one way or the other what the next step is. The evidence would have to support the claim, the preponderance of evidence.

Representative Thorpe: You get to the middle ground?

Nothing: Right, it how you go after the facts.

Dave Kemnitz-North Dakota President of AFL-CIO. See testimony attachment.

Vice Chairman Kasper: On your testimony on page two, so I don't misunderstand what you are trying to say here, second paragraph, as seeing WSI would assert the right of the claimant to certain/benefits and see that the same was provided, you are not supposing that it's WSI obligation to rule in favor of a claim? What do you really mean by that paragraph?

Kemnitz: In our estimation, the mission of Worker's Compensation is 65-01-01 and we saw and felt, their idea their mission of the bureau. It became more and more in our eyes that they felt that their mission was to limit their liability which was to protect the fund at all costs. They can limit the liability. So 65-01-01 is the essence of what that bureau should be looking at when it looks at a claimant. The bureau should be held at a higher bar because that is the only place where we can go.

Vice Chairman Kasper: You said that you preferred the original bill, are you saying to me that you would like the overstrike lifted?

Kemnitz: The original bill has this over struck as well as new language that said "to avoid forfeiture and afford relief. What was over struck in the original was the civil action or claim arriving under this title which is subject to judicial review, must be review solely on the merits of the action or claim, and then this title may not be construed liberally on behalf of any party to the election or claim. If the bill before you in this engrossment, the sentence starting on line 14 and ending on 15, the over struck was removed. The new language which is not this bill, said

to the extent possible, this title must be construed to avoid forfeiture and to afford relief. That was the original request. We felt that the original bill had a more far reaching and definite mission statement for Worker's Compensation in this state for the bureau than the engrossed. The engrossed is a good step in a proper direction. It does allow the courts to say, given that balance of evidence and the weight of it, we should decide on behalf of the claimant, would that be the employer or the employee.

Representative Ruby: This language that was struck, doesn't it reinforce the sentence above it?

Kemnitz: I would like to defer to Representative Schneider who is a lawyer.

Representative Schneider: The way I read it it's almost a legislative directive to the judicial branch on a way to interpret claims. I like the bill as its coming forward saying that the claim must be reviewed solely on the merits without the additional language.

Kemnitz: The original bill?

Representative Schneider: No, the first engrossed bill. It strikes the middle ground, it says that it should be reviewed solely on its merits but it takes out the legislative directive.

Kemnitz: The original language to the extent possible title must be construed to award relief; we felt that it was a mission statement directive for the bureau but always limiting liability.

Vice Chairman Kasper: That would appear that you like one but not the other.

Kemnitz: If we could get the full vote.

Sylvan Loegering~North Dakota Injured Workers Support Group. See testimony attachment. My first reaction was disappointment. I would like to follow-up on the question you asked about WSI asserting the benefits of the injured worker. I would answer that yes, the claim comes before WSI and that injured worker has some benefits coming, the injured worker shouldn't have to prove it. WSI should say you have rights coming; we will give them to you,

even if the injured worker doesn't understand what those rights are. WSI should be asserting the benefits of the injured workers saying here's what there. Likewise, if it's challenged, by the employer, WSI looks at the facts and says, you know what; the injured worker doesn't have to prove the employer is wrong. It should be the mission WSI to provide sure and certain relief of the injured worker and its dependents. My mind compares it to mandatory sentences for felonies or whatever. Judges & legislatures don't like mandatory sentences because it ties the hands of the judge. The judge can't look at mitigating or aggravated circumstances or other factors. To me what this bill does is it allows the judge to do what the judge's job is to look at the evidence and facts and then make a judgment. It gives the court a little bit of room to weight the circumstances and facts and make a judgment accordingly. I do encourage you to make a do pass.

Representative N Johnson: So I understand correctly, what you said is if an injured worker that WSI realizes that the employer needs to carry forth on something that their wrong. You are saying WSI won't go with the injured worker, even if they know the employer is wrong?

Loegering: Let me clarify what I said, if an injured worker is hurt on the job, files a claim, and the employer says something that says, you know what that injured worker doesn't have those benefits coming. It's not the injured worker responsibility to prove that the benefits coming. If WSI see by the facts that the benefits should be paid out, they should go with the injured worker without the injured worker have to prove that they really do deserve these. There are cases where employers will give a statement to WSI basically to prove a reason why to deny benefits. The case I'm thinking about where it is proven false, nobody pursues to prove it's false.

LeRoy Volk~Self. I'm one of these injured workers who didn't know the laws right away. My employer said that I didn't get hurt because I finished the whole day, Monday. I got up on

Tuesday and couldn't move. He said that I did it at home. How could I do it at home when I want home 9:30, at supper, showered and went to bed? I didn't know my rights. I have to go and prove myself to Worker's Compensation that I got hurt on the job and fight for my rights. I was against a stone wall and had to hire a lawyer to keep my benefits. Worker's Compensation doesn't help you.

Sebald Vetter~C.A.R.E. I support SB 2310 but it not what we want.

Chairman Keiser: Anyone here to testify in opposition on SB 2310?

Rob Forward~Staff Counsel for Worker's Compensation. See testimony attachment.

Representative Thorpe: Correct me if I'm wrong, regardless of this bill, if you are at 51% against the claimant's 49%, (inaudible).

Forward: I have listened to the past discussion on this bill and one thing that I've noticed and hope to clear up today is that this talks about how a court is suppose to read the statue, if that statue uses (?). It doesn't talk about burden of proof. Right now as it stands, all Worker's Compensation matter are considered on the preponderance of the evidence. The 51/49 has nothing to do with the rule of liberal construction.

Representative Thorpe: I thought you said sometime that liberal construction was being put back in. Actually the overstrike (inaudible).

Forward: It's a good point and what I hoped to do was impress upon you that the legislature has never spoken on how the Worker's Compensation act is to be construed until 1995. Liberal construction rule never appeared in any of our Worker's Compensation code. In 1922, the Supreme Court set down through District Courts and itself that we were going to adopt the liberal construction code. So, what we see there is the language from 1995 being taken out.

Once you take that out, you are telling the Supreme Court that yes once again you can apply liberal construction to Worker's Compensation.

Representative Thorpe: I guess I usually disagree (inaudible).

Forward: Yes, because I think your focus a little too much burden of proof and who has more evidence to proof their side. This is focused on how a court interprets statue. With the rule of liberal construction whenever a statue is ambiguous, you always have to rule in favor of the injured worker. You are talking about statutory wording and confusion to figure out the language of the statue.

Representative Thorpe: Right now if this bill were to pass, I don't see the liberal construction for either side.

Forward: I disagree; this resurrects the liberal construction rule.

Chairman Keiser: Because the language is being struck says on behalf of any party, does that mean it can't be liberally construed on behalf of the injured worker or WSI? Is that your argument?

Forward: To a certain extent, yes. The statutory rules and interpretation created way be when, is which is title one of your code, tells the courts how to interpret statues and those are the one we ask to tell the court which one to use for Worker's Compensation. It the one's used for every other statue.

Representative Schneider: Do you know in other civil judicial proceeding, does the legislature give directive that they may not construe decisions liberally or do we let the judicial branch decide cases on the merits of the claim?

Forward: I don't know the answer to that on top of my head.

Representative Amerman: The Board of Directors opposes this bill, is that unanimous?

Forward: Yes.

Representative N Johnson: When you no longer pursue it, the employer made a false statement, WSI should be pursuing that but nobody pursues that. Is there ways to do that?

Forward: It does happen and we do look at it. On a related note I can tell you that either this week or was last week, we had a case appealed all the way up to the Supreme Court and WSI in fact disagreed with the employer and accept the benefits. The decision was appealed. If the employer is doing something to harass the employees or threatened his termination if they file a claim, we investigate. I can speak directly to that because it is now part of my responsibilities to handle special investigations. We have two right now that we are looking at where an employer could done that.

Representative Clark: Were you saying that in 1922 the Supreme Court was legislating from bench?

Forward: No, in 1922 is when they adopted this interpretation, they said this is the way we will interpret Worker's Compensation statues. In 1919 is when you created legislative work comp act and when I talk about judicial legislating, I talking about more recent cases. You'll see in other states it appears that the rule of liberal construction has gotten two ways, it's gone to the way of no limitations on the Supreme Courts in those states do not apply on the limitations on how they do that. You can see the frustration in the other statues. The other way is courts themselves adopted limitations on how they apply the rule of liberal construction. So the courts have self limited themselves.

Representative Boe: We made it all from the 20's to the 80's without any problems, it seems that we are signaling that the makeup of the court or was it all of saddened we were getting out lawyered? Could it be one of those two?

Forward: One of the former sitting behind me, I'm not going to say that, I would think that you could say it was the change of the makeup of the court. Like everything, things come slower in North Dakota and other states changed it earlier and we waited ten years, I don't know if I can answer your question.

Chairman Keiser: Just listening to the discussion, if we are to adopt the bill as it's drafted and return liberal construction, why couldn't we do a better job writing the statutes so that they are not ambiguous.

Forward: You are going to always going to different factual scenarios that don't always fit the statutory line and from the Worker's Compensation perspective that happens almost daily.

Bill Shalhoob~North Dakota Chamber of Commerce. See testimony attachment.

Chairman Keiser: Anyone here to testify in opposition, neutral. Seeing none, what are the wishes of the committee and closes the hearing on SB 2310.

Representative Schneider: I feel this bill strike good ground. It removes the word liberally from the statute, which I think is a good thing. It simply leaves in the language that the case should be decided on the merits. I not scared of letting the judicial system to figure it out.

Chairman Keiser, you are on to something with your question about writing better statutes. That's what good about three bodied system is, you have those checks and balances. It still says that the case should be decided solely on its merits but removes the handcuffs in letting the courts weigh out the evidence and truly reinstates the preponderance of the evidence.

Representative Vigesaa: Moves a Do Not Pass on SB 2310.

Representative Clark: Second.

Chairman Keiser: Further discussion.

Representative Boe: I'm going to resist the do not pass. I guess I don't understand it completely, I think that Representative Schneider says that if we take liberally out, we are back to just to the merits and the spoils of war goes to the best lawyer.

Representative Schneider: This doesn't take it back to the pre 1995 where you had a legislative directive that the act will be construed. This leaves it silent. It still leaves in the language that case must be review solely on its merits, which seems reasonable. We don't

mandate to the judicial branch to say that you will construed this employment case liberally or not. We let the courts decide. I think removing the word liberally from the statue is a good thing and you silence with us and hopefully we move forward. I oppose the motion as well.

Representative Ruby: If I heard testimony right, it wasn't just necessarily a legislative directive before as far as construing, it was liberally was along the Supreme Court that set that directive. By removing this it puts the directive back in the Supreme Court's hands than a legislative.

Vice Chairman Kasper: The Supreme Court ruling adopted liberal construction which was a judge made rule. It appears as time went on, the courts began to more liberally, more liberally, and more liberally interpret decisions and the legislature acted in 1995 and said no more liberal, it preponderance of the evidence. It's been working pretty good.

Chairman Keiser: At the risk of someday to appear before the Supreme Court again, I want to respond to Representative Boe, there is no question in my mind that 1995, the legislature collectively fed up with the Supreme Court and their decision making process and their application of law and as a result this happened. That my personal position.

Representative Thorpe: I going to resist because if we were to go back to a (?) that the state decided they are going to throw out WSI & Worker's Compensation and go back to where the injured worker could sue for damages. I think the agency is one up.

Vice Chairman Kasper: Isn't it now used as a preponderance of the evidence with this in there? The preponderance of the evidence determines not liberal construction. So what you are saying is what we are doing with this in here.

Representative Thorpe: With it in here as it is now, I would have to lean on the side of the employer.

Vice Chairman Kasper: Preponderance of the evidence doesn't look at either side, it looks and weights the evidence and says where is the weight? Whichever side has the weight, the preponderance is the way the ruling is suppose to be. With this struck, it could turn it upside down, no longer would the preponderance of the evidence apply.

Representative Thorpe: That injured worker on Monday had a back spasm is the preponderance then he injured himself on Sunday? I don't know?

Representative Schneider: This is the point that Rob Forward was trying to make when he was testifying and the clarifications is that this bill doesn't relate to 51%, preponderance is on the books and it isn't going to change. I think we have an excellent judicial system. That is the beauty of the three bodies system. We need to keep in mind that liberal construction is on the books. Our predecessors thought is was a good idea for 70 years and this bill doesn't even go that far, it just takes out the legislative directive portion of it.

Voting rolling was taken on HB 2310 for a Do Not Pass with 8 yea, 5 nay, 0 absent and Representative Vigesaa is the carrier.

Date: Mar 2 - 2009Roll Call Vote # 1**2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES****BILL/RESOLUTION NO.** 2310House House, Business & Labor Committee☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☒ Do Not Pass ☐ As AmendedMotion Made By Vigasaa Seconded By Clark

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	7		Representative Amerman		7
Vice Chairman Kasper	7		Representative Boe		7
Representative Clark	7		Representative Gruchalla		7
Representative N Johnson	7		Representative Schneider		7
Representative Nottestad	7		Representative Thorpe		7
Representative Ruby	7				
Representative Sukut	7				
Representative Vigasaa	7				

Total (Yes) 8 No 5Absent 0Floor Assignment Vigasaa

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

REPORT OF STANDING COMMITTEE

SB 2310, as engrossed: Industry, Business and Labor Committee (Rep. Kelser, Chairman) recommends **DO NOT PASS** (8 YEAS, 5 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2310 was placed on the Fourteenth order on the calendar.

2009 TESTIMONY

SB 2310

#1

Senate I,B&L

Tuesday February 3, 2009

Testimony of David L. Kemnitz, President ND AFL-CIO in support of:

SB 2310

The ND AFL-CIO supports SB 2310 for the following reasons:

- 1. It is our position that the 1995 Legislature weakened the "Purpose of workforce safety and insurance law" as originally stated in NDCC 65-01-01 by eliminating the concept of "liberal construction" when dealing with claimants asserting their right to benefits under the act.**
- 2. The over struck language on page 1 lines 14,15 & 16, once removed, again instructs our Workers' Compensation bureau that its mission and purpose is to serve all those who fall under the act.**
- 3. The new language on page 1, lines 16 & 17 further instructs WSI "To the extent possible, this title must be construed to avoid forfeiture and to afford relief." In our view, this is particularly important in that over the last 14 years WSI has become an agency that primarily works to limit its liability, build and protect the financial reserves, provide excess surplus that in turn provides windfall dividends to employers and in general operates in such a manner that "sure and certain relief" for injured, diseased and disabled workers and their families is far short of what it should and could be.**
- 4. We believe the item 3 statement manifests itself in the testimony of WSI, its board of directors and staff which opposes, aggressively and vehemently, virtually every piece of legislation seeking to protect workers in the WSI system from harmful (to claimants) decisions made by the system.**
- 5. There are in the present law numerous checks against alleged claimant fraud or abuses. Use of alcohol and drugs, inaccurate medical statements, falsifying documents, failure to disclose past injuries, unreported income, failure to comply with agreed requirements, failure to report accidents/injuries in a timely manner, failure to seek work, failure to keep work, failure to submit to medical examination, failure to follow all the rules-to the tee-all of the time. There at the same time many reports by claimants that WSI is quick to reduce, deny or withhold benefits while slow to award, reinstate or release benefits and in other ways slow in guiding claimants to the fullest possible assistance**

- the law may provide. A recent independent review reported that WSI is indeed following the law and that the law is, in some areas, very conservative towards achieving relief for eligible claimants.
6. Under today's law, it appears that the most attention is being paid to keeping the lowest employer premium in the nation. That in itself may have merit if it weren't for the fact that the 1995, 1997, 1999 and 2001 legislative changes took benefits from claimants in the name of balancing a shortfall in the fund. That the fund reserves and surplus are extremely healthy and that very little of what was taken has been returned. Why does WSI and its board of directors take such an seemingly over zealous approach to fund operation and condition when under NDCC 65-04-30, it is stated that the "State treasurer is custodian of the fund. Further in 65-04-30 "The organization shall submit to the office of management and budget once each month a monthly financial statement showing the receipts, disbursements, investments, and status of the fund." When it comes to investments NDCC 65-04-31 states "Investment of the fund must be under the supervision of the state investment board...". It would appear that these provisions were probably initiated in order that the Workers' Compensation Bureau concentrate on helping injured, diseased and disabled workers and their families recover.
 7. North Dakota's Workers' Compensation Bureau needs to have its original mission statement restored. That mission is to provide "sure and certain relief" in light of the fact of law excluding "every other remedy, proceeding, or compensation". The term "liberal construction" as defined simply assures that the agency "will give the most favorable view in support of the petitioner's claim and that such a policy does not authorize the amendment, alteration or extension of its provisions beyond the statute's obvious meaning". (Sutherland Statutory Construction)
 8. For the employing community in North Dakota "Title 65 does not provide for an action against an employer or fellow employee by an injured worker where the employer has contributed premiums to the workers' compensation fund". (Olson v. AMOCO, 474 F. Supp. 560 (D.N.D. 1978), aff's, 604 F.2d 26 (8th Cir. 1979). (Page 2 of North Dakota Workers' Compensation Law 2007 edition) The term "strict construction" is not meant that the statute shall be stintingly or even narrowly construed, but it means that everything shall be excluded from its operation which does not

clearly come within the scope of the language used". (Sutherland Statutory Construction)

9. SB 2310 then appears to restore WSI to its original and rightful mission. "To the extent possible, this title must be construed to avoid forfeiture and to afford relief". Definitions: Forfeiture does not require the knowing and intentional relinquishment of a known right; rather forfeiture results in the loss of a right regardless of the defendants' knowledge there of and irrespective of whether the defendant intended to relinquish the right. Relief is general designation of assistance, redress or benefit....Relief is to furnish such medical and other care as shall be necessary to relieve the worker of the effects of the injury.

Respectfully Submitted;



David L. Kemnitz; President
ND AFL-CIO

SB2310

"Forfeiture" does not require the knowing and intentional relinquishment of a known right; rather forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.

In the relation to WSI it would seem that WSI would assert the claimants right to certain services/benefits and see that same was provided.

"Forfeiture" the failure to make a timely assertion of a right.

"Waiver" is intentional relinquishment of known rights.

"Relief" is general designation of assistance, redress or benefit.

"Relief" can mean relief to either or both parties.

"Relief" is whatever the party moving for summary judgement was seeking and the court (in this case the law) agrees the party is entitled to.

liet' To furnish such medical and other ~~effects~~ shall be necessary
Relieve the worker of the effects of the injury -

REMARKS FOR IBL COMMITTEE re SB 2310

Sylvan Loegering, Volunteer Coordinator, ND Injured Workers Support Group
February 3, 2009

We are all familiar with 65-01-01 but sometimes it seems we slide over 5 important words. The statute says in part, "...Sure and certain relief is hereby provided **regardless of questions of fault**". I believe the relief for employers against litigation was originally balanced with relief for employees for injuries without having to spend weeks, month or years proving they need relief. The workers' compensation experience of many injured workers is not free of hassle and many don't get relief.

Many workers find themselves in the untenable position of almost literally having to **prove they were injured** on the job in order to get benefits while they find benefits **denied on the possibility** that the injury is not work-related. While I don't have the detailed memory of when legislative changes were made in this statute I do know the wording of this bill is not new. We only have to go as far as the "Red Book" to find citations of case law using almost exactly the same language that is found in this bill with dates of 1922, 1963, 1967, 1987, 1990, and 1992. That last date is interesting. It is just before the legislature felt the need to overhaul the system because of systemic problems.

I have to wonder, are we smarter now than the courts were for over 70 years or have we allowed ourselves to be steered off the path? Are our workers, their families or our state better off when we stray from what was apparently the original design of our workers' compensation system?

Speaking of our state being better off, there is wide-spread agreement among our leaders, including, I'm sure, members of this committee that this state needs economic development. We work hard to make North Dakota a good place to do business. However, the one thing businesses need is good workers. I know North Dakota has those but one of our struggles is to keep those workers while attracting more. If we make North Dakota a less than desirable place to hold a job through oppressive workers' compensation laws we make economic development more difficult. I don't bring up this thought lightly. While testifying before the interim IBL committee last year an injured worker said that while he considered North Dakota a good place to live he would not take another job in North Dakota because of his experience with WSI. I believe part of his statement was, "I'll live in ND but I'll drive across the river to work." Living near a border city (Fargo) I have heard almost the identical sentiment from many other workers.

I'd like to say a word about WSI's role in debates over legislation. In another hearing one of WSI's representatives called WSI a "legislative monster" with tongue in cheek. I thought she made a valid point that WSI was created by and is controlled by the legislature. She might have been saying that if WSI is a monster it is only because the legislature created it that way. I realize that fiscal notes are necessary and WSI is the source. It is fair that WSI provide opinions on pending legislation. **However, I do not believe WSI's opinions should put undue pressure on the legislature.** If WSI were allowed to dictate its role and how it is to operate it would be like an employee telling his employer, "This is my job, let me do it my way." That would be a reversal of positions. The legislature is the boss.

As long as I'm taking on giants, let me do another. Lets talk about the employers' role in these discussions. I feel like I should hang my head or bite my tongue because I have been an employer. I have had to meet payroll. I have belonged to local chambers of commerce and the National Federation of Independent Business. I know the business community has clout in the form of organization, financing and, to some extent, votes. They do not appear bashful about using that clout. However, I could mention that 2/3 of the voters in 2008 did not agree with the Chamber on Measure 4. Here is the point: A bargain was struck in 1919 between employers and employees. **The employers got their share of the bargain- immunity from law suits regarding work-related injuries and employees got their share- sure and certain relief for themselves, their families and dependents. The employers' share has remained unchanged, but the employees' share has been tinkered with and amended until it is vastly different than what they got in the original bargain.** Attempts of employers to amend the sure and certain relief is taking advantage of their position. Employees have never been able to take back the immunity they bargained away in 1919. Some might make the argument that employers are paying the premiums. Actually that is not true. Every job held by an employee makes a profit for the employer. If it doesn't the job fails to exist. The employer is simply taking a share of the profit generated by each employee and putting it into a fund so the fund can provide sure and certain relief.

Both WSI and the business community come in with slick, well-prepared and professional presentations. They obviously can out-do employees when it comes to presenting their cases. I submit that the opinions of those two giants should carry no more weight than the opinions of ordinary working Joes or Janes. I humbly submit that your decisions should not be based on who can get to your meetings or on slickness of presentations nor should they be based on which constituency you want to serve. They should be based on what is right and what is good for the state.

In conclusion, Mr. Chairman, members of the committee, the next move is up to you. If you believe there are problems at WSI and you do not correct them it could no longer be considered WSI's fault. It would be the legislature's. You can decide today to turn our state back toward the original bargain or you can leave our injured workers frustrated and upset thinking that WSI is, indeed, a monster in the worst sense. Regardless whether your motivation is a sense of justice, empathy for injured workers, economic development or the desire to do what is right I urge you to vote "do pass" on this bill.

Bruce Furness
Interim CEO



**North Dakota
Workforce Safety
& Insurance**

Putting Safety to Work

www.WorkforceSafety.com

1600 East Century Avenue,
Suite 1
PO Box 5585
Bismarck ND 58506-5585

December 5, 2008

Orin Volk
910 Yegen Rd
Bismarck ND 58504

DOC: 34813716

Injured Worker: Orin Volk
Claim No.: [REDACTED]
Body Part: Left Hip, Left Lower Leg, Head

Birth Date: [REDACTED]
Injury Date: 11/25/2008

Dear Orin Volk:

To assist Workforce Safety & Insurance (WSI) in processing your claim, additional information is needed.

Please complete the enclosed Injured Worker Contact (Prior Injury & Pre-Existing Condition Follow-Up) questionnaire (C96a). Sign and date the form and return to WSI within 14 days from the date of this letter.

If you have any questions or concerns, please contact me or a customer service representative at 1-800-777-5033 or 701-328-3800.

Sincerely,

Tamara D., Claims Adjuster
Bismarck Office

Enclosure: Injured Worker Contact (Prior Injury & Pre-Existing Condition Follow Up Questionnaire) (C96a)

FL106-2

#3

DOC:34813716

Example	Address	Telephone	Business
1	1234 Main St.	555-1234	ABC Corp.
2	5678 Elm St.	555-5678	XYZ Inc.
3	9010 Oak St.	555-9010	DEF Ltd.
4	1111 Pine St.	555-1111	GHI Co.
5	2222 Birch St.	555-2222	JKL Corp.
6	3333 Cedar St.	555-3333	MNO Inc.
7	4444 Spruce St.	555-4444	PQR Ltd.
8	5555 Fir St.	555-5555	STU Co.
9	6666 Willow St.	555-6666	VWX Corp.
10	7777 Ash St.	555-7777	YZA Inc.
11	8888 Hickory St.	555-8888	BCD Ltd.
12	9999 Walnut St.	555-9999	EFG Co.
13	10101 Cherry St.	555-10101	HIJ Corp.
14	11111 Peach St.	555-11111	KLM Inc.
15	12121 Apple St.	555-12121	NOP Ltd.
16	13131 Orange St.	555-13131	QRS Co.
17	14141 Lemon St.	555-14141	TUV Corp.
18	15151 Lime St.	555-15151	WXY Inc.
19	16161 Grape St.	555-16161	ZAB Ltd.
20	17171 Strawberry St.	555-17171	CCD Co.
21	18181 Blueberry St.	555-18181	EEE Corp.
22	19191 Raspberry St.	555-19191	FFF Inc.
23	20201 Blackberry St.	555-20201	GGG Ltd.
24	21211 Elderberry St.	555-21211	HHH Co.
25	22221 Mulberry St.	555-22221	III Corp.
26	23231 Currant St.	555-23231	LLL Inc.
27	24241 Elderberry St.	555-24241	MMM Ltd.
28	25251 Boysenberry St.	555-25251	NNN Co.
29	26261 Loganberry St.	555-26261	OOO Corp.
30	27271 Marionberry St.	555-27271	PPP Inc.
31	28281 Tayberry St.	555-28281	QQQ Ltd.
32	29291 Udderberry St.	555-29291	RRR Co.
33	30301 Wineberry St.	555-30301	SSS Corp.
34	31311 Dewberry St.	555-31311	TTT Inc.
35	32321 Salmonberry St.	555-32321	UUU Ltd.
36	33331 Sauterberry St.	555-33331	VVV Co.
37	34341 Swallowberry St.	555-34341	WWW Corp.
38	35351 Thimbleberry St.	555-35351	XXX Inc.
39	36361 Tuckermerry St.	555-36361	YYY Ltd.
40	37371 Vinberry St.	555-37371	ZZZ Co.
41	38381 Winterberry St.	555-38381	AAA Corp.
42	39391 Wizardberry St.	555-39391	BBB Inc.
43	40401 Wizardberry St.	555-40401	CCC Ltd.
44	41411 Wizardberry St.	555-41411	DDD Co.
45	42421 Wizardberry St.	555-42421	EEE Corp.
46	43431 Wizardberry St.	555-43431	FFF Inc.
47	44441 Wizardberry St.	555-44441	GGG Ltd.
48	45451 Wizardberry St.	555-45451	HHH Co.
49	46461 Wizardberry St.	555-46461	III Corp.
50	47471 Wizardberry St.	555-47471	LLL Inc.
51	48481 Wizardberry St.	555-48481	MMM Ltd.
52	49491 Wizardberry St.	555-49491	NNN Co.
53	50501 Wizardberry St.	555-50501	OOO Corp.
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55	52521 Wizardberry St.	555-52521	QQQ Ltd.
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60	57571 Wizardberry St.	555-57571	VVV Co.
61	58581 Wizardberry St.	555-58581	WWW Corp.
62	59591 Wizardberry St.	555-59591	XXX Inc.
63	60601 Wizardberry St.	555-60601	YYY Ltd.
64	61611 Wizardberry St.	555-61611	ZZZ Co.
65	62621 Wizardberry St.	555-62621	AAA Corp.
66	63631 Wizardberry St.	555-63631	BBB Inc.
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71	68681 Wizardberry St.	555-68681	GGG Ltd.
72	69691 Wizardberry St.	555-69691	HHH Co.
73	70701 Wizardberry St.	555-70701	III Corp.
74	71711 Wizardberry St.	555-71711	LLL Inc.
75	72721 Wizardberry St.	555-72721	MMM Ltd.
76	73731 Wizardberry St.	555-73731	NNN Co.
77	74741 Wizardberry St.	555-74741	OOO Corp.
78	75751 Wizardberry St.	555-75751	PPP Inc.

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From	To

From	To

Duties:

15. Were you ever unable to work in the past due to injury or health problems? ☐ Yes ☐ No
If yes, for how long? _____

problems? ☐ Yes ☐ No If yes, complete the following:

Case No.	Date	To Whom Issued	Restitution	From	To
				From	To
				From	To
				From	To

18. Please list the names and addresses of all medical providers that you see for your routine medical care.

[illegible]

1. **First Name** _____
2. **Last Name** _____
3. **Address** _____
4. **City** _____
5. **State** _____
6. **Zip** _____
7. **Phone** _____
8. **Occupation** _____
9. **Employer** _____
10. **Supervisor** _____
11. **Date of Birth** _____
12. **Sex** _____
13. **Marital Status** _____
14. **Number of Children** _____
15. **Number of Dependents** _____
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C96a

Bruce Furness
Interim CEO



**North Dakota
Workforce Safety
& Insurance**

Putting Safety to Work

www.WorkforceSafety.com

DOC: 34813706

1800 East Century Avenue,
Suite 1
PO Box 5585
Bismarck ND 58508-5585

December 5, 2008

Orin Volk
910 Yegen Rd
Bismarck ND 58504

Injured Worker:
Claim No.:
Body Part:

Orin Volk

[REDACTED]

Left Hip, Left Lower Leg, Head

Birth Date:

Injury Date:

[REDACTED]
10/25/2008

Dear Orin Volk:

On behalf of Workforce Safety & Insurance (WSI), I am sorry to hear about your injury. My name is Tamera D. and I will be handling your claim.

The necessary information will be gathered to determine if your injury entitles you to benefits according to North Dakota Workers' Compensation Law. A notice stating whether your claim is accepted or denied will be mailed to you.

I have enclosed a brochure explaining WSI benefits. Information is also available at our website www.WorkforceSafety.com.

If you have any questions or concerns, please contact me or a customer service representative at 1-800-777-5033 or 328-3800.

Sincerely,

Tamera D.

Tamera D., Claims Adjuster
Bismarck Office

cc: Farmers Livestock Exchange

Enclosure: *Workers' Compensation and You: A Guide for Injured Workers* brochure

FL100-1



North Dakota
Workforce Safety
& Insurance
Putting Safety to Work

INJURED WORKER CONTACT
(PRIOR INJURY & PRE-EXISTING
CONDITION FOLLOW-UP)
CLAIMS DIVISION
SFN 51153 (09/2008)

DOC:34813716

VENUE, SUITE 1
PO BOX 5585
BISMARCK ND 58506-5585
Telephone 1-800-777-6033
Toll Free Fax 1-888-786-6655
TTY (hearing impaired) 1-800-366-6655
Fraud and Safety Hotline 1-800-243-3331
www.WorkforceSafety.com

PLEASE PRINT OR TYPE USING BLACK OR BLUE INK

Injured Worker Orin Volk	Claim Number [REDACTED]	Body Part (s) Left Hip, Left Lower Leg, Head
-----------------------------	----------------------------	---

1. Before your current injury, have you ever had any injuries or health problems, work related or not, to this area of your body? ☐ Yes ☐ No If no, skip to questions 13-18. If yes, please continue.
2. How did your past injury or condition occur?
3. How long ago was the past injury or condition?
4. What was the diagnosis for your past injury or condition?
5. Please list any medical doctor, chiropractor, physical therapist, occupational therapist, or other health care professional that you treated with for your past injury or condition. (Continue on back if needed).

Complete Name	Address	City, State, Zip	Phone	Time Frame

6. When was the last time you were treated for your past injury or condition?
7. What type of treatment did you receive? (Medical doctor, chiropractor, physical therapist, etc.)
8. When was the last time you took medication for your past injury or condition?
9. What is the name of the medication(s) you took for your past injury or condition?
10. Does the past injury or condition continue to cause you pain and discomfort? ☐ Yes ☐ No If yes, please explain.
11. Explain the limits the past injury or condition has had on your daily activities?
12. Do you have any of the following as a result of your past injury or condition?
☐ Loss of Motion ☐ Limp ☐ Prosthetic ☐ Deformity ☐ Scar ☐ Orthotic

C96a³⁷

#4

2009 Senate Bill No. 2310
Testimony before the Senate Industry, Business, and Labor Committee
Anne Jorgenson Green, Staff Counsel
Workforce Safety and Insurance
February 3rd, 2009

Mr. Chairman, Members of the Committee:

My name is Anne Green. I am staff counsel for Workforce Safety and Insurance (WSI). I am here to testify in opposition to Senate Bill 2310 which reverses this legislature's message to the Courts in 1995 that the law is to be followed as written and passed by the legislative branch of government. The WSI Board of Directors unanimously opposes this bill.

During the 1970's and 1980's, the North Dakota Supreme Court held, in a series of decisions, that the provisions of the Worker's Compensation Act were to be construed in favor of the injured worker to afford benefits and avoid forfeiture. Although WSI applied the law in accordance with the legislation passed by you, the Courts ruled otherwise. This line of cases of "liberal construction" resulted in the payment of benefits where there was no entitlement under workers compensation law.

An example of these rulings occurred in 1989, when the North Dakota Supreme Court held in White v. North Dakota Workers Compensation Bureau, 441 N.W.2d 908 (1989), that despite medical treatment at the time of injury, an admission by the injured worker that he had hurt himself during the course of his employment, and a two and one half year gap in time before the worker filed for benefits, the law requiring a claim to be filed within one year was not applicable, because based on the injured worker's education and intelligence, he could not have known that he suffered a work related injury.

In 1995, the legislature responded to the ruling in White and similar rulings by passing language which leveled the playing field, requiring that a claim must be reviewed solely on its merits and without favor to either the injured worker or the employer. Additionally, Arkansas, Florida, Maine, Minnesota, Montana, Nevada, Wyoming and Ohio have all eliminated liberal construction language in their workers compensation law.

Application of the law as it is written, without preference to any party, permits WSI to accurately develop claims policy, set claims reserves and future premium rates. A reversion to liberal construction may act to increase the level of uncertainty of actuarial estimates because of the increased potential for upward loss development associated with adverse opinions by the courts.

For these reasons, WSI requests a "do not pass" on Senate Bill 2310. That concludes my testimony. I am happy to answer any questions that you might have.

5



Testimony of Bill Shalhoob
North Dakota Chamber of Commerce
SB 2310
February 3, 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 SB 2310 and urge a do not pass from the committee on this bill.

SB 2310 eliminates the requirement that judicial review of claims be decided solely on their merits and establishes a bias in favor of the claimant. In all of our business and other dealings all of us would like a "fair advantage" in our negotiations or contracts. The basis for any dispute resolution assumes each party will get a fair and equal hearing during the process. All aspects of the claims process are set in statute or rule and there is substantial legal precedent to follow. The prejudice SB 2310 establishes is unacceptable.

Thank you for the opportunity to appear before you today in opposition to SB 2310. I would be happy to answer any questions.

THE VOICE OF NORTH DAKOTA BUSINESS

SB 2310
ND AFL-CIO

March 2, 2009
House I, B4h.

The question asked or that should be asked
at every step of evaluation when deciding
Worker's compensation coverage for N.D.

Workers' compensation

65-01-01 - for workers injured -, and
for their families and dependents,
Sure and certain relief provided - -
to the exclusion of every other remedy.

10 Does N.D. law provide adequate and
proper mechanisms to ensure

"sure and certain relief" to workers
and their families?

20 Does the Agent charged with
administration and delivery of

"sure and certain relief" do so?

Without prejudice?

In the letter and spirit of 65-01-01?

30 We believe that SB2310 is a step in the right direction.

David L. Hemnitz
President

ND AFL-CIO



House IBL Committee SB 2310 March 2, 2009
ND AFL-CIO
David L. Kemnitz; President

Definitions:

Forfeiture, does not require the knowing and intentional relinquishment of a known right; Rather forfeiture results in the loss of a right regardless of the defendant's knowledge there of and irrespective of whether the defendant intended to relinquish the right.

Note: In our estimation, this definition in relation to ND WSI would seem that WSI would assert the claimants right to certain services/benefits and see that the same was provided.

Forfeiture, the failure to make a timely assertion of a right.

Waiver, is intentional relinquishment of known rights.

Relief, is general designation of assistance, redress or benefit.

Relief, can mean relief to either or both parties.

Relief, is whatever the party moving for summary judgment was seeking and the court (the law) agrees the party is entitled to.

Relief, To furnish such medical and other care as shall be necessary to relieve the worker of the effects of the injury.





REMARKS FOR IBL COMMITTEE re SB 2310

**Sylvan Loegering, Volunteer Coordinator, ND Injured Workers Support Group
March 2, 2009**

This bill reminds me of laws regarding mandatory sentencing. Many judges and legislators object to mandatory sentencing because it dictates to the judge what the decision should be instead of allowing him or her to consider mitigating or aggravating circumstances or other factors. In my mind our present laws are like mandatory sentences. They require a certain decision. This slight change in the law at least allows the judge a little latitude to do a judge's job, which is to consider evidence and testimony and then make a judgement

I support SB 2310 and ask you to vote Do Pass.



2009 Engrossed Senate Bill No. 2310
Testimony before the House Industry, Business, and Labor Committee
Rob Forward, Staff Counsel
Workforce Safety and Insurance
March 2, 2009

Mr. Chairman, Members of the Committee:

My name is Rob Forward. I am a staff attorney for Workforce Safety and Insurance (WSI). I am here to testify in opposition to Engrossed Senate Bill 2310. The WSI Board of Directors opposes this bill.

This legislation would reinstate the rule of liberal construction for workers compensation statutes.

In a nutshell, liberal construction is the name of a judge-made rule centered on the concept that if there is an ambiguity in a statute, a court will interpret the statute so as to award an injured worker benefits. This rule of interpretation was adopted by the North Dakota Supreme Court in 1922 (Bordson v. ND Workmen's Comp, 191 N.W. 839) shortly after the Legislature created our workers compensation system in 1919. After it was adopted, our court system applied it wisely and sparingly, mindful of their duty to read statutes as the Legislature had written them.

However, in the recent past the North Dakota Supreme Court began handing down decisions that appeared to engage in judicial legislating by extending coverage when there was no entitlement to benefits. At times, their use of the rule seemed to ignore the intent of the Legislature.

From WSI's standpoint, the way that the rule was being applied by the Supreme Court made it difficult to administer claims and produced unpredictability. WSI was, and is, required to follow what the Legislature has mandated, and if the

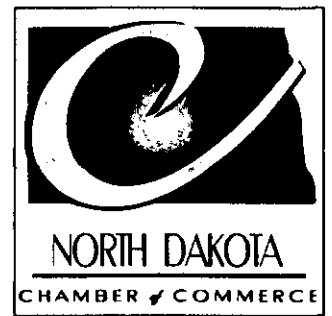
Supreme Court mandates another version, which are we to follow? For example, in a case called White v. North Dakota Workers Compensation Bureau, 441 N.W.2d 908 (1989), the Supreme Court disregarded the Legislature's requirements for filing a claim within the one-year statute of limitations and awarded benefits to an injured worker who had waited two and one-half years to file. Their reasoning was less concerned with ambiguities in the written law as it should have been, and more focused on the injured worker's intelligence and background. So, how was WSI to apply the statute of limitations? Ignore the Legislature and give all claimants two and one-half years to file or make subjective judgments on their intelligence?

In 1995, the North Dakota Legislature followed Arkansas, Florida, Maine, Montana, Nevada, Wyoming, and New Mexico by abolishing the rule of liberal construction. None of those states have reinstated the rule.

The Senate amended the SB 2310, but unfortunately their change does not alter the reinstatement of the rule of liberal construction. So, their amendment has no practical effect on the original bill.

The statute should stay as it currently is.

WSI requests a "do not pass" recommendation on Engrossed Senate Bill 2310. That concludes my testimony. I'd be happy to answer any questions.



Testimony of Bill Shalhoob
North Dakota Chamber of Commerce
SB 2310
March 2, 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 SB 2310 and urge a do not pass from the committee on this bill.

Elimination of lines 15 and 16 causes the statute to revert to language in place before 1995. Without specific legislative direction courts will be free to interpret the statute as they previously have done, effectively establishing a liberal construction or bias in favor of a claimant and replacing legislative intent with judicial ruling. In all of our business and other dealings all of us would like a "fair advantage" in our negotiations or contracts. The basis for any dispute resolution assumes each party will get a fair and equal hearing during the process. All aspects of the claims process are set in statute or rule and there is substantial legal precedent to follow. The prejudice SB 2310 establishes is unacceptable.

Thank you for the opportunity to appear before you today in opposition to SB 2310. I would be happy to answer any questions.

THE VOICE OF NORTH DAKOTA BUSINESS



The following associations support our testimony and position on WSI issues:

AGC of ND
ND Grocers Association
ND Motor Carriers
ND Hospitality Association
ND Petroleum Council
ND Automobile Dealers Association
ND Implement Dealers Association
ND Retail Association
ND Petroleum Marketers
ND Health Care Association

The following chambers are members of a coalition that support our 2009 Legislative Policy Statements:

Chamber of Commerce of Fargo Moorhead
Greater Bottineau Area Chamber of Commerce
Hettinger Area Chamber of Commerce
Kenmare Association of Commerce
Minot Chamber of Commerce
Oakes Area Chamber of Commerce
Bismarck-Mandan Area Chamber of Commerce

THE VOICE OF NORTH DAKOTA BUSINESS

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