

2009 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2386

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2386

Senate Industry Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: February 3, 2009

Recorder Job Number: 8457

Committee Clerk Signature

Minutes:

**Chairman Klein** opened the hearing on SB 2386, all members present.

**Senator Behm**, District 19, introduced SB 2386 and testified in support. (See attachment #1)

**Senator Andrist:** In your definition of *permanently disabled*, are we saying education level and work history or important? (Defer to Dean Haas)

**Dean Haas**, General Counsel to North Dakota Medical Association and North Dakota Society of Orthopedists testified in favor of SB 2386. (See attachment #2)

**Sylvan Loegering**, Volunteer Coordinator, ND Injured Workers Support Group, testified in support of SB 2386. (See attachment #3)

**Tim Wahlin**, Chief of Injury Service with WSI, testified in opposition of SB 2386. (See attachment #4 and #4.1)

**Bill Shalhoob**, representing the North Dakota Chamber of Commerce, testified in opposition of SB 2386. (See attachment #5)

**Chairman Klein:** A resolution in the House is proposed to look at what is provided; do you want to sum it up?

**Bill Shalhoob:** It does sum it up

**Senator Potter:** Didn't you feel that the audit report was conclusive, with regards to how we treat pre-existing conditions.

**Bill Shalhoob:** She called us the "most conservative". What would it take to get us to the middle? Is it this bill, or does it need more or less, let's find out?

**Senator Potter:** Do you think we could handle a 1% rate increase?

**Bill Shalhoob:** Without being able to comment on what a study would be able to show, we have supported many of the changes.

Chairman Klein closed the hearing on SB 2386

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2386

Senate Industry, Business, and Labor

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Hearing Date: February 3, 2009

Recorder Job Number: 8490

Committee Clerk Signature

Minutes:

**Chairman Klein:** Opened discussion on SB 2386

**Senator Wanzek:** When you sit on WSI, there is one issue that is the main conflict. It is the reason for a lot of denied claims. It needs to be studied more.

**Chairman Klein:** There must be troubling issues that the Auditory Board see's.

**Senator Potter:** The people working for the State @ WSI are getting a bad rap for interpreting the law. The law itself and how it is written is causing the troubles.

**Senator Behm:** Some of this is obvious to me. We need to make it more clearly on what is and is not covered.

**Senator Wanzek:** The cases that create the most problems are the cases where there is no clear incident.

**Chairman Klein:** Whatever it is, it is in your medical history.

**Senator Andrist:** Made motion to Do Not Pass on SB 2386

**Senator Wanzek:** Seconded

**Chairman Klein:** Roll call vote passes 4 to 3

**FISCAL NOTE**  
**Requested by Legislative Council**  
01/27/2009

Bill/Resolution No.: SB 2386

**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 redefines when pre-existing injuries are compensable; redefines the standards for permanent total disability reverting back to a more subjective standard; redefines temporary total disability and eliminates the 104 cumulative week cap for temporary total disability benefits.

**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 2386

**BILL DESCRIPTION:** Redefine TTD, PTD, and Compensability of Pre-Existing Conditions

**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 redefines when pre-existing injuries are compensable; redefines the standards for permanent total disability reverting back to a more subjective standard; redefines temporary total disability and eliminates the 104 cumulative week cap for temporary total disability benefits.

SB 2386 has the potential to increase materially both reserve requirements and future rate levels.

**Reserve Level Impact:** North Dakota changed the criteria used to classify claims as PTD and TTD effective January 1, 2006. At the time the change in definition was introduced, we assumed that the number of PTD's would decrease by roughly 20% or, roughly 10 claims per year. The reserve increase associated with PTD claims incurred during the three and one-half year period ending June 30, 2009 could range between \$5 million and \$7 million over the levels that would otherwise be required. We derived the range under the assumption that 35 additional claims would emerge during the period January 1, 2006 through June 30, 2009.

The change in criteria used to classify TTD's will likely add to the cost of the proposed legislation. However, we do not have sufficient data to quantify the increase. In addition, the elimination of the 104 week cap on TTD benefits will

likely increase costs further.

**Premium Rate Level Impact:** We believe that SB 2386 will have a material impact on rate levels in the state. Using assumptions consistent with the underlying estimate of the associated increase in reserve levels, the change to the criteria used to categorize a claim as PTD, could increase rate levels by more than 1%, or more than \$1.5 million per year.

Though we cannot quantify the likely impact, the proposed changes to TTD's will add to the increase.

The proposed change to the terms under which a pre-existing condition is compensable will add to the cost of the bill. WSI does not have an appropriate base of historical experience to permit an actuarial evaluation of anticipated costs associated with this change. Furthermore, the extremely short timeframe available for our review exacerbates the difficulties associated with deriving an actuarially appropriate estimate of expected costs.

We evaluated potential costs associated with SB 2386 under the assumption that no other changes would be made concurrently to the State's benefit structure. To the extent that this piece of legislation passes in conjunction with other changes under consideration – the costs could compound.

DATE: February 2, 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.*

<b>Name:</b>	John Halvorson	<b>Agency:</b>	WSI
<b>Phone Number:</b>	328-6016	<b>Date Prepared:</b>	02/02/2009

Date: 2/3/09  
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2386

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) 4 No 3

Absent 0

Floor Assignment Senator Klein

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

**REPORT OF STANDING COMMITTEE**

**SB 2386: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends**  
**DO NOT PASS** (4 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). SB 2386 was  
placed on the Eleventh order on the calendar.



2009 TESTIMONY

SB 2386

Mr. Chariman, members of the committee, my name is Sen. Art Behm and I represent District 19 in the Senate. I introduced Senate Bill 2386 to address concerns that have been raised by WSI's consultants, small business owners, and injured workers.

### **Pre-existing injuries**

First, Senate Bill 2386 seeks to address cases involving injured workers with pre-existing injuries. As noted in the consultant's report on WSI conducted by Marsh USA, "North Dakota workers' compensation (law), in some instances, is open to interpretation as to whether a claim is work-related, or an aggravation of a pre-existing injury."

Under these unclear laws, injured workers with latent or undiscovered pre-existing injuries that are worsened by a work-related injury often have their claims denied. For example, take a hypothetical worker employed at a grain elevator who picks up a 100 lb. sack of seed and feels immediate pain in his lower back. He reports the injury, goes to the doctor, and the doctor orders and MRI. The MRI establishes that he has a herniated disc, an injury clearly caused by the lifting. However, the MRI also reveals that the injured employee has degenerative disc disease that was never previously diagnosed.

WSI, upon review of the claim, takes the position that the herniated disc is not a compensable injury because the actions of this employee were nothing more than a "trigger" to "produce symptoms . . . in the preexisting injury, **disease**, or other condition . . ." These claims are denied despite the evidence that the worker never had any impairment or function loss as a result of degenerative disc disease.

In some real-world examples of how this law affects workers with *known* preexisting injuries, WSI has denied compensability to an oil-field worker's herniated disc because he had bruised his back as a child. Similarly, WSI has denied compensability to a car wash employee with tennis elbow because he played the accordion as young man. Both the bruised back and accordion playing were considered "pre-existing conditions." In neither case were the childhood conditions active before or at the time of the work injury.

SB 2386 corrects these situations by requiring active impairment or disability in the 6 months prior to a work injury in order for a condition to be considered pre-existing. This provision essentially mirrors current North Dakota law relating to private insurers (N.D.C.C., Section 26.1-36.4-03). Under these changes, WSI would essentially "take the injured worker as they find him or her."

### **Aggravation awards**

Relatedly, under current law, benefits are paid on an aggravation basis if a work injury combines with a pre-existing condition which has never caused impairment or disability. SB 2386 provides that the pre-existing impairment or disability must have been active in the 6-month period before the work injury. In other words, the pre-existing impairment or disability must be relevant to an injured worker's current medical condition to trigger a reduction in benefits.

### **Permanent total disability**

Current law limits permanent total disability benefits to those workers whose injuries are life changing, e.g., loss of both eyes, both legs, both arms etc. without regard to the effect of the injury on earnings capacity. SB 2386 simply provides that an injured worker who has a permanent loss of earning capacity is considered permanently disabled.

### **Temporary total disability**

Similarly, under current law, temporary total disability benefits cease after 2 years regardless of whether an injured worker remains disabled. SB 2386 does away with arbitrary line drawing in favor of a case by case analysis, which provides that a disabled worker will continue to receive temporary total disability benefits so long as he/she remains disabled.

Thank you and I would be happy to answer any questions from the committee.

#2



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**Testimony before the  
Senate Industry, Business and Labor Committee  
Senate Bill 2386  
February 3, 2009**

Good morning Chairman Klein and members of the Senate 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 Senate Bill 2386, relating to workers' compensation definitions for compensable injury, disability, and aggravation awards. NDMA believes that it is important to ensure that health insurance exists to the widest degree, and that where employment causes the need for medical care or disability, the workers compensation insurance system ought to bear the cost.

Physicians are an integral part of the state's worker's compensation system. We recognize that doctor's opinions are essential to most claims determinations, including whether the injury or disease is work-related, or worsened (aggravated) by work activities, the extent of the worker's permanent partial impairment, and disability status (i.e., the work restrictions—both its extent and duration). We also believe, as you do, that evidence-based medicine is good medicine, and this dedication to reality pertains as well to physician opinions.

Some of our members have noted that simply using the word "degenerative," in a clinical record has resulted in an unwarranted denial of benefits, and have used instead the technical term, such as osteophyte formation. Amending the definition of a non-compensable pre-existing injury is the clearest way forward to recognizing the need to compensate an employee in the circumstance where the work injury (rather than merely the pre-existing susceptibility) caused the worker's need for medical attention, and the resulting work restrictions.

Physicians recognize, as the North Dakota Supreme Court once observed, that "[p]utatively, almost every injury could, with sufficient scrutiny, be linked to some preexisting weakness or susceptibility." *Balliet v. North Dakota Workmen's Compensation Bureau*, 297 N.W.2d

791, 794 (N.D. 1980). WSI has narrowly construed N.D.C.C. § 65-01-02(10)(b)(7), frequently denying coverage on the ground the injury is pre-existing. The denial of compensation may occur in any case where the body has some pre-existing defect: say degenerative disc disease, or spinal stenosis, or spondylolisthesis. In many of these cases, the worker may not even know that he is afflicted, but radiographic evidence may show that the condition had been there prior to the injury. While the physician is likely to agree that the degenerative condition itself looks the same now on a repeat test (x-ray, or MRI), the clinical picture may be dramatically different. The compensability determination should look at the effect of the work injury on the employee's life and health—that is, his need for medical attention, and the disability, not merely on whether the work injury altered the appearance of the MRI. The bill takes a straight-forward approach to the issue: in order to deny coverage due to a pre-existing condition, it must have been diagnosed before the work injury.

Section 2 of the bill amends the aggravation statute, N.D.C.C. § 65-05-15. The need for amendments to the statute can be illustrated by reviewing a case, *Mikkelson v. North Dakota Workers Comp. Bureau*, 2000 ND 67, 609 N.W.2d 74, 75. Mikkelson injured her back and neck while lifting a child from a wheel chair on October 6, 1997. As a result of the work injury, she was restricted to "light-medium" work, which precluded her from continuing to work as a teacher's aide. *Id.* ¶ 2. Ms. Mikkelson had been involved in an auto accident four years before, in 1993, injuring her neck. *Id.* ¶ 3. However, at the time of the work injury, this prior neck injury wasn't active to any degree—the record reflected that after her car accident in 1993, Mikkelson "missed about two weeks of work before returning to employment without any medically mandated work restrictions." *Id.* ¶ 14. In other words, there was no evidence at all that her prior injury remained active to any degree. Nevertheless, the Court agreed that the aggravation statute applied to reduce her benefits to one-half because an independent medical evaluator had concluded that the first accident and injury causally contributed to the severity of Mikkelson's work injury in 1997. *Id.* ¶ 15.

In other words, the aggravation statute applies even if the impairment or disability is no longer in evidence at the time of the work injury. *Id.* Nearly any prior injury can theoretically qualify under this interpretation of the aggravation statute to reduce a worker's benefits to half of what they should be. See *Balliet, supra*. The use of this lax causation test is insufficient to ensure that workers are protected from arbitrary application of the aggravation statute. Causation is a notoriously broad concept, and like beauty, is in the eye of the beholder. See Prosser & Keeton, *Law of Torts*, § 41, at 236 (noting "the fatal trespass done by Eve was cause of all our woe.") WSI can easily

find an IME physician to opine that a prior injury played a causal role in recurrence. On the other hand, we can instead apply real-world evidence—i.e., that the prior injury is active at the time of the work injury in order to reduce benefits. The bill accomplishes this by requiring a showing that the prior injury caused previous work restrictions or interference with physical function during the 6 month period prior to injury.

While many claim that North Dakota's workers compensation benefits compare favorably with other states, this isn't accurate for injured workers whose disability lasts longer than two years. For the long-term injured, benefits are inadequate. N.D.C.C. § 65-01-02 defines "permanent total disability," onerously, in that it includes only those with:

- a. Total and permanent loss of sight of both eyes;
- b. Loss of both legs or loss of both feet at or above the ankle;
- c. Loss of both arms or loss of both hands at or above the wrist;
- d. Loss of any two of the members or faculties in subdivision a, b, or c;
- e. Permanent and complete paralysis of both legs or both arms or of one leg and one arm;
- f. Third-degree burns that cover at least forty percent of the body and require grafting;
- g. A medically documented traumatic brain injury affecting cognitive and mental functioning which renders an employee unable to provide self-care and requires supervision or assistance with a majority of the activities of daily living; or
- h. A compensable injury that results in a permanent partial impairment rating of the whole body of at least twenty-five percent pursuant to section 65-05-12.2.

Any person not meeting this very limited definition isn't permanently disabled, and under N.D.C.C. § 65-01-02(29), is merely temporarily totally disabled, and limited to two years (104 weeks) of temporary total disability.

After total disability benefits end at 2 years, the employee is shunted to partial disability status. But partial disability benefits are also capped at 5 years of benefits. See N.D.C.C. § 65-05-10(2). Partial disability benefits are calculated by establishing an "earnings capacity," which may be established by an expert in vocational rehabilitation regarding the employee's capacity to earn in the statewide job pool. N.D.C.C. § 65-05-10(3). Partial disability benefits are two-thirds of the difference between pre-injury wages, and the artificially contrived earnings capacity. N.D.C.C. § 65-05-10. In practice, a vocational expert determines an earnings capacity by identifying a variety of one-size-fits-all, light-duty and low-skilled jobs that are usually available in this state. Although the vocational expert normally concludes that the employee retains an earnings

capacity, many employees—especially those with limited educational backgrounds and a history of heavy work—never do return to work. After 5 years of reduced partial disability benefits, these employees are left to their own devices.

Admittedly, determining whether an employee is totally disabled, and how long it lasts, is one of the most difficult issues in workers compensation. Yet, limiting compensation in cases of permanent total or temporary total benefits is detrimental to employees with the most serious disabilities. WSI has said that the current definitions are preferable because they're "objective," implying that subjective criteria are always inferior. While subjective criteria make the decision-making more difficult, and prone to opinion, in some cases it is necessary to weigh subjective factors. Disability determinations are different from causation determinations primarily because employees have different work histories, educational backgrounds, and work restrictions, and analyzing whether an employee can return to work does not lend itself to a single objective standard. On the other hand, deciding cause is notoriously subjective.

The true issue is whether the narrow grouping of "objective" injuries in N.D.C.C. section 65-01-02(25) as the sole grounds for total disability are too harsh. Surely, saving WSI from having to make the tough disability decision based upon the normal "subjective" criteria is not a reason to prefer the current definition. After all, the legislature created administrative agencies for this very purpose—to make the hard decisions.

This bill serves the laudable purpose of affording workers compensation coverage in cases where the employment caused the need for medical attention and disability, and places the cost of work injuries on the employment, where it belongs. It further recognizes that the current definition of total disability is too harsh, and extends disability to those who cannot return to the kind of work to which they are fitted. For these reasons, NDMA supports SB 2386.

**REMARKS FOR IBL COMMITTEE re SB 2386**  
**Sylvan Loegering, Volunteer Coordinator, ND Injured Workers Support Group**  
**February 3, 2009**

This bill goes to the heart of much, if not most, of the frustration I hear from injured workers. We all know that words mean something and this section of the law tells WSI how to deal with specific issues. In many cases the result is denial of benefits that seem like they should not be denied. The result is frustration, anger and often despair on the part of injured workers.

Some years ago I sold health insurance. I understand workers' compensation is not health insurance but these principals will apply. One of the first things we learned to do is look at how a competitor's policy described a preexisting condition. The policies that had a low premium typically did not have a definition. Patients found themselves being denied coverage because a malignant tumor or other problem was discovered after a claim was filed and the company could truthfully say it "existed" before the policy was purchased. The somewhat better policies used the criterion of whether or not it had "manifested" itself prior to purchase date. The even better policies restricted use of the word preexisting to conditions for which the insured party had received medical treatment or advice within a certain time frame prior to purchase. **The Blue Cross Blue Shield plan my wife and I currently have defines preexisting condition as "a condition, disease, illness or injury for which the Member received medical advice or treatment within the 6-month period immediately preceding the Member's Enrollment Date under this Benefit Plan."** If we substitute injury date for date of purchase or date of enrollment it is easy to see that a practical, objective definition takes the guess work out for injured worker and claims analyst alike. The definition of a preexisting injury on page 3 of the bill, lines 13 through 19, defines preexisting in a way that is understandable to employees and is objective for claims analysts. This would make life simpler for both.

While we are on that subsection I call your attention to paragraph 9 lines 22 through 24. As it stands, that paragraph is ambiguous. I have been told that the paragraph refers to non-employment injuries. I hope that the committee will consider an amendment adding the word "non-employment" or similar word on line 24 before the word "injury" to clear up any confusion.

Subsection 29 provides a definition that the average person can understand. The bill would also correct a problem with current law in which an arbitrary time line is established for maximum medical improvement. Certain injuries can and do take more than two years to heal. This change might make a small change for the fund but it could make a huge difference in the budget of an employee who can't work. I'm in favor of that provision.

The change on page 5, lines 1 - 9 provide language that is understandable and to the point. I say, "yes".

Taken together the provisions of this bill would restore fairness to the system, would make the system more transparent to injured employees and go a long way toward reducing the dissatisfaction felt by so many citizens of North Dakota- not only injured workers, but their families and friends.



**2009 Senate Bill No. 2386**  
**Testimony before the Senate Industry, Business, and Labor Committee**  
**Presented by: Tim Wahlin, Chief of Injury Services**  
**Workforce Safety & Insurance**  
**February 3, 2009**

Mr. Chairman, Members of the Committee:

My name is Tim Wahlin, Chief of Injury Services with WSI. I am here on behalf of WSI to testify in opposition to SB 2386 and to provide information to the Committee to assist in making its determination. WSI's Board of Directors voted unanimously to oppose this bill.

This bill significantly alters current law in three unique areas.

The bill redefines how WSI will address preexisting conditions when sorting out work related conditions from those existing prior to the work event. This change broadens what qualifies as a work related injury. Currently, North Dakota law defines as not being compensable, preexisting injuries, diseases, or other condition "unless the employment substantially accelerates its progression or substantially worsens its severity."

This bill redefines "preexisting conditions" as those that were previously diagnosed and have caused restrictions or interfered with physical function within the previous six months. This change within the definition will make compensable, many chronic and degenerative conditions that may have existed prior to the work injury.

The bill also repeals the change to an objective standard for permanent total disability (PTD) that was adopted in the 2005 legislative session. The repeal goes back to and readopts the subjective standards that were in place prior to the 2005 session. The reasons supporting this change were set forth in detail during the 2005 session and include; limiting litigation by employing a bright-line standard, linking severity of an injury

to the declaration of PTD, increasing the speed of determination and likewise shortening the supplementary benefits timing to correlate, eliminating the likelihood of determinations being supported by an injured employee's socio-economic condition, rather than the injury, to name a few.

The change also was meant to address an audit recommendation "this state has an inordinate number of injured workers who have been declared to be permanently and totally disabled." (Joint House and Senate IB&L Committee Hearing 1/10/05).

Finally, the bill repeals the caps on temporary total disability benefits (TTD). Again, in the 2005 Legislative Session, this body adopted numerous structural changes to our code. One of those changes was to place caps on the duration of TTD benefits of 104 weeks. This was in conjunction with changes to vocational rehabilitation, PTD benefits and retraining benefits that refocused the agency's mission on returning injured workers to our workforce as soon as possible. This change significantly altered WSI's course of conduct with injured employees. WSI has in most situations become a benefit manger for an injured employee, who is now placed in a position of responsibility to cooperate fully and invest in their own success as the rehabilitation process proceeds. It is early in the process yet, but anecdotally, response from the vocational rehabilitation specialists has been positive and they note a far higher personal investment in the results by injured employees.

The fiscal note has been provided with my testimony.

WSI would respectfully urge this committee to vote "do not pass" on SB 2386.

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

#5



Testimony of Bill Shalhoob  
North Dakota Chamber of Commerce  
SB 2386  
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 2386 and urge a do not pass from the committee on this bill.

SB 2386 makes the definition of a permanent total disability more rather than less subjective. This will naturally increase disagreement and litigation. It redefines temporary total disability and eliminates the 104 week limit. Temporary is temporary and with this language temporary will become permanent, not a good change. Finally, it redefines when pre-existing conditions are compensable. The sum total is a premature return to a pre- 1995 benefit structure that we know caused financial problems for the agency and the employers of North Dakota. I say premature because we supported HCR 3008, a resolution that calls for a study of these very items and would include comparing our benefits with other states with respect to them. Let's look before we leap in changing these benefits. Get the outcome of a study and act with, not without, certain knowledge.

Thank you for the opportunity to appear before you today in opposition to SB 2386. I would be happy to answer any questions.

*THE VOICE OF NORTH DAKOTA BUSINESS*

**WORKFORCE SAFETY & INSURANCE**  
**2009 LEGISLATION**  
**SUMMARY OF ACTUARIAL INFORMATION**

#6

**BILL NO: SB 2386**

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**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 redefines when pre-existing injuries are compensable; redefines the standards for permanent total disability reverting back to a more subjective standard; redefines temporary total disability and eliminates the 104 cumulative week cap for temporary total disability benefits.

SB 2386 has the potential to increase materially both reserve requirements and future rate levels.

**Reserve Level Impact:** North Dakota changed the criteria used to classify claims as PTD and TTD effective January 1, 2006. At the time the change in definition was introduced, we assumed that the number of PTD's would decrease by roughly 20% or, roughly 10 claims per year. The reserve increase associated with PTD claims incurred during the three and one-half year period ending June 30, 2009 could range between \$5 million and \$7 million over the levels that would otherwise be required. We derived the range under the assumption that 35 additional claims would emerge during the period January 1, 2006 through June 30, 2009.

The change in criteria used to classify TTD's will likely add to the cost of the proposed legislation. However, we do not have sufficient data to quantify the increase. In addition, the elimination of the 104 week cap on TTD benefits will likely increase costs further.

**Premium Rate Level Impact:** We believe that SB 2386 will have a material impact on rate levels in the state. Using assumptions consistent with the underlying estimate of the associated increase in reserve levels, the change to the criteria used to categorize a claim as PTD, could increase rate levels by more than 1%, or more than \$1.5 million per year.

Though we cannot quantify the likely impact, the proposed changes to TTD's will add to the increase.

The proposed change to the terms under which a pre-existing condition is compensable will add to the cost of the bill. WSI does not have an appropriate base of historical experience to permit an actuarial evaluation of anticipated costs associated with this change. Furthermore, the extremely short timeframe available for our review exacerbates the difficulties associated with deriving an actuarially appropriate estimate of expected costs.

We evaluated potential costs associated with SB 2386 under the assumption that no other changes would be made concurrently to the State's benefit structure. To the extent that this piece of legislation passes in conjunction with other changes under consideration – the costs could compound.

**DATE: February 2, 2009**