2013 HOUSE INDUSTRY, BUSINESS, AND LABOR

HB 1163

2013 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee
Peace Garden Room, State Capitol

HB 1163
January 21, 2013
Job 17418

☐ Conference Committee

Committee Clerk Signature Ge Mae Kaeh

Explanation or reason for introduction of bill/resolution:

Workers' compensation definitions of compensable injury
(Fiscal note)

Minutes: Attached testimony #1-3

Meeting called to order.

Hearing opened.

Tim Wahlin, Chief of Injury Services at WSI: (1:51) Written testimony attachment #1, referring to Attachment 2.

Tim Wahlin: (7:46) You have an actuarial statement (included with fiscal note) of impact on this statute. That pricing says there will be no effect. That pricing is based on the effects of the statute or amendment being presented right now. That statute as amended would put us back into the position we were before the Supreme Court handed down this opinion so there would be no effect because that is how we were interpreting statute before.

Representative M. Nelson: (8:47) If I had a jar at work and I got a ruptured or bulging disc but have no symptoms, is that a compensable injury?

Tim Wahlin: To the extent that you could show that work created an injury and you are relating it back to a particular physical effect, that would be an injury in my opinion.

Representative M. Nelson: (9:24) How would you know you were injured?

Tim Wahlin: Whenever a claim is made, it is incumbent on the worker to be able to prove that there is an injury. It is proven by objective medical evidence.

Representative M. Nelson: (9:50) If I had a compensable injury and my symptoms got worse, would that change how WSI dealt with me?

Tim Wahlin: No, because the underlying effect is you had a compensable injury. Any worsening of that injury is compensable.

Representative Amerman: (10:24) If I had an injury where I work and it was compensable, and then everything was fine, but then had pain from it again three years later and needed a prescription, would that be covered?

Tim Wahlin: You were injured at work and it is compensable. Everything linked to that original injury remains compensable for the remainder of your life.

Chairman Keiser: (11:30) Can you differentiate between continuing medical treatment and partial impairment relative to this issue?

Tim Wahlin: It remains compensable for the remainder of his life. That means medical gets paid. 100%--no deductible--no copay. You are entitled to disability benefits to the extent that you are unable to work as a result of the injury. Disability benefits remain payable up to your presumed date of retirement where you would convert over to an additional benefit payable which would pay part of that. The third thing we would pay is Permanent Partial Impairment, which is a rating system and a one-time payment that is not connected to either of those.

Representative Ruby: (12:26) A lot of discussion we've had in the past is about degenerative disease conditions and what an injury does to worsen the severity of the degenerative disease. In the interpretation of this actual case, did the justices decide that the disease was there but the duties of the job accelerated or was it just the symptoms of the pain that was enough to qualify?

Tim Wahlin: (13:25) It's a very subtle question. In my reading of the case, the two justices who wrote in favor of that interpretation suggested that pain is a possible worsening of an underlying condition. When we look at it, we say pain is a symptom, and an injured worker would have to show why there is a worsening. That is the focus of the dissent.

Representative Ruby: How can you determine what the progression of the disease would have been without the problems compared to what the injury either had an affect or no affect.

Tim Wahlin: (14:52) Our directions by statute are to look at the objective medical evidence. We rely on what the medical provider tells us it is.

Representative Kasper: (15:35) Did the court get into the claimant's work history prior to this incident?

Tim Wahlin: I believe that would have been filtered through in the actual hearing before the ALJ (administrative law judge).

Representative Kasper: (16:23) If this gentleman had operated this type of equipment 15 years prior to when this claim occurred, I would assume that there was a lot of jarring in his

lower back. Maybe things didn't become apparent until this was the straw that broke the camel's back. If that were the case, would WSI have had a different position, or wouldn't it have mattered?

Tim Wahlin: (17:07) I believe it would have mattered. However, we are going to look at what the physicians are telling us. If that were supported, it would be a payable claim.

Representative Kasper: Looking at the bottom of page two on the Supreme Court's ruling, Dr. Goehner is saying that the job duties cause this injury. How did WSI relate that statement in denying the claim?

Tim Wahlin: I don't recall how it was dealt with. There probably were multiple medical opinions saying different things.

Chairman Keiser: We have an injured worker, their claim is recognized, they are going to get medical, they may or may not get permanent partial. They may get disability. Now over time, at some point later, the pain increases significantly. The medical will still track that and the medical side is not an issue. Can it be a change in permanent partial? Can they now move on to disability benefits because of the increase in pain? Is this what that is about?

Tim Wahlin: (19:31) This is one step before that. It's what North Dakota says is a compensable claim. What the statute says and our interpretation is that if you have a pre-existing condition and it is not a work injury, that pre-existing condition will only be the basis of a compensable claim if you can show that your work substantially worsened or progressed the underlying condition, then it is compensable. If your work causes symptoms to arise from that pre-existing condition, there is no worsening, it is not compensable. You will receive nothing.

Representative Kasper: (20:15) What you just said, does it matter whether or not the worker was covered by a prior employer under WSI in North Dakota or not?

Tim Wahlin: (21:00) If the claim was now to the extent that a medical professional could tell us that it caused this to progress, it is compensable. If there is a pre-existing condition, not work related, the symptoms caused the rise as opposed to a worsening that would not be compensable.

Representative Kasper: (22:00) In my example, where someone had worked 15 to 20 years on similar machines, how do you know where the trigger point is? I don't think the situation occurs overnight. How can we not look at the prior evidence?

Tim Wahlin: (23:00) To the extent that the doctor says those activities caused this to happen, it is compensable.

Representative Kasper: Even if it just became apparent now?

Tim Wahlin: Yes

Representative M. Nelson: (23:40) If with years of accumulation, if it only became known to the worker now it would be compensable. Did that worker know that he had injuries beforehand or did it only become known when he had the pain symptoms?

Tim Wahlin: He had pain and the testimony accepted by the ALJ said that is attributable. That is a system from his pre-existing condition, not work related. It simply caused symptoms in the condition as opposed to being able to show any progression in the underlying condition. What the statute focuses on, is putting an industrial event as the causation of the worsening, separating it out from other types of medical coverage. Only an industrial event will be covered by WSI.

Representative M. Nelson: (25:03) Now you are saying he should be covered. I don't understand the difference.

Tim Wahlin: In this case, the symptoms arose but there was no documentation of a substantial worsening or progression in that underlying condition. If he had been able to show that there was a substantial progression caused by work, it would be compensable. Just having discomfort or pain is not enough when you have a pre-existing condition in North Dakota.

Representative Frantsvog: (26:04) In order for it to be compensable, there has to have been a substantial progression. Couldn't that progression have taken place over the work history and never brought forth until this job? Your comment that there has to be substantial progression before it is compensable, is that what you're saying? Somehow you have to be shown that there was a substantial progression?

Tim Wahlin: Yes.

Representative Amerman: (27:12) You mentioned the fiscal note has no impact because if this bill passes, it is going to do what you have always been doing. If this bill fails, what will be the impact?

Tim Wahlin: (27:35) We have gone to our actuaries. They are uncertain how many claims it would affect. They have a broad window of affect. They are saying, at the low end is an increase of rates of 5.5% to 12.6% based on $250 million premium per year. If this case progresses the way it appears, there will be a broadening of claims that will be acceptable.

Representative Louser: In the wording "substantial acceleration or worsening," who makes the determination?

Tim Wahlin: (28:36) Eventually WSI will make the determination based on medical testimony. That can be appealed to an administrative law judge who will hear evidence. That can be appealed to the district court which can be appealed to the Supreme Court.

Representative Kreun: (29:11) With the rate changes, all of these jobs have categories. Is this a broad category for everybody or will it be related to the type of work for that raise in premiums?

Tim Wahlin: Yes, however we have not priced it down to the particular employment level. (29:50) I would suspect that it will have a broader impact on heavier employments than it would have on clerical.

Representative Ruby: In your explanations of the worsening conditions and whether or not it is worsening of a pre-existing issue, you're saying that the past pain was more of a symptom. It's a hard sell to tell the employee that an increase in pain is not a worsening of the condition. How do you justify when you explain that, that it's not a worsening of the condition but just a symptom?

Tim Wahlin: (31:09) In my conversations with adjustors or injured workers I always go back to what we are looking for is the underlying condition. If you bring a condition to your employment, the only way that can be compensable is if you can show me that work has progressed it or worsened it; that's the test.

Representative Becker: (32:00) Some of the questions seem to focus on a pre-existing condition. The way I read the bill, that is a separate issue. The bill deals with something that is already known to be pre-existing. The method of determining pre-existing would be in a separate statute. If we start with the basis that there is a pre-existing, we have a starting point. If they have a known pre-existing illness that causes a symptom when they have a specific motion or work and this job requires them to do that, you are not compensating them because the injury was already there.

Tim Wahlin: (33:28) That is correct, unless the job has worsened the condition. Then it is compensatory.

Representative Gruchalla: (33:50) I heard you say that if this bill doesn't pass, it does open the door to look back at previous denials?

Tim Wahlin: No, to the extent that we've made a determination on a claim that is final we would not go back and open any of those. If there is a claim with a reoccurrence, the new law would be in play.

Representative N. Johnson: (34:50) If this is not passed, you are still back to the unknown. It doesn't mean that you change everything forward? There would be the questions all time?

Tim Wahlin: Correct

Representative M. Nelson: (35:16) What is the difference between aggravation and substantial acceleration or worsening?

Tim Wahlin: In order to be compensable you have to show that a pre-existing condition substantially worsened. If the answer is yes, then we ask if the pre-existing condition ever caused work related restrictions. Did it impact ability to work? If yes, then we apply the aggravation statute. It's a combination of the pre-existing and the worsening. We pay the

first part of 100% and after that we pay 50%. It is a separate statute which is the aggravation statute.

Representative Sukut: (36:48) Who is responsible for getting the previous injury in the record?

Tim Wahlin: (37:48) It should be everyone's responsibility, but it should be WSI's duty to ask those questions upon the initial filing of the claim. The information WSI has is open to the extent that you can request information about the name, type of injury, and what part of the body.

Representative Sukut: (38:57) Scenario. This individual has a back problem and lifts something heavy and pain reoccurs. When the pain reoccurs, is that now a symptom or an increase in the injury?

Tim Wahlin: (39:30) Our inquiry would be--did that lifting event worsen that underlying condition? We're looking at the underlying condition. We're not looking at the fact that symptoms have arisen under this scenario. We've always looked back to the condition. If it is worsening or progressing, it is compensable. If not, it is not.

Representative Sukut: It has to be a gray area. Do you would have to get a doctor's opinion?

Tim Wahlin: Yes. Objective medical evidence.

Representative Kreun: (40:50) In the judges' determination, it was 2 to 2 with VandeWalle breaking the tie. In his written conclusion, he did agree that at this time the aggravation would be of an underlying arthritic condition. He is "disturbed by the failure to distinguish those instances in which pain aggravates and underlying condition." He's referring this back to WSI after the decision to correct?

Tim Wahlin: Yes, it has been remanded for further findings and is ongoing at this point.

Representative Kreun: If this bill passes, does that satisfy his understanding?

Tim Wahlin: From point going forward, it will be clear. In this case I don't know.

Representative Boschee: (42:25) If it does not pass, this broadens the opportunity for more people to be assessed claims. The solution there is increasing premiums. Are there other occupations in which pain would be assessed at a physical or occupational health exam so there would be a measure rather than assessing increased premiums?

Tim Wahlin: (43:10) Yes. If this goes the direction is appears to be, then the next step is how are we going to handle the determination of pain, measuring the amounts, the extent, restrictive affects, and the forthrightness to the pain complaint. This would be an arena that we have not been in before.

Tom Balzer, North Dakota Motor Carriers Association and on behalf of the Greater North Dakota Chamber: (44:00) We support this bill.

In high school I decided to find out how tough Darin Erstad was when playing football. I have a compressed vertebra and a chipped vertebra. My job requires me to sit which makes my back hurt. Other activities help my back. The question in this case is my job requiring me to sit in that chair now becomes a compensable injury that WSI has to pay for. That is the question you are asked to determine. We do not feel that is right. WSI's interpretation previously has been good, while not perfect. For us, the ruling of the Supreme Court and the request of the Chief Justice asking for clarity means they are asking for help. A 5 to 6% increase in premiums is huge. A 10-12% increase is unbearable.

Representative M. Nelson: Are you concerned that if pain is no longer compensable that it will open up your membership to being sued by the employees for relief?

Tom Balzer: I don't share that concern. When you are dealing with pain, our industry has made strides in changing the types of activities, reducing receptiveness, finding assistance materials that can help reduce those claims. We want to make our industry as safe and welcoming to individuals as we can.

Opposition:

(48:20) **Dean J. Haas, Attorney at Larson Latham Huettle, LLP:** Written testimony Attachment #3.
The history of this pre-existing statute didn't just begin with the Mickelson case. This statute has been around since 1989. I cited quite a few cases in my testimony where WSI prevailed. They could point to, in those cases, an identifiable pre-existing condition. They had evidence that this employment contribution wasn't significant enough to pay benefits.

Do we need this amendment? No, we do not. This is a dire change. At least in those cases, there was a theoretical potential that you could prevail by showing your condition substantially worsened through a doctor. "After the work injury I had to frequently treat this worker." This is significant and it needs careful attention. It most commonly comes up in degenerative disc disease. It gets worse as you age, and it is not going to be symptomatic in many cases. Some people get symptoms because something at work makes it hurt and then it never goes away. How are we going to determine whether it is worse or not? It is going to require a change in the MRI. If you have an asymptomatic person with an MRI that shows that it is there and then you get hurt at work. The MRI is not going to change. The clinical might be completely different. What is the pain level, what is the activity level, do you need care? How do you prove a significant change? No other state that I'm aware of has a test this drastic. In 2009 the legislature had HCR3008 as a study. The resolution passed but the study was never done. Again, this is a change because the interpretation goes back to the 1998 case with Geck. Perhaps this study should be done.

Representative Ruby: (53:40) How do you medically measure pain?

Dean Haas: Physicians can make that difference. It is subjective.

Representative Ruby: (54:19) I understand there are some range of motion issues, but that doesn't always mean it is limited because of pain. I have been in situations where the question is to rate pain 1 to 10. That is really subjective because we all have different pain thresholds. When we talk about allowing pain to be considered as part of the increase in the condition, we should have some medical way to determine that. It's even more subjective than degenerative issues. Do you have ways to help us measure the level of pain to determine what benefits should be applied?

Dean Haas: (55:50) At the threshold the legislature has to tell WSI you only need objective changes on an MRI. Perhaps then a better law can be enacted than the existing one. OSHA has a standard. They say, "If it is significantly different now and it is now chronic pain and you need medical attention, our medical profession can determine that." Is there a significant change in their clinical course with no treatment prior but now needs treatment.

Representative Kasper: (57:40) Looking at the bill, line 9 is talking about the disease or injury "unless the employment substantially accelerates its progression or substantially worsens its severity." What I read that to say is, current law says if your injury is A level now it has to go to B level or above to qualify. What I see this saying is that increased pain is not going to provide a benefit. If your pre-existing condition is A and it moves to B, this would not apply any way, is that correct?

Dean Haas: (58:42) The key is how do you prove a significant change? This legislation and WSI would say to prove the significant change you have to show something changed on an objective test like an MRI not just an increase in symptoms. Even if treatment is increased somewhat, it wasn't enough and in those cases WSI will continue to prevail.

Representative Kasper: I don't see it that way. The current law is on lines 9 and 10. It's clarifying that pain in and of itself is not substantive enough to say it has gotten worse. Isn't that what the amendment says?

Dean Haas: (1:00:40) You are right that it does say there has to be a change on the MRI. Do I care if I have degenerative findings on an MRI if it never becomes symptomatic?

Representative Kasper: (1:01:10) How do you measure pain? If there are no other changes in the physical condition, this bill says pain which is more severe is not enough to cause it to be compensable.

Dean Haas: (1:01:38) The legislature looked at that in 2009 with the concurrent resolution. This is a significant change.

Chairman Keiser: The current law, not the new proposed language, was interpreted by WSI just as Representative Kasper was describing it. However, the court said pain can be factored into the situation. So the amendment is attempting to return through statute the interpretation of that language to the previous policies that were implemented.

Dean Haas: To come to that conclusion, you'd have to ignore the Geck case. That case said that pain could be a significant worsening. That was the law all the way up to the Mickelson case. WSI won all those cases in between. It just was never interpreted again. I do think WSI was interpreting it that way but there wasn't any authority for it.

Chairman Keiser: I think the court said, it wasn't clear in statute.

Representative M. Nelson: (1:03:22) Are we kind of creating a Twilight Zone? If I get turned down by WSI, can I go to my insurance company? Or do I have lots of insurance and no coverage?

Dean Haas: (1:03:50) This does shift medical costs to Blue Cross which should have been born by the industry that created it.

Tom Ricker, President of North Dakota AFLCIO: (1:04:36) I am here to speak in opposition to the bill. The bill sets the hurdle to high. Pain is different for different people. It's not limited to back pain. Gave example of carpal tunnel as a cumulative disorder that came back and got worse with a new job. The claim would be denied because of pre-existence. I think WSI still has the ability to look at case by case if it should be compensable or not. I think this sets the bar too high for the injured worker. I hope you would consider a do not pass on this bill.

Neutral: none

Chairman Keiser: Hearing closed.

2013 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee
Peace Garden Room, State Capitol

HB 1163
January 22, 2013 pm
Job 17556

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Workers' compensation definitions of compensable injury

Minutes:

You may make reference to "attached testimony."

Chairman Keiser and Representative M. Nelson discussed the status of an amendment which had been requested by Representative M. Nelson.

Will hold this bill.

2013 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee
Peace Garden Room, State Capitol

HB 1163
January 23, 2013 pm
Job 17652

☐ Conference Committee

Committee Clerk Signature Pe Mae Kuchar

Explanation or reason for introduction of bill/resolution:

Workers' compensation definitions of compensable injury
(Fiscal note)

Minutes: *Attachment #1*

Attachment 1, amendment 13.0220.02001

Representative M. Nelson: (1:00) We are trying to create Workmen's Compensation Law that is understandable with no gaps or overlaps. Having read the Supreme Court decisions, they were asking for guidance and to clearly define them. The bill really doesn't do that. The bill jumps to the conclusion that pain is just a symptom. There are differences in pain. There is acute pain and chronic pain. Chronic pain, due to research, indicates there are actual physical changes. This would make it not a symptom. The problem comes when you can't go to your doctor and have those things tested for. It is much like if you would have had a ruptured disc in the 1950s, they would have seen nothing. If they would have really needed to take a look, they would have done surgery because they didn't have the MRI. The right way to deal with this is to study the situation and get up to speed of where the science is at this point so we can be fair to employers and employees. That is why I hoghoused it.

Representative M. Nelson: moved to adopt amendment (attachment 1 to hoghouse HB 1163)

Representative Gruchalla: Seconded it.

Representative Amerman: (5:02) I think this is a good step. We had the Supreme Court with 2 and 2 and the Chief Justice asking for a little guidance. Maybe we need some guidance. This would be a good step.

Representative M. Nelson: (5:56) One of the problems with the bill as it was, you take words in their common meaning. If we pass the bill as it was, we are putting a thing in the Century Code that goes contrary to what would be the normally understood meaning of the words.

Representative Ruby: (7:00) We have had issues that deal with degenerative disease, soft tissue, etc. This is how they interpreted it all these years. If we are going to start counting pain, then there are some unseen soft tissue issues. There are other things that are unseen and unmeasurable just like pain.

Representative Amerman: (8:55) Just because it has been interpreted one way by WSI does not mean that it is right according to the Supreme Court. I don't think it is good policy to pass law just so they make it look like they have been doing it right all along. I think we need to study this.

Chairman Keiser: (9:30) WSI's interpretation of the code was that pain is not a compensable injury by itself. If we hoghouse this bill and do not pass this bill, then until the next biennium all of the claims that came in following the Supreme Court will have to be considered because of their ruling. If we do not pass this bill, for two years all those claims would come in.

There are two decisions we need to make. The committee has to decide whether they want to reinstate by clarifying in the statute what the intent of the legislature is. The second decision is whether there should be a study.

I think there is still time to submit a separate bill that would do a study. We have to determine as a committee whether we want to maintain what was being done as a policy or not.

Representative Ruby: (11:30) I don't think the Supreme Court told WSI that they were wrong. There was just no clear legislative definition to guide them.

A Roll Call vote was taken on the amendment 13.0220.02001:
Yes 4, No 11, Absent 0.

Chairman Keiser: The motion to adopt the amendment **fails**.

Representative Sukut: Moved Do Pass on HB 1163

Representative Ruby: Seconded the motion

A Roll Call vote was taken on the Do Pass Motion:
Yes 11, No 4, Absent 0.

Chairman Keiser: The motion for a Do Pass carries.

Representative Ruby is the carrier.

FISCAL NOTE
Requested by Legislative Council
01/10/2013

Bill/Resolution No.: HB 1163

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **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 explicitly provides that pain is a symptom and is not a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition.

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.*

see attached

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
Telephone: 328-6016
Date Prepared: 01/18/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: HB 1163

BILL DESCRIPTION: Definition of Compensable Injury

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation explicitly provides that pain is a symptom and is not a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition.

FISCAL IMPACT: No fiscal impact is anticipated as the proposed bill will not result in a change to WSI's current and historical application of the statute.

DATE: January 17, 2013

Date: 1-23-2013pm

Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1163

House Industry, Business, and Labor Committee

Legislative Council Amendment Number 13.0220.02001

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☑ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider ☐ Consent Calendar

Motion Made By Nelson Seconded By Gruchalla

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser		✓	Rep. Bill Amerman	✓	
Vice Chairman Gary Sukut		✓	Rep. Joshua Boschee	✓	
Rep. Thomas Beadle		✓	Rep. Edmund Gruchalla	✓	
Rep. Rick Becker		✓	Rep. Marvin Nelson	✓	
Rep. Robert Frantsvog		✓			
Rep. Nancy Johnson		✓			
Rep. Jim Kasper		✓			
Rep. Curtiss Kreun		✓			
Rep. Scott Louser		✓			
Rep. Dan Ruby		✓			
Rep. Don Vigesaa		✓			

Total Yes ~~5~~ 4 No ~~6~~ 11

Absent

Floor Assignment

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

Hoghouse 1163 and replace

Date: 1-23

Roll Call Vote #: 2

2013 HOUSE STANDING COMMITTEE ROLL CALL VOTES BILL/RESOLUTION NO. 1163

House Industry, Business, and Labor Committee

Legislative Council Amendment Number _____

Action Taken: ☑ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider ☐ Consent Calendar

Motion Made By Sukut Seconded By Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser	✓		Rep. Bill Amerman		✓
Vice Chairman Gary Sukut	✓		Rep. Joshua Boschee		✓
Rep. Thomas Beadle	✓		Rep. Edmund Gruchalla		✓
Rep. Rick Becker	✓		Rep. Marvin Nelson		✓
Rep. Robert Frantsvog	✓				
Rep. Nancy Johnson	✓				
Rep. Jim Kasper	✓				
Rep. Curtiss Kreun	✓				
Rep. Scott Louser	✓				
Rep. Dan Ruby	✓				
Rep. Don Vigesaa	✓				

Total (Yes) 11 No 4

Absent _____

Floor Assignment Ruby

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

REPORT OF STANDING COMMITTEE

HB 1163: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **DO PASS** (11 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1163 was placed on the Eleventh order on the calendar.

2013 SENATE INDUSTRY, BUSINESS, AND LABOR

HB 1163

2013 SENATE STANDING COMMITTEE MINUTES

Senate Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

HB 1163
March 19, 2013
Job Number 20155

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to workers' compensation definitions of compensable injury; and to provide for application

Minutes: Testimony Attached

Chairman Klein: Opened the hearing.

Representative Keiser: Introduced the bill. It adds to the North Dakota Century Code, the additional language in subsection seven, that pain is a symptom and not a substantial acceleration or substantial worsening of a preexisting injury, disease or other condition. He submitted the bill because workers' comp has always treated pain as a symptom and not a substantial acceleration. In the interim the court intervened and made a ruling in contradiction to what the practice had been at workers' comp. If the court needs us to write the policy, we are happy to do it.

Tim Wahlin, Chief of Injury Services for Workforce Safety and Insurance: Written Testimony Attached (1) and the North Dakota Supreme Court Opinion (2). (5:30-13:50)

Senator Murphy: Asked when he asked Dr. Peterson for his opinion on this matter, before it was drafted or after.

Tim Wahlin: Said Dr. Peterson was involved in this matter at the inception of this case, regarding the Mickelson case. As the Mickelson case has rolled forward he has been consulted throughout that process.

Senator Murphy: Said his question was as far as this legislation, was he involved in this at the beginning?

Tim Wahlin: Said he was not involved in the drafting of the legislation at any point.

Senator Murphy: Asked who was.

Tim Wahlin: Said the legal counsel within the agency was asked to draft this information.

Senator Murphy: Asked if he had talked to their medical director about this.

Tim Wahlin: Said no he has not.

Senator Murphy: Asked why he wouldn't want to base this law on medical science when it is about pain. It is about medicine.

Tim Wahlin: Said it is also about the intersection of medicine and law.

Senator Murphy: Said if the foundation of this is pain, which is a medical situation and you are going to draw legislation from this, wouldn't you want some medical science to back this up?

Tim Wahlin: Said yes.

Senator Murphy: Asked if he thought he had that.

Tim Wahlin: Said yes.

Senator Murphy: Said you didn't go through WSI's own medical director?

Tim Wahlin: Said no.

Senator Murphy: Asked why that would be.

Chairman Klein: Said would you do that if I asked you to propose a bill and bring it in? You would draft it the way it was intended for me to be drafted. I don't suspect you would go to everyone in the office to see whether or not it is a good idea. You would do it because it is what we want drafted.

Tim Wahlin: Said that is always how we draft. We have a number of medical provisionals that we draw information from. The most efficient course is the one we take. Dr. Peterson is involved, Dr. Peterson is consulted.

Senator Murphy: Mr. Wahlin you testified here that if we don't pass this bill it would broadly expand North Dakota's coverage for these employees and significantly increase statewide premium rates, right?

Tim Wahlin: Said that's correct.

Senator Murphy: Asked why he would care. We already have the lowest rates in the nation and it seems to me the name of your agency is workers' safety insurance. It seems to me you are more concerned with employer safety insurance. Would you comment on that?

Tim Wahlin: Said yes I will. At any point and time when we see a significant impact one way or the other, we are going to bring that to the legislature's attention. You write the rules. If

you believe that expansion is commensurate with the cost, that's your job. That information will always be brought forward by us.

Chairman Klein: Said every bill that is introduced or every legal opinion that is made, that has a direct fiscal impact is important to us. It is important to the legislature and actuarially needs to be shared so we know what direction the fund needs to go or what we need to do.

Tim Wahlin: Said that is their direction, yes.

Questions continue (18:35-32)

Greg Peterson, M.D. Medical Consultant for Workforce Safety and Insurance: Written Testimony Attached (3). (32:40-36:04)

Questions (36:10-46)

Bill Shalhoob, Greater North Dakota Chamber of Commerce: Written Testimony Attached (4). (46:48-48:16)

Patty Peterson, RN, Family Nurse Practitioner-Board Certified: Written Testimony Attached (5). (48:30-50:21)

Nora Allen, Nurse Practitioner: In support. (50:46-52:08)

Opposition

Michael R Moore, MD, NDMA Representative and Member of WSI Board of Directors: Written Testimony Attached (6). (52:40-56:48)

Chairman Klein: Dr. Moore you are suggesting what the language currently says goes beyond the clarification that we were looking for?

Dr. Moore: Said yes. I believe as I read this, it seems to me to be saying that pain is dismissed as being unimportant. In fact that is the reason people seek medical attention. We are taught we are supposed to listen to the patient's complaint as the first step in making diagnoses because that will ninety percent of the time give you the best clue of what the problem is. To completely dismiss the patients experience of pain or their description of pain, I think is a mistake simply from a medical standpoint, entirely outside the question of how it applies to workers' compensation law.

Chairman Klein: Said that in Dr. Peterson's testimony what he heard was that you need to take all of these issues into consideration. He's not singling something that it is not compensable. It is a combination of how you look at each and every one of those things. We heard from the young ladies also that you factor in a lot of things. Doesn't the current language give you enough flexibility?

Dr. Moore: Said he doesn't believe the current language accomplishes that, again I quote; "Pain is a symptom and is not a substantial acceleration or substantial worsening of preexisting injury, disease, or other condition." It seems to dismiss it as having any importance whatsoever. Certainly everything would have to be considered in total but there are many conditions for which there is no scan or test you can do that defines any difference. He said he could specify conditions which can be demonstrated by a particular scan or test or MRI but which are not painful. The injury could go from being a minor nuisance kind of problem to one that now dominates the patience medical condition and requires treatment. To insist that there is always a test or scan to demonstrate that is a mistake. Sometimes the only thing that has changed is the patience experience with pain.

Questions Continued (59:37-68)

Shelly Killen, M.D. Board Certified Physical Medicine and Rehabilitation Physician: Assistant Professor at the University of North Dakota and Chairman of the Neuroscience Department at St. Alexius, representing herself: Written Testimony Attached (8). (1:18:45-1:23)

Questions (1:23:45-1:26)

Dean J. Haas: Written Testimony Attached (9).

Questions (1:32:15-1:37:52)

Renee Pfenning, North Dakota Building and Construction Trades Council and ND AFL-CIO: In opposition.

Courtney Koebele, North Dakota Medical Association: In opposition.

Also Testimony Attached (10) from John Mickelson, D.O.

Chairman Klein: Closed the hearing.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

HB 1163
March 26, 2013
Job Number 20499

☐ Conference Committee

Committee Clerk Signature Ella Lubelt

Explanation or reason for introduction of bill/resolution:

Relating to workers' compensation definitions of compensable injury; and to provide for application

Minutes: Discussion and Vote

Senator Murphy: Said he ran off some articles from the Fargo Forum's Sunday paper, if anyone would like to see them. There was also an editorial in the Forum today and it is starting to get a little bit of attention. He took Dr. Moore's proposed amendment and had it drafted. When you combine medical and legal at this level of sophistication, sometimes the attorney's don't understand the medical and the medical doesn't understand the legality. Amendment Attached (1). (0-2:20)

Senator Murphy: Moved to adopt amendment 13.0220.02002.

Senator Sinner: Seconded the motion.

Chairman Klein: Asked if he showed this amendment to WSI, so we understand the implications.

Senator Murphy: Said this comes from WSI from their medical board.

Chairman Klein: Said it was his understanding that Dr. Moore had not been at the meeting when this discussion was held. He provided this as he was reviewing it as something he might throw out there as one of the discussions.

Senator Murphy: Said in that case his answer is no, I did not.

Tim Wahlin, Chief of Injury Services for Workforce Safety and Insurance: Said the proposed language was delivered from Dr. Moore and he was copied on the letter which has a couple of different paragraphs in it. We were aware of the language yes.

Chairman Klein: Said he also has an amendment to 1163 which he worked on with WSI. It incorporates some of Dr. Moore's concerns in their too. Amendment Attached (2). Amendment in new language form Attached (3).

Senator Andrist: Said the difficulty with all these attempts is we have to make them lawyer proof so they know exactly where we are.

Discussion continued on the two amendments, the differences and the understanding of the amendments, 02002 and 02003. (7:30-13:30)

Chairman Klein: The clerk will call the roll on the Murphy amendment.

Roll Call Vote: Yes - 2 No - 5 Absent - 0 Motion Failed

Chairman Klein: Said he handed out the 03 amendment and a copy of how it would read.

Senator Murphy: Moved to adopt amendment 13.0220.02003.

Senator Sorvaag: Seconded the motion.

Discussion

Tim Wahlin: Commented on the amendment 02003; it does clarify for everyone involved that pain is one of those factors, one of those symptoms to be considered in determining the case whether there has been a substantial worsening, substantial progression of that preexisting condition. It clarifies that it is going to be considered but alone it will not be substantial worsening, it will be a symptom.

Roll Call Vote: Yes - 7 No - 0 Absent - 0 Motion Passed

Senator Laffen: Moved a do pass as amended.

Senator Unruh: Seconded the motion.

Roll Call Vote: Yes - 5 No - 2 Absent - 0 Motion Passed

Floor Assignment: Senator Andrist

FISCAL NOTE
Requested by Legislative Council
01/10/2013

Bill/Resolution No.: HB 1163

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **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 explicitly provides that pain is a symptom and is not a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition.

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.*

see attached

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
Telephone: 328-6016
Date Prepared: 01/18/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: HB 1163

BILL DESCRIPTION: Definition of Compensable Injury

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation explicitly provides that pain is a symptom and is not a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition.

FISCAL IMPACT: No fiscal impact is anticipated as the proposed bill will not result in a change to WSI's current and historical application of the statute.

DATE: January 17, 2013

13.0220.02003
Title.03000

Prepared by the Legislative Council staff for
Senator Klein

March 25, 2013

3/26/13

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1163

Page 1, line 11, after "and" insert "may be considered in determining whether there"

Page 1, line 11, remove "not"

Page 1, line 12, after "condition" insert ", but pain alone is not a substantial acceleration or a substantial worsening"

Renumber accordingly

Date: 03/26/2013
Roll Call Vote # 1

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1163

Senate Industry, Business, and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 13.0220.02002

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Murphy Seconded By Senator Sinner

Senators	Yes	No	Senator	Yes	No
Chairman Klein		x	Senator Murphy	x	
Vice Chairman Laffen		x	Senator Sinner	x	
Senator Andrist		x			
Senator Sorvaag		x			
Senator Unruh		x			

Total (Yes) 2 No 5

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent: Senator Murphy's Amendment

Date: 03/26/2013
Roll Call Vote # 2

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1163

Senate Industry, Business, and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 13.0220.02003

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Murphy Seconded By Senator Sorvaag

Senators	Yes	No	Senator	Yes	No
Chairman Klein	x		Senator Murphy	x	
Vice Chairman Laffen	x		Senator Sinner	x	
Senator Andrist	x				
Senator Sorvaag	x				
Senator Unruh	x				

Total (Yes) 7 No 0

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent: Senator Klein's Amendment

Date: 03/26/2013
Roll Call Vote # 3

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1163

Senate Industry, Business, and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 13.0220.02003

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Laffen Seconded By Senator Unruh

Senators	Yes	No	Senator	Yes	No
Chairman Klein	x		Senator Murphy		x
Vice Chairman Laffen	x		Senator Sinner		x
Senator Andrist	x				
Senator Sorvaag	x				
Senator Unruh	x				

Total (Yes) 5 No 2

Absent 0

Floor Assignment Senator Andrist

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

REPORT OF STANDING COMMITTEE

HB 1163: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1163 was placed on the Sixth order on the calendar.

Page 1, line 11, after "and" insert "may be considered in determining whether there"

Page 1, line 11, remove "not"

Page 1, line 12, after "condition" insert ", but pain alone is not a substantial acceleration or a substantial worsening"

Renumber accordingly

2013 CONFERENCE COMMITTEE

HB 1163

2013 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee
Peace Garden Room, State Capitol

HB 1163
April 10, 2013
Job 21066

☒ Conference Committee

Lynnell Thorson

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact paragraph 7 of subdivision b of subsection 10 of section 65-01-02 of the North Dakota Century Code, relating to workers' compensation definitions of compensable injury; and to provide for application.

Minutes:

Meeting called to order. Roll taken.

Representative Ruby: Explain the changes to us.

Senator Andrist: We feel this bill should pass. There was strong testimony that pain can be a disease in itself when it comes to the nervous system. The language left too many workers hanging. The language is a symptom but may be considered for compensation purposes.

2:35 Tim Wahlin, WSI: We were asked to take in some of the suggestions and address some of the reaction that pain is not a guiding principle. We have added that language into what was already there. It was our intent from the beginning that pain should be considered. The organization looks at what is the basis or condition that's substantially worse. We feel that is still reflected in this amendment. It acknowledges in the amendment that pain is a symptom to be considered.

3:37 Representative Ruby: This language is trying to say the same thing that I thought our language accomplished. The more words that are put in it's up to the courts to decide what we meant.

Representative Keiser: If the amendment is broken apart into two pieces and look at the last part of it, can you have pain without an injury?

5:35 Wahlin: There was testimony that there are certain conditions/injuries which will trigger a chronic pain which is your body's reaction that ends up multiplying. The disease itself can be chronic pain.

Representative Keiser: How do you reconcile the first part? Aren't the two in contradiction with each other?

Wahlin: The attempt there refers to the same language that exists above when we talk about pre-existing injuries, diseases or other conditions.

7:44 Representative Ruby: With that language we initially passed, by using the word *substantial* it was a recognition that wasn't a substantial worsening of the pre-existing injury or disease. In a way, we've kind of recognized that in the previous language before the Senate amendments.

Wahlin: That's correct.

8:33 Representative M. Nelson: Does this section affect both the disability payments for people who aren't able to work as well as the impairment from the permanent partial impairment awards?

Wahlin: That is correct.

Representative M. Nelson: We use the 6th Edition of the AMA's guide?

Wahlin: That's correct.

Representative M. Nelson: In that guide, can pain be impairment in and of itself?

9:17 Wahlin: Within the guide itself, I believe it can. I believe, however, that our statutes regarding permanent partial impairment, we say we're not recognizing that.

Representative M. Nelson: My concern is when we're figuring permanent partial impairment then, when this is really the only guiding lining we have in statute, is that going to affect where you could add 3 points on for payment from pain, etc. Is this going to actually affect how the WSI does permanent partial ratings?

10:09 Wahlin: I don't believe it will. This is the test for a gateway to determine whether or not an injury is compensable. Once you make the compensability you roll through our system.

Representative M. Nelson: When you have a person with a compensable injury and their pain is reduced, do you use that as a sign that the severity of their injury has been reduced? Will it reduce the payments to the people if their pain is reduced?

10:56 Wahlin: Possibly yes.

11:27 Senator Andrist: I thought it can be considered. I thought we were protecting the system so that our accident compensation system wouldn't become responsible and our rate payers for every back pain that anyone gets.

Wahlin: That's correct.

Senator Andrist: This is why we wanted language they crafted, so this couldn't happen. This is the most important WSI bill this session. We spent time trying to fix this system so it's responsive to employers and to employees. We wanted to get this bill passed, and this is the language that WSI helped us draft and we thought we could get it passed. It was very contentious on our side. Unless we can improve the protections for pain, I don't know if we can get it approved by the Senate.

13:47 Senator Murphy: When I'm injured or sick and trying to heal, I don't consult my attorney. I consult my doctor. The overwhelming opinion of the medical community is that this is terrible language.

14:49 Representative Ruby: We are trying to find that fine line.

16:00 Representative Keiser: If I understand what you're trying to do with this language and if I read it, if there is an injury which is accepted by WSI, pain is likely to be part of the consideration at that point, and worsening pain relative to that injury can be considered an additional actions by WSI in additional decisions, the addition of the last language is an attempt to clarify that if there is pain associated with any other part of the body not related to that part that was injured and compensable, that that pain would be excluded from consideration in future decisions. That's what you think this language does.

Wahlin: Yes

17:18 Representative Keiser: Is there a fiscal note?

Wahlin: I don't have one in front of me.

Senator Andrist: We had testimony from WSI.

Representative Ruby: The latest one dated March 27.

Senator Andrist: We had testimony from the department of actuaries estimated the defeat of this bill could cost an estimated $32.5 million.

18:48 Representative Ruby: I felt that the language we passed out from the House because of the words substantial worsening of the pre-existing accomplished the same thing with fewer words.

19:25 Senator Andrist: We agree the simpler and more direct the better. The amendment was an effort to duplicate the enemies of the bill.

Representative Ruby: Did the new language placate the opponents?

Senator Andrist: I don't know.

20:32 Representative Keiser: Is there additional information we should consider relative to the medical community?

Senator Andrist: We had strong testimony from several physicians that pain is really a disease in itself.

21:42 Senator Klein: The medical community was all there. This was our olive branch and work with them but it didn't work. This language does what we had hoped.

23:48 Senator Murphy: I would ask that the record show that Dr. Greg Peterson is not an employee of WSI. He is an outside consultant. Dr. Moore is on the advisory board and did come with language that I proposed from him which was rejected by the committee.

Representative Keiser: I **move** that the House accede to the Senate amendments. Seconded by Senator Klein.

A Roll Call vote to accede to Senate amendments on HB 1163. **Yes = 6**, **No = 0**. Motion carried.

FISCAL NOTE
Requested by Legislative Council
03/27/2013

Amendment to: HB 1163

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **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 amended legislation explicitly provides that pain is a symptom and that pain alone is not a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition.

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.*

see attached

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
Telephone: 328-6016
Date Prepared: 03/27/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: HB 1163 w/ Senate Amendment

BILL DESCRIPTION: Definition of Compensable Injury

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The amended legislation explicitly provides that pain is a symptom and that pain alone is not a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition.

FISCAL IMPACT: No fiscal impact is anticipated as the amended bill will not result in a change to WSI's current and historical application of the statute.

DATE: March 27, 2013

FISCAL NOTE
Requested by Legislative Council
01/10/2013

Bill/Resolution No.: HB 1163

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **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 explicitly provides that pain is a symptom and is not a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition.

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.*

see attached

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.*

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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
Telephone: 328-6016
Date Prepared: 01/18/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: HB 1163

BILL DESCRIPTION: Definition of Compensable Injury

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

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FISCAL IMPACT: No fiscal impact is anticipated as the proposed bill will not result in a change to WSI's current and historical application of the statute.

DATE: January 17, 2013

2013 HOUSE CONFERENCE COMMITTEE ROLL CALL VOTES

Committee: **House Industry, Business and Labor**

Bill/Resolution No. 1163 as (re) engrossed

Date: 4-10-2013

Roll Call Vote #: _____

Action Taken

- [x] HOUSE accede to Senate amendments
- [ ] HOUSE accede to Senate amendments and further amend
- [ ] SENATE recede from Senate amendments
- [ ] SENATE recede from Senate amendments and amend as follows

House/Senate Amendments on HJ/SJ page(s) 1149 --

- [ ] Unable to agree, recommends that the committee be discharged and a new committee be appointed

((Re) Engrossed) _____ was placed on the Seventh order of business on the calendar

Motion Made by: Keiser Seconded by: Klein

Representatives	4/10			Yes	No		Senators	4/10			Yes	No
Ruby	✓			✓			Andrist	✓			✓	
Keiser	✓			✓			Klein	✓			✓	
M. Nelson	✓			✓			Murphy	✓			✓	

Vote Count Yes: 6 No: 0 Absent: _____

House Carrier _____ Senate Carrier _____

LC Number 13.0220. . 02003 title .03000 of amendment

LC Number _____ . _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

REPORT OF CONFERENCE COMMITTEE

HB 1163: Your conference committee (Sens. Andrist, Klein, Murphy and Reps. Ruby, Keiser, M. Nelson) recommends that the **HOUSE ACCEDE** to the Senate amendments as printed on HJ page 1149 and place HB 1163 on the Seventh order.

HB 1163 was placed on the Seventh order of business on the calendar.

2013 TESTIMONY

HB 1163

1 1-21-2013
HB 1163

2013 House Bill No.1163
Testimony before the House Industry, Business, and Labor Committee
Presented by: Tim Wahlin, Chief of Injury Services
Workforce Safety & Insurance
January 21, 2011

Mr. Chairman, Members of the Committee:

My name is Tim Wahlin, Chief of Injury Services at WSI. I am here on behalf of WSI to convey support of this bill and to provide information to the Committee to assist in making its determination. After review and analysis of the legal opinion giving rise to this bill, the WSI Board of Directors supports this bill.

This bill was drafted in response to the recent North Dakota Supreme Court opinion of Mickelson v. WSI, 2012 ND 164. I have provided a copy for your reference. The opinion was signed by two Justices; two Justices dissented with the main holding of the opinion; and the Chief Justice wrote a separate, concurring opinion. The Chief Justice indicated he was "disturbed' that the statutes and Supreme Court opinions have not done a better job explaining the application of the law at issue in the Mickelson case. Page 13. This bill should provide this requested clarification.

The underlying claim at issue in this case involves an employee who "developed soreness in lower back due to repetitive motion over time using foot pedal and driving over rough terrain." Page 2. The Administrative Law Judge concluded that the employee had underlying degenerative disk disease that became symptomatic while working. She also concluded that this was not a compensable injury because the work, while triggering symptoms of the underlying condition, did not substantially worsen or progress the condition as required by North Dakota Century Code section 65-01-02(10)(b)(7). Pages 10-11. This decision was affirmed by the District Court, and then reversed and remanded by the Supreme Court.

The governing law in this case is section NDCC 65-01-02(10)(b)(7). This section, provides, in relevant part, as follows:

10. "Compensable injury" means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings...

b. The term does not include:...

(7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.

Under WSI's interpretation of this statute, if an employee had a preexisting condition and an incident at work occurred which produced symptoms in this underlying condition, in most cases pain or discomfort, the incident would not qualify as a compensable injury. This would be categorized as a "trigger" under 65-01-02(10)(b)(7). However, if more than just symptoms occurred, and the medical evidence showed the occurrence at work substantially accelerated or substantially worsened the underlying condition, the claim would be compensable.

In Mickelson, a plurality of the Court has rendered an interpretation of 65-01-02(10)(b)(7) as follow:

> "When those terms are considered together to give meaning to each term, they mean injuries attributable to a preexisting injury, disease, or other condition are compensable if the employment in some real, true, important, or essential way makes the preexisting injury, disease or other condition more unfavorable, difficult, unpleasant, or painful, or in some real, true, important, or essential way hastens the progress or development of the preexisting injury, disease, or other condition." Page 20.

The two justices who authored this analysis suggest that when work creates unpleasantness or painfulness from an underlying condition, it has hastened the progress or development of the underlying condition. This conclusion may well mean pain triggered from a preexisting condition is now compensable because a worsening may be presumed.

This is not WSI's interpretation of this statute. WSI, as did the Administrative Law Judge in this case, read the statute to require a substantial worsening or progression in the preexisting condition, not just symptoms. To conclude a worsening has occurred because there is pain, or that the pain itself is a new compensable condition, essentially renders the statute moot.

Should this expansive reading of the statute ultimately prevail, it will have significant impacts on the fund. Cases adjudicated under the prior interpretation, which have become final, it is assumed, will not be required to be reopened. Those pending and those future claims, even if generated from existing injuries, would be subject to this expansion of this interpretation of the term compensable injury.

In the event this Legislative Assembly concludes the Administrative Law Judge's interpretation of section 65-01-02(10)(b)(7) is consistent with its intention, additional clarification of this point seems appropriate.

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

(2)
1-21-2013
HB 1163

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2012 ND 164

James Mickelson, Appellant
v.
North Dakota Workforce Safety and Insurance, Appellee
and
Gratech Company, Ltd., Respondent

No. 20110232

Appeal from the District Court of McLean County, South Central Judicial District, the Honorable Bruce A. Romanick, Judge.
REVERSED AND REMANDED.
Opinion of the Court by Kapsner, Justice.
Dean J. Haas, P.O. Box 2056, Bismarck, N.D. 58502-2056, for appellant.
Jacqueline S. Anderson, Special Assistant Attorney General, P.O. Box 2626, Fargo, N.D. 58108-2626, for appellee.

Mickelson v. Workforce Safety & Insurance

No. 20110232

Kapsner, Justice.

[¶1] James Mickelson appeals from a judgment affirming a Workforce Safety and Insurance ("WSI") decision denying his claim for workers' compensation benefits. He argues WSI erred in deciding he did not suffer a compensable injury. We conclude WSI misapplied the definition of a compensable injury, and we reverse and remand for further proceedings.

I

[¶2] On December 17, 2009, Mickelson applied to WSI for workers' compensation benefits, claiming he "developed soreness in lower back due to repetitive motion over time using foot pedal and driving over rough terrain" on August 30, 2009, while employed as an

equipment operator for Gratech Company, Ltd. According to Mickelson, he began working for Gratech on July 29, 2009, as an equipment operator, and he generally worked twelve-hour days, sitting in a pay loader and operating it with his right foot. Mickelson reported he operated the pay loader over rough terrain, which resulted in significant jarring and jolting. He claimed that before working for Gratech, he had not had any lower back pain, or pain radiating into his right leg. According to Gratech, Mickelson did not miss any work because of an injury from July 29 through December 3, 2009, when he was laid off, and he did not report the injury to Gratech until December 14, 2009.

[¶3] On August 30, 2009, Mickelson saw Dr. Matthew Goehner, a chiropractor, and Dr. Goehner's contemporaneous office note stated Mickelson had "pain across the lower back and pain/numbness into the right thigh and calf to foot" and diagnosed "[l]umbosacral region dysfunction with associated soft tissue damage causing nerve root irritation, lumbosacral strain from repetitive foot control use." Mickelson did not seek further treatment from Dr. Goehner until December 7, 2009, and he also saw Dr. Goehner for treatment five more times in December 2009, and once in January 2010. Dr. Goehner's notes state Mickelson reported low back pain with right leg numbness after standing for ten minutes and describe a decreased range in motion. In January 2010, Mickelson received treatment from Linda Regan, a physician assistant. An x-ray indicated "[m]ild degenerative changes of the lumbar spine," and Regan's preliminary report stated "[n]o degenerative joint disease seen" and "[l]umbar strain with right radiculopathy on standing." A January 2010 MRI of Mickelson's lumbosacral spine revealed "moderate to severe degenerative disk disease with a central disk protrusion at L5-S1." Regan later wrote a letter "to whom it may concern," stating that because Mickelson did not have back pain before operating the pay loader, "the combination of the rough terrain, using heavy equipment, sitting in one position for several hours at a time and also only using his right leg has caused the back pain with right leg radiculopathy for which he originally sought care." Mickelson also received treatment from Julie Schulz, a physical therapist, and she wrote a letter "to whom it may concern," stating Mickelson's "injury is directly related to his work situation. He did not have prior back pain. This is a reasonable mechanism of injury for this problem."

[¶4] In April 2010, Dr. Goehner also wrote a letter "[t]o whom it may concern," stating Mickelson had

> not presented with any lower back problems prior to 8/30/09. [His] injury is directly related to his job duties at work which included repetitive foot control use which caused stress to the muscles, ligaments, and joints of the lower back and pelvis. Following the injuries to the lower back [Mickelson] was diagnosed with degenerative disk disease. As you know, degenerative disk disease is a

> condition that develops over time and is a normal part of the aging process. Mr. Mickelson did not have any of the symptoms of degenerative disk disease prior to performing his job duty of repetitively using the foot controls and driving over rough terrain.

[¶5] Meanwhile, in February 2010, WSI initially denied Mickelson's claim for benefits, stating the January 2010 MRI revealed preexisting degenerative conditions or arthritis and concluding his "one month employment with Gratech triggered symptoms of [his] pre-existing degeneration but did not cause the condition and [he] did not report an injury to Gratech until 12/14/2009." Mickelson requested reconsideration, claiming his work substantially worsened his condition and he had never had prior lumbar spine problems. In March 2010, Dr. Gregory Peterson, a WSI medical consultant, conducted a record review and reported Mickelson's condition of "lumbar degenerative disc disease [was] not caused by his reported work injury. Repetitive motion on rough ground while operating a loader may trigger symptoms associated with lumbar degenerative disc disease, but not cause, substantially worsen, or substantially accelerate the condition." In March 2010, WSI again denied Mickelson's claim, relying on Dr. Peterson's review and concluding Mickelson had "not proven that his work activities substantially accelerated the progression of or substantially worsened the severity of his lumbar spine condition."

[¶6] Mickelson sought a formal administrative hearing, and an administrative law judge ("ALJ") was designated to issue a final decision on his claim. See N.D.C.C. § 65-02-22.1. After an administrative hearing, the ALJ affirmed WSI's denial of benefits, concluding Mickelson failed to establish he suffered a compensable injury during the course of his employment. The ALJ explained Mickelson had preexisting degenerative disc disease and his low-back pain and right leg pain and numbness were symptoms of his degenerative disc disease. The ALJ said Mickelson's employment triggered his symptoms of degenerative disc disease, but there was no evidence his employment substantially accelerated the progression or substantially worsened the severity of the degenerative disc disease. The ALJ rejected Mickelson's argument that triggering of symptoms constitutes a substantial worsening of his degenerative disc disease, concluding that interpretation would render the "trigger" language of N.D.C.C. § 65-01-02(10)(b)(7) meaningless. The ALJ also rejected Dr. Goehner's assessment of a lumbosacral strain from repetitive foot control use, concluding his assessment was not consistent with his later opinion that Mickelson's symptoms stem from degenerative disc disease. The district court affirmed the ALJ's decision.

II

[¶7] Under the Administrative Agencies Practice Act, N.D.C.C. ch.

28-32, courts exercise limited appellate review of a final order by an administrative agency. Workforce Safety & Ins. v. Auck, 2010 ND 126, ¶ 8, 785 N.W.2d 186. Under N.D.C.C. §§ 28-32-46 and 28-32-49, the district court and this Court must affirm an order by an administrative agency unless:

> 1. The order is not in accordance with the law.
> 2. The order is in violation of the constitutional rights of the appellant.
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶8] In reviewing an ALJ's factual findings, a court may not make independent findings of fact or substitute its judgment for the ALJ's findings; rather, a court must determine only whether a reasoning mind reasonably could have determined the findings were proven by the weight of the evidence from the entire record. Auck, 2010 ND 126, ¶ 9, 785 N.W.2d 186. When reviewing an appeal from a final order by an independent ALJ, similar deference is given to the ALJ's factual findings, because the ALJ has the opportunity to observe witnesses and the responsibility to assess the credibility of witnesses and resolve conflicts in the evidence. Id. Similar deference is not given to an independent ALJ's legal conclusions, however, and a court reviews an ALJ's legal conclusions in the same manner as legal conclusions generally. Id. Questions of law, including the interpretation of a statute, are fully reviewable on appeal. Id.

III

[¶9] Mickelson argues he suffered a compensable injury, because his employment caused a substantial worsening of the symptoms of his previously asymptomatic degenerative disc disease. He argues pain can be a substantial worsening of his condition and the triggering of degenerative disc disease from no symptoms to a disabling condition that requires medical care is compensable as a significant worsening of the clinical picture of his condition.

[¶10] The parties agree the provisions for aggravation in N.D.C.C. § 65-05-15 are not applicable to Mickelson's claim, because the language of that statute applies to "a prior injury, disease, or other condition, known in advance of the work injury," or to the "progression of a prior compensable injury." N.D.C.C. § 65-05-15(1) and (2). See Mikkelson v. North Dakota Workers Comp. Bureau, 2000 ND 67, ¶¶ 12-17, 609 N.W.2d 74. There is no evidence in this record that Mickelson knew about his lower back injury, disease, or other condition before he operated the loader for Gratech, and the ALJ found "there is no evidence . . . Mickelson had these symptoms [of low back pain and right leg radiculopathy] before he operated the loader for Gratech." Rather, the issue in this case involves whether Mickelson suffered a compensable injury.

[¶11] Claimants have the burden of proving by a preponderance of evidence they have suffered a compensable injury and are entitled to workers' compensation benefits. N.D.C.C. § 65-01-11; Bergum v. Workforce Safety & Ins., 2009 ND 52, ¶ 11, 764 N.W.2d 178. To carry this burden, a claimant must prove the "condition for which benefits are sought is causally related to a work injury." Bergum, at ¶ 11. To establish a casual connection, a claimant must demonstrate the claimant's employment was a substantial contributing factor to the injury and need not show employment was the sole cause of the injury. Bruder v. Workforce Safety & Ins., 2009 ND 23, ¶ 8, 761 N.W.2d 588.

[¶12] Section 65-01-02(10), N.D.C.C., defines a "compensable injury" under workers' compensation law, and provides, in relevant part:

> 10. "Compensable injury" means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings.
> . . . .
>
> b. The term does not include:
> . . . .
>
> (7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.

[¶13] In discussing the language of N.D.C.C. § 65-01-02(10)(b)(7), this Court has said "a preexisting injury must have been substantially accelerated or substantially worsened by the claimant's employment in order for the claimant to be entitled to benefits," and a "compensable injury does not exist when the claimant's employment

merely triggers symptoms of the preexisting injury," disease, or other condition. Johnson v. Workforce Safety & Ins., 2012 ND 87, ¶ 8. See also Bergum, 2009 ND 52, ¶ 12, 764 N.W.2d 178. Under N.D.C.C. § 65-01-02(10)(b)(7), this Court's decisions about a compensable injury in the context of a lower back claim generally involve a history of back-related injuries before a work incident. See Curran v. Workforce Safety & Ins., 2010 ND 227, ¶¶ 1, 3, 791 N.W.2d 622; Bergum, at ¶ 2; Bruder, 2009 ND 23, ¶ 2, 761 N.W.2d 588. Those decisions have generally recognized that whether a compensable injury exists involves a factual determination, but we have not otherwise analyzed the distinction between compensability when employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition and noncompensability when employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition.

[¶14] In Geck v. North Dakota Workers Comp. Bureau, 1998 ND 158 ¶ 6, 583 N.W.2d 621, and Pleinis v. North Dakota Workers Comp. Bureau, 472 N.W.2d 459, 462 (N.D. 1991), this Court reviewed workers' compensation decisions under a prior definition of compensable injury, which said a compensable injury did not include:

> Injuries attributable to a preexisting injury, disease, or condition which clearly manifested itself prior to the compensable injury. This does not prevent compensation where employment substantially aggravates and acts upon an underlying condition, substantially worsening its severity, or where employment substantially accelerates the progression of an underlying condition. However, it is insufficient to afford compensation under this title solely because the employment acted as a trigger to produce symptoms in a latent and underlying condition if the underlying condition would likely have progressed similarly in the absence of such employment trigger, unless the employment trigger is also deemed a substantial aggravating or accelerating factor. An underlying condition is a preexisting injury, disease, or infirmity.

[¶15] In Pleinis, 472 N.W.2d at 463 (footnote omitted), this Court construed the prior definition and rejected a claimant's argument that a predicate requirement for rejecting a claim was that a preexisting condition must clearly manifest itself before a work incident:

> The third sentence describes the consequences when employment acts as a trigger to produce symptoms in a "latent and underlying condition." In that situation compensation is not allowed if the underlying condition would likely have progressed similarly in the absence of an employment trigger, unless the employment trigger is a

> substantial aggravating or accelerating factor.
>
> The statutory language unambiguously describes when compensation is allowed for injuries attributable to both a latent underlying condition and an underlying condition which clearly manifested itself prior to the compensable injury. In both situations injuries attributable to the preexisting condition are compensable if employment substantially aggravates or accelerates the condition. . . . [T]he statute focuses on whether the underlying condition would likely have progressed similarly in the absence of employment, or whether the employment substantially aggravated or accelerated the condition.

This Court upheld a decision rejecting a claim for benefits, stating the agency's findings were sufficient to understand that the claimant's employment was not a substantial or accelerating factor of his underlying arthritis and osteoarthritic change and the underlying condition would likely have progressed similarly in the absence of his employment. Pleinis, at 463. Under Pleinis and the prior definition of compensable injury, the focus was on whether the underlying latent condition would likely have progressed similarly in the absence of employment, or whether employment substantially aggravated or accelerated the condition.

[¶16] In Geck, 1998 ND 158, ¶ 10, 583 N.W.2d 621, in the context of a latent underlying arthritic condition that was asymptomatic until a sharp knee pain was triggered while kneeling at work, a majority of this Court said there was no evidence contradicting that the claimant's pain in her left knee was caused by her work activity and that kneeling at work resulted in her latent underlying arthritic condition becoming symptomatic and painful. The majority concluded pain could be an aggravation of an underlying condition of arthritis and remanded for appropriate findings on whether the claimant's employment substantially aggravated arthritis in her left knee. Id. at ¶¶ 10-15.

[¶17] The definition of compensable injury at issue in Pleinis and Geck was amended to its current form by 1997 N.D. Sess. Laws ch. 527, § 1. See Geck, 1998 ND 158, ¶ 6 n.1, 583 N.W.2d 621. The current provisions of N.D.C.C. § 65-01-02(10)(b)(7) do not include language referring to both a latent underlying condition and an injury, disease, or condition which clearly manifested itself before a compensable injury. See Geck, at ¶ 6; Pleinis, 472 N.W.2d at 462. According to a WSI representative, however, the 1997 amendment did "not significantly change the substance" of the definition of compensable injury; rather, the amendment

> removes unnecessary and confusing language. It also adopts language that better matches the language of the "aggravation statute" at 65-05-15. This will create a more

> workable progression of compensation with no gaps between the various statutes. If the workplace incident is a "mere trigger" of a preexisting condition then there is no coverage. If the work injury significantly aggravates a known preexisting condition then there is a partial coverage. If the work injury is not really affected by the presence of the preexisting condition then it is a "new and separate" injury and is covered at 100% of benefits.

Hearing on H.B. 1269 Before House Industry, Business and Labor, 55 N.D. Legis. Sess. (Feb. 5, 1997) (written testimony of Reagan R. Pufall, WSI Attorney).

[¶18] The issue in this case involves the meaning of the current language of N.D.C.C. § 65-01-02(10)(b)(7). Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. If the language of a statute is clear and unambiguous, the letter of the statute may not be disregarded under the pretext of pursing its spirit. N.D.C.C. § 1-02-05. If the language of a statute is ambiguous, however, a court may resort to extrinsic aids to resolve the ambiguity. N.D.C.C. § 1-02-39.

[¶19] Under N.D.C.C. § 65-01-02(10)(b)(7), the Legislature has used the disjunctive word "or" in the phrase about whether employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition. The word "or" is disjunctive and ordinarily means an alternative between different things or actions with separate and independent significance. State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, ¶ 14, 712 N.W.2d 828. The Legislature's use of two different phrases with the disjunctive "or" contemplates separate and independent significance for ascertaining whether an injury attributable to a preexisting injury, disease, or other condition is compensable because employment substantially accelerates the progression or substantially worsens the severity of the injury, disease, or other condition. See id. A commonly understood meaning of "substantial" is "consisting of or relating to substance, . . . not imaginary or illusory, . . . real, true, . . . important, essential." Merriam-Webster's Collegiate Dictionary 1245 (11th ed. 2005). That source also defines "accelerate" to mean "to bring about at an earlier time, . . . to cause to move faster, . . . to hasten the progress or development of." Id. at 6. That source also defines "worsen" as to make "worse," which in turn means "more unfavorable, difficult, unpleasant, or painful." Id. at 1445. Moreover, under the statutory definition of compensable injury, an injury attributable to a preexisting injury, disease, or other condition is not compensable when employment acts as a "trigger" to produce "symptoms" in the preexisting injury, disease, or other condition. A commonly

understood meaning of "symptom" is "subjective evidence of disease or physical disturbance, . . . something that indicates the presence of bodily disorder." Id. at 1267. That source defines "trigger" as "something that acts like a mechanical trigger in initiating a process or reaction." Id. at 1337.

[¶20] When those terms are considered together to give meaning to each term, they mean injuries attributable to a preexisting injury, disease, or other condition are compensable if the employment in some real, true, important, or essential way makes the preexisting injury, disease or other condition more unfavorable, difficult, unpleasant, or painful, or in some real, true, important, or essential way hastens the progress or development of the preexisting injury, disease, or other condition. In contrast, injuries attributable to a preexisting injury, disease, or other condition are not compensable if employment acts like a mechanical trigger in initiating a process or reaction to produce subjective evidence of a disease or physical disturbance or something that indicates the presence of a bodily disorder. We recognize, as did the ALJ and Dr. Peterson, that pain can be a symptom, or subjective evidence, of an injury, disease or other condition. Under the ordinary meaning of those terms, however, employment can also substantially worsen the severity, or substantially accelerate the progression of a preexisting injury, disease, or other condition when employment acts as a substantial contributing factor to substantially increase a claimant's pain. That conclusion is consistent with our decision in Geck, that pain can be a substantial aggravation of an underlying latent condition. 1998 ND 158, ¶ 10, 583 N.W.2d 621.

[¶21] Nevertheless, under the ordinary meaning of the language in N.D.C.C. § 65-01-02(10)(b)(7), the distinction between compensability and noncompensability for injuries attributable to a preexisting injury, disease, or other condition is not clear, and we may consider extrinsic aids, including legislative history and former statutory provisions, to construe the current language. N.D.C.C. § 1-02-39(3) and (4). When the language in N.D.C.C. § 65-01-02(10)(b)(7) is considered together and in conjunction with the statement in the 1997 legislative history that those amendments did not change the substance of the definition of compensable injury, we conclude part of the analysis for assessing compensability of injuries attributable to a latent preexisting injury, disease, or other condition is whether or not the underlying preexisting injury, disease, or other condition would likely have progressed similarly in the absence of employment. See Pleinis, 472 N.W.2d at 462-63. We decline to construe those terms so narrowly as to require only evidence of a substantial worsening of the disease itself to authorize an award of benefits. Rather, the statute also authorizes compensability if employment substantially accelerates the progression or substantially worsens the severity of the injury, disease, or other condition, which we conclude requires consideration of whether the

preexisting injury, disease or other condition would have progressed similarly in the absence of employment. Under that language, employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition when the underlying condition likely would not have progressed similarly in the absence of employment. That interpretation provides additional clarification and explanation for delineating between noncompensability when employment triggers symptoms in a preexisting latent injury, disease, or other condition and compensability when employment substantially accelerates the progression or substantially worsens the severity of the preexisting injury, disease, or other condition. That interpretation is also consistent with the purpose of workers compensation law to provide "sure and certain relief" for workers, see N.D.C.C. § 65-01-01, and with the principle that employment must be a substantial contributing factor for a compensable injury and need not be the sole cause of the injury. Bruder, 2009 ND 23, ¶ 8, 761 N.W.2d 588.

[¶22] Here, the ALJ relied heavily on Dr. Peterson's opinion and decided Mickelson's employment triggered his symptoms of degenerative disc disease, but did not substantially accelerate the progression or worsen the severity of the degenerative disc disease itself, stating:

> The greater weight of the evidence shows that Mr. Mickelson's low back pain and right leg radiculopathy are symptoms of his degenerative disc disease. There is no evidence that Mr. Mickelson had these symptoms before he operated a loader for Gratech Company Ltd.
>
> At the hearing, Dr. Peterson discussed the significance of Mr. Mickelson's degenerative disc disease symptoms and their relation to his alleged work injury. Dr. Peterson testified that Mr. Mickelson's degenerative disc disease was not caused by his reported work injury. Dr. Peterson explained that Mr. Mickelson's symptoms are consistent with the MRI findings and typical of degenerative disc disease, including radiation of pain into the right leg. And his symptoms upon standing, which are relieved by sitting, are also typical of degenerative disc disease. Dr. Peterson agreed with Dr. Goehner that degenerative disc disease develops over time and is an aging process. It is not the result of a repetitive injury (Dr. Goehner also characterized Mr. Mickelson's condition as "chronic" as opposed to an acute injury). According to Dr. Peterson, work activities have no significant effect on the development of degenerative disc disease and there is no evidence that repetitive stress accelerates or worsens degenerative disc disease. But, if you subject degenerative discs to the type of work Mr. Mickelson was doing, you may trigger symptoms of degenerative disc disease, but the degenerative disc disease itself is not substantially

> aggravated or worsened. In sum, Dr. Peterson opined that Mr. Mickelson's low back and right leg pain are symptoms of his degenerative disc disease. His work activities may have elicited these symptoms, but the work didn't substantially aggravate or worsen the degenerative disc disease.
>
> Drs. Peterson and Goehner agree that Mr. Mickelson has degenerative disc disease unrelated to his work duties and that his low back and right leg symptoms are related to the degenerative disc disease. They part company however, in that Dr. Goehner says that the degenerative disc disease is worse because Mr. Mickelson's work caused him to have symptoms, and he didn't have symptoms before. Dr. Peterson says that Mr. Mickelson's work may have triggered symptoms of the degenerative disc disease, but work didn't make the degenerative disc disease worse; it made it symptomatic.
>
> . . . Mr. Mickelson has preexisting degenerative disc disease and his low back pain and right leg pain and numbness are symptoms of his degenerative disc disease. Mr. Mickelson's employment triggered his symptoms of degenerative disc disease but there is no evidence that Mr.
>
> Mickelson's employment substantially accelerated the progression or substantially worsened the severity of the degenerative disc disease. Mr. Mickelson suggests that the triggering of symptoms constitutes a substantial worsening of his degenerative disc disease. If that were the case, the "trigger" language in 65-01-02[(10)](b)(7) would be meaningless. The language of section 65-01-02[(10)](b)(7) makes clear that a mere triggering of symptoms in a preexisting disease will not suffice as a compensable injury, in the absence of evidence that the disease itself is substantially worse. Here, the evidence shows that Mr. Mickelson's work acted as a trigger to make the underlying degenerative disc disease symptomatic, but there is no evidence that the underlying disease was made worse. Mr. Mickelson may think it unfair, but the legislature [has] made clear that a mere trigger of symptoms is not enough to establish compensability.

[¶23] We conclude Dr. Peterson's opinion and the ALJ's acceptance of that opinion misapplied the definition of compensable injury. The ALJ said Mickelson's condition itself, degenerative disc disease, must have substantially worsened. Although the ALJ made a conclusory statement there was no evidence Mickelson's employment substantially accelerated the progression of his degenerative disc disease, the ALJ's decision focused on whether the disease itself worsened without considering whether the underlying injury, disease, or other condition would likely have progressed

similarly in the absence of his employment. We conclude the ALJ misapplied the law by looking too narrowly at Mickelson's degenerative disc disease itself without considering whether his injury, disease, or other condition would likely not have progressed similarly in the absence of his employment so as to substantially accelerate the progression or substantially worsen the severity of his injury, disease, or other condition. We therefore reverse the judgment and remand for proper application of N.D.C.C. § 65-01-02 (10)(b)(7).

IV

[¶24] Mickelson argues the ALJ failed to address the August 30, 2009, opinion by Mickelson's treating physician, Dr. Goehner, stating Mickelson sustained a compensable soft tissue injury. WSI responds the ALJ adequately addressed that issue and could reasonably conclude Mickelson failed to establish a compensable injury to his lumbar spine in the context of resolving the issue about his degenerative disc disease.

[¶25] The ALJ's decision describes some inconsistency about the nature of Mickelson's injury, disease, or other condition in Dr. Goehner's August 30, 2009, office note and in his April 2010 letter "to whom it may concern." The ALJ found the "greater weight of the evidence shows that Mr. Mickelson's low back pain and right leg radiculopathy are symptoms of his degenerative disc disease." Contrary to the ALJ's conclusion, however, Dr. Goehner's April letter referenced stress to the muscles, and he did not specifically eliminate a muscle strain as an injury, disease, or other condition. Moreover, this issue is intertwined with the correct application of the definition of compensable injury, and on remand, WSI must adequately explain Dr. Goehner's soft-tissue or muscle strain diagnosis in the context of the correct application of N.D.C.C. § 65-01-02(10)(b)(7).

V

[¶26] Mickelson argues he adequately explained his failure to provide notice of his injury to his employer within seven days of the injury and that failure is not an independent ground to deny his claim. WSI responds the ALJ could reasonably decide WSI could consider Mickelson's failure to provide his employer with notice of injury within seven days of the injury.

[¶27] Section 65-05-01.2, N.D.C.C., provides an "employee shall take steps immediately to notify the employer that the accident occurred and . . . the general nature of the injury to the employee, if apparent," and "[a]bsent good cause, notice may not be given later than seven days after the accident occurred or the general nature of the employee's injury became apparent." Under N.D.C.C. § 65-05-

01.3, WSI "may consider" an employee's failure to notify an employer of an accident and the general nature of the employee's injury in determining whether the employee's injury is compensable. An obvious purpose of those statutes is to provide notice to an employer to allow the employer to alleviate dangerous conditions to prevent injuries. The plain language of those statutes allows WSI to "consider" a claimant's failure to notify an employer of an accident and the nature of the employee's injuries. Here, however, the ALJ did not decide Mickelson's claim on this issue, and we will not further address it.

VI

[¶28] We reverse the judgment and remand for proceedings consistent with this opinion.

[¶29] Carol Ronning Kapsner
Mary Muehlen Maring

VandeWalle, Chief Justice, concurring specially.

[¶30] I was part of the majority in Geck v. North Dakota Workers Comp. Bureau, 1998 ND 158, 583 N.W.2d 621, concluding that pain could be an aggravation of an underlying arthritic condition. While I agree with that conclusion, I am disturbed by the failure of the statutes and our opinions construing those statutes to distinguish those instances in which pain aggravates an underlying condition, i.e., substantially worsens the severity of the condition, from those instances in which, as the majority opinion here recognizes, pain is only a symptom of the condition triggered by employment. To the extent that is a factual, rather than a legal question, I am willing to remand the matter to WSI for further consideration under the facts of this case.

[¶31] Gerald W. VandeWalle, C.J.

Crothers, Justice, concurring in part and dissenting in part.

[¶32] I concur in Parts IV and V. I respectfully dissent from Part III in which the majority reverses the ALJ's decision based on what it concludes is an improper application of N.D.C.C. § 65-01-02(10)(b)(7). Majority opinion at ¶ 23. I would affirm because the ALJ correctly applied current law and because the ALJ reasonably could have found based on the evidence that Mickelson failed to prove a compensable injury.

[¶33] A "compensable injury" under workers' compensation law is defined as follows:

> "10. 'Compensable injury' means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings.
> . . . .
>
> "b. The term does not include:
> . . . .
>
> "(7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity."

N.D.C.C. § 65-01-02(10). This case focuses on exclusionary language in the statute to determine whether Mickelson's low back pain is compensable as a substantial acceleration or a substantial worsening of an existing injury.

[¶34] Mickelson's argument is substantially based on a law review article written by his lawyer and on a general Workers' Compensation treatise. The majority does not follow Mickelson down that path but spends considerable effort parsing the meaning of "symptom," "substantially" and "trigger" and applying two of this Court's decisions issued before N.D.C.C. § 65-01-02(10) was changed in 1997. Majority opinion at ¶¶ 14-21. I respectfully submit both Mickelson and the majority fail to focus on the plain words given by the legislature, which of course should direct our result. See N.D.C.C. § 1-02-02 ("Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained.").

[¶35] The statute applicable to Mickelson's claim says injuries attributable to a preexisting disease do not constitute a compensable injury. N.D.C.C. § 65-01-02(10)(b)(7). An exception to the limitation is if the injury attributable to a preexisting disease is proven to substantially accelerate or substantially worsen severity of the disease. Id. The ALJ's conclusion 2 succinctly, and I believe correctly, explains both a proper reading of the statute and why Mickelson's claim fails:

> "Mr. Mickelson has preexisting degenerative disc disease and his low back pain and right leg pain and numbness are symptoms of his degenerative disc disease. Mr. Mickelson's employment triggered his symptoms of degenerative disc disease but there is no evidence that Mr. Mickelson's employment substantially accelerated the progression or substantially worsened the severity of the

> degenerative disc disease. Mr. Mickelson suggests that the triggering of symptoms constitutes a substantial worsening of his degenerative disc disease. If that were the case, the 'trigger' language in 65-01-02(b)(7) would be meaningless. The language of section 65-01-02(b)(7) makes clear that a mere triggering of symptoms in a preexisting disease will not suffice as a compensable injury, in the absence of evidence that the disease itself is substantially worse. Here, the evidence shows that Mr. Mickelson's work acted as a trigger to make the underlying degenerative disc disease symptomatic, but there is no evidence that the underlying disease was made worse. Mr. Mickelson may think it unfair, but the legislature [h]as made clear that a mere trigger of symptoms is not enough to establish compensability."

[¶36] Rather than affirming the ALJ's straightforward application of the statute, the majority opinion seemingly grinds the meaning of ordinary words to powder and reshapes them to say "a preexisting injury, disease, or other condition are compensable if the employment in some real, true, important, or essential way makes the preexisting injury, disease or other condition more unfavorable, difficult, unpleasant, or painful, or in some real, true, important, or essential way hastens the progress or development of the preexisting injury, disease, or other condition." Majority opinion at ¶ 20. After reshaping, the statute is read by the majority to say "pain can be a substantial aggravation of an underlying latent condition," Majority opinion at ¶ 20 (citing Geck v. North Dakota Workers Comp. Bureau, 1998 ND 158, ¶ 10, 583 N.W.2d 621), and "employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition when the underlying condition likely would not have progressed similarly in the absence of employment." Majority opinion at ¶ 21. In simple terms, the majority holding appears to be that pain caused by current employment can be a compensable injury because it made an existing condition more "unfavorable," "difficult" or "unpleasant." But clearly, that is not what the legislature said or meant in N.D.C.C. § 65-01-02(10)(b)(7).

[¶37] A key part of the majority's result is based on this Court's outdated holding in Geck. The definition of compensable injury applicable to Geck's claim in July of 1996 was far different from the definition applicable to Mickelson's claim. In Geck, the definition of compensable injury applicable to the case was:

> "b. The term ['compensable injury'] does not include:
> . . . .
>
> (6) Injuries attributable to a preexisting injury, disease, or condition which clearly manifested itself prior to the compensable injury. This does not prevent compensation

> where employment substantially aggravates and acts upon an underlying condition, substantially worsening its severity, or where employment substantially accelerates the progression of an underlying condition. It is insufficient, however, to afford compensation under this title solely because the employment acted as a trigger to produce symptoms in a latent and underlying condition if the underlying condition would likely have progressed similarly in the absence of the employment trigger, unless the employment trigger is determined to be a substantial aggravating or accelerating factor. An underlying condition is a preexisting injury, disease, or infirmity."

Geck, 1998 ND 158, ¶ 6, 583 N.W.2d 621.

[¶38] The version of N.D.C.C. § 65-01-02(10) applicable to Mickelson's claim requires a "substantial acceleration" or "substantial worsening" of the severity of the preexisting injury, disease or other condition. The current statute no longer allows recovery for "aggravation" of a condition like that considered in Geck. Therefore, even following the Geck majority's view that pain could have been an aggravation of Geck's existing condition, the current statute eliminates the possibility for compensation when pain is no more than aggravation of an underlying disease.

[¶39] Rather than requiring us to dissect the statute, I believe this case is more like Bergum v. N.D. Workforce Safety & Ins., 2009 ND 52, 764 N.W.2d 178. There, the claimant alleged a recent work incident substantially worsened or substantially accelerated his chronic low back condition. Id. at ¶ 10. This Court applied the version of the statute applicable to Mickelson's claim and held:

> "A claimant seeking workforce safety and insurance benefits has the burden of proving by a preponderance of the evidence that the claimant has suffered a compensable injury and is entitled to benefits. N.D.C.C. § 65-01-11; Manske v. Workforce Safety & Ins., 2008 ND 79, ¶ 9, 748 N.W.2d 394. To carry this burden, a claimant must prove by a preponderance of the evidence that the medical condition for which benefits are sought is causally related to a work injury. Manske, ¶ 9; Swenson [v. Workforce Safety & Ins. Fund], 2007 ND 149, ¶ 24, 738 N.W.2d 892.
>
> "Under N.D.C.C. § 65-01-02(10), a compensable injury 'must be established by medical evidence supported by objective medical findings.' Section 65-01-02(10)(b), N.D.C.C., excludes preexisting injuries from what is defined as a 'compensable injury,' stating in part:
>
> > "10. 'Compensable injury' means an injury by accident arising out of and in the course of hazardous employment which must be

> established by medical evidence supported by objective medical findings.
> . . . .
>
> "(b) The term does not include:
> . . . .
>
> "(7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.

"(Emphasis added.) Thus, under N.D.C.C. § 65-01-02(10)(b)(7), unless a claimant's employment 'substantially accelerates' the progression of, or 'substantially worsens' the severity of, a preexisting injury, disease, or other condition, it is not a 'compensable injury' when the claimant's employment merely acts to trigger symptoms in the preexisting injury, disease, or other condition.

A

"Bergum argues that although a worsening of his preexisting condition is not apparent on x-ray or other radiological testing, Bergum's symptoms have worsened since the January 2006 incident and have more significantly impacted him. Bergum further argues his injury is compensable based upon this Court's decision in Geck v. North Dakota Workers Comp. Bur., 1998 ND 158, 583 N.W.2d 621. We disagree.

"In Geck, 1998 ND 158, ¶ 10, 583 N.W.2d 621, the claimant for workers compensation benefits suffered pain in her knee caused by kneeling at work, resulting in her underlying condition of arthritis becoming symptomatic and painful. Under the version of N.D.C.C. § 65-01-02 then in effect, this Court stated that when employment 'triggers symptoms in a latent and underlying condition, compensation is generally not allowed if the underlying condition would likely have progressed similarly in the absence of the employment trigger, unless the employment trigger is a substantial aggravating or accelerating factor.' Geck, ¶ 7 (emphasis omitted); see also Hein v. North Dakota Workers Comp. Bur., 1999 ND 200, ¶ 17, 601 N.W.2d 576 (quoting Geck). In Geck, at ¶ 13, this Court held that the ALJ had failed to reconcile favorable medical evidence and failed to set forth expressly the reasons for disregarding the favorable medical evidence. In light of the medical evidence, this Court remanded the Geck case to the Bureau to make findings whether the employment

> trigger 'substantially aggravated' the arthritis in the claimant's knee. Geck, at ¶ 14.
>
> "In this case, the issue is whether Bergum's work-related incident 'substantially accelerated' the progression of, or 'substantially worsened' the severity of, a preexisting injury, disease, or other condition. Unlike Geck, the ALJ's opinion here, adopted by WSI as its final order, made a number of specific factual findings addressing the competing expert physician opinions and ultimately accepted the opinion of WSI's examining physician, Dr. Joel Gedan, a board certified neurologist, over the opinion of Bergum's treating physician, Dr. Gomez. As will be discussed further, WSI's final order contains findings of fact and conclusions of law that explicitly explain why Dr. Gedan's expert opinion was accepted over Dr. Gomez's opinion. We conclude that our decision in the Geck case does not mandate a finding that Bergum has a compensable injury in this case."

Bergum, at ¶¶ 11-15.

[¶40] Like in Bergum, Mickelson's case is controlled by the current statute requiring proof of a compensable injury stemming from employment that substantially accelerates the progression of an existing disease or substantially worsens its severity. Like in Bergum, Mickelson's case had conflicting evidence which was considered and explained by the ALJ. Like in Bergum, Mickelson's case does not turn on the holding in Geck but instead requires affirmance under a plain reading of the law, the evidence in this case and our standard of review.

[¶41] Daniel J. Crothers
Dale V. Sandstrom

(3) 1-21-2013
HB 1163

Before the House Industry, Labor and Business Committee

Testimony of Dean J. Haas on 2013 House Bill 1163, January 21, 2013

Hon. Chairman George Keiser and Members of the House Industry, Labor and Business Committee

I am an attorney practicing law at Larson Latham Huettl, LLP, including practice in worker's compensation. My familiarity with North Dakota worker's compensation law dates back to 1984, when I served as counsel to the Bureau until 1995. I have been representing injured workers on and off for since then. I testify today on behalf of injured workers in opposition to House Bill 1163.

This bill would amend a crucial definition of compensable injury in the 'trigger statute,' N.D.C.C. § 65-01-02(10)(7). The trigger statute determines the circumstance in which the worsening of a preexisting condition by a work injury is compensable, and when it is not. The trigger statute does not itself direct whether the worsening of a preexisting condition by injury must be proven only by changes to the condition shown on an x-ray or MRI, or whether the significant change can be the significant pain and need for medical care that resulted from the injury.

But the North Dakota Supreme Court has held that a significant increase in pain and need for medical care can be compensable. *See Mickelson v. North Dakota Workforce Safety and Insurance*, 2012 ND 164, 820 N.W.2d 333. **HB 1163 bill would deny that pain can show a significant worsening of the preexisting condition, and reverse the decisions of the North Dakota Supreme Court.** The Court ruled as it did because degenerative conditions such as aging discs do not concern us unless painful. An injury may not only trigger the onset of pain, but never go away afterwards, shattering the employee's life. So, in determining coverage for preexisting conditions worsened by work injury, the vast majority of State Worker's Compensation Acts look to the effect of the work injury on the employee's health, life, his need for medical attention, and disability, not on whether the injury altered the appearance of an MRI.

The leading commentator on Workers' Compensation Law, Professor Larson, says that "preexisting disease or infirmity of the employee does not disqualify a claim ... if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. This is sometimes expressed by saying the employer takes the employee as it finds that employee."1 Larson, *Workmen's Compensation Law*, § 9.02[1], p. 9-15 (2007).

HB 1163 would tighten North Dakota's already 'conservative approach' to denying benefits when a work injury combines with a preexisting condition to cause a need for significant medical care, by requiring the preexisting condition to be shown to be worse on an x-ray or MRI. The bill would thus make North Dakota an outlier in the compensation it provides to older workers with degenerative but asymptomatic conditions.

I am not aware of any other state that has such a harsh construction of preexisting conditions. This is because we all age, and over time, we will all develop degenerative changes; as you know, for example, we all develop degenerative disc disease at some point. But many people have these aging discs without having any symptoms. Thus, OSHA is of the view that an employment injury that substantially alters the need for medical attention is a significant worsening of a preexisting condition. *See* Segwick, 2010 Performance Evaluation of North Dakota Workforce Safety and Insurance, at 92, citing the OSHA Handbook.

North Dakota physicians have told me that pain, level of function and activity level, and need for care are extremely important, and that a focus on radiographic images misses the mark. Treating physicians, I am told, generally disagree with the idea that a 'mere triggering' of significant pain is not relevant. After all, much of medicine treats pain, and it is a breach of medical ethics to ignore pain treatment.

In 2009, the legislature agreed that the preexisting condition issue required study, recognizing that North Dakota law excluding coverage for preexisting conditions is more restrictive than other jurisdictions. *See* House Concurrent Resolution No. 3008 (2009). The 2008 Performance Evaluation Report of Berry, Dunn, McNeil & Parker and the 2010 Performance Evaluation conducted by Sedgwick both noted the extremely conservative nature of the preexisting condition exclusion in North Dakota. Berry et al. noted in their 2008 Evaluation that WSI's claims adjusters reported "a change in philosophy surrounding the investigation of prior injuries, pre-existing conditions or degenerative conditions," and being "encouraged by management to become 'more focused' on their investigations." *Id.* at p. 90. Similarly, Sedgwick noted how the preexisting condition exclusion morphed over the years, beginning with the intent in 1989 to preclude claims "attributable to a pre-existing condition if it was the independent intervening cause of the injury." Sedgwick, at p. 90. At this point, North Dakota has one of the most restrictive preexisting condition exclusions in the nation.

WSI's draft bill denying that a significant increase in pain from an employment injury can constitute a significant worsening in a preexisting degenerative condition is a severely retrograde step, and should not be done without the study the legislature ordered in 2009.

Moreover, this bill is not necessary. WSI has prevailed in most of the litigation whether the preexisting condition was worsened by work injury. See e.g., *Pleinis v. North Dakota Workers Comp. Bureau,* 472 N.W.2d 459, 462 (N.D. 1991); *Hein v. North Dakota Workers Compensation Bureau*, 1999 ND 200, 601 N.W.2d 576; *Bruder v. Workforce Safety & Ins.*, 2009 ND 23, ¶ 8, 761 N.W.2d 588; *Bergum v. N.D. Workforce Safety and Insurance*, 2009 ND 52, ¶ 12, 764 N.W.2d 178; *Curran v. North Dakota Workforce Safety and Insurance*, 2010 ND 227, 791 N.W.2d 622. Thus, Professor Larson observes that "denials of compensation in this category [due to a preexisting condition] are almost entirely the result of holdings that the evidence did not support a finding that the

employment contributed to the final result." 1 Larson, *Workers' Compensation Law*, § 9.02[4], p. 9-19 (Revised November 2007).

In other words, whether the claim is compensable depends upon whether, as a factual matter, the employment "contributed to the final result," *i.e*, whether employment contributed to the employees' *damages*. WSI's conclusion that a worsening of the condition itself must be a worsening shown via x-ray or MRI is illogical and not grounded in any compensation principle.

Thank you for listening to the employee's perspective. I share your interest in improving North Dakota's Worker's Compensation system, and hope to continue to provide constructive input from an important stakeholder—injured workers—who have no organized voice to present their legitimate views and concerns.

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Addendum: A History

The subsection denying benefits due to preexisting conditions was created in 1989 with the passage of Senate Bill 2256. I was Bureau counsel at the time, and the testimony stated that the intent was to preclude injuries "attributable to a preexisting condition if it was the independent intervening cause of the injury. The subsection does not prevent compensation where an employment injury has also contributed to the preexisting condition by worsening its severity, or accelerating its progression." The trigger language was added in 1991, so that de minimis triggering events that did not substantially alter the natural progression of a preexisting condition are not made compensable for that reason alone. See *Pleinis v. North Dakota Workers Comp. Bureau,* 472 N.W.2d 459, 462 (N.D. 1991).[i]

Then, in *Geck v. North Dakota Workers Comp. Bureau,* 1998 ND 158, 583 N.W.2d 621, the Court held that a compensable aggravation of a preexisting arthritis does include a worsening of symptoms. Rejecting the ALJ's legal conclusion that the employee's employment injury was not compensable because it was "merely a trigger," to pain, *Geck*, ¶ 11, the Court said that "Pain can be an aggravation of an underlying condition of arthritis," finding the distinction between worsening the "condition itself" and the symptoms to be without significance. *Id.* ¶ 10.

The statute was amended yet again by 1997 House Bill 1269, wherein WSI told the committee that legislature that the trigger exclusion means that a condition that is getting progressively worse is not compensable if it *merely takes a turn for the worse at work,* but is compensable if the employment significantly alters the significance of the condition. *See* Hearing on H.B. 1269 Before House Industry, Business and Labor Committee, 55th N.D. Legis. Sess. (February 5, 1997)(prepared testimony of Reagan Pufall.) The degenerative changes inherent to aging are not of much concern unless there are symptoms. Pufall's testimony illustrates this as he contended that a workplace injury that substantially accelerates or worsens a condition "so that it got much worse more quickly than it would have otherwise," is compensable. *Id.* WSI also claimed that "*[t]his bill does not significantly change the substance of this paragraph.* It removes unnecessary and confusing language." The 1997 amendments did not attempt to over-rule *Geck,* and the 2009 legislature agreed that the preexisting condition issue required study, given that North Dakota law was—and remains to this day—much more restrictive than other jurisdictions. *See* House Concurrent Resolution No. 3008 (2009).

As noted above, the relatively conservative and cautious North Dakota Supreme Court again re-affirmed that a significant increase in pain and medical treatment due to a work injury can be a compensable injury under our State's Worker's Compensation Act. *See Mickelson v. North Dakota Workforce Safety and Insurance*, 2012 ND 164, 820 N.W.2d 333.

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[i] In *Pleinis*, the Bureau initially awarded the employee medical benefits for a localized contusion and strain of the right knee which occurred in a slip and fall he sustained at work in September of 1984. *Pleinis*, 472 N.W.2d at 460. X-rays of Pleinis's knee taken at the time of the injury indicated that he had osteoarthritis, but the diagnosis was limited to a contusion/strain, and the treatment course related to the sprain/contusion. He had no other problems, and there was no indication that the work injury triggered, worsened or accelerated the employee's arthritis or its symptoms at the time; WSI only paid benefits for the soft tissue injury. Significantly, the employee returned to work and received no further medical treatment for his knee until he consulted a physician nearly five years after the initial contusion, in March, 1989. *Id.* There was no new injury that caused the pain to recur. The Bureau found that there was no causal relationship of any kind—including a worsening of symptoms—between Mr. Pleinis' injury and his arthritis. *Pleinis,* at 461. This factual finding of a natural progression ruled out that the employment caused a worsening of the claimant's pain that thus resulted in a need for medical care.

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Title.

1-23-2013pm

Prepared by the Legislative Council staff for
Representative M. Nelson
January 23, 2013

HB 1163

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1163

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a workers' compensation review committee study of workers' compensation coverage of worsening of conditions.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. WORKERS' COMPENSATION REVIEW COMMITTEE STUDY - WORSENING OF CONDITIONS.

1. During the 2013-14 interim, the workers' compensation review committee shall study workers' compensation coverage of worsening of conditions. The committee may conduct this study by including the study as one of the elements to be evaluated in the workforce safety and insurance independent performance evaluation conducted under section 65-02-30. The study should include consideration of how the state's workers' compensation law:

   a. Addresses prior injuries, preexisting conditions, and degenerative conditions;

   b. Distinguishes between triggers, aggravation, and substantial worsening or acceleration of conditions;

   c. Addresses pain and chronic pain as elements in worsening of conditions, including whether the law distinguishes between pain that aggravates an underlying condition or substantially worsens or accelerates a condition and pain that is only a symptom of the condition triggered by employment; and

   d. Relating to coverage of worsening of conditions, compares to the comparable workers' compensation laws of other states.

2. The committee shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the legislative management."

Renumber accordingly

2013 House Bill No.1163
Testimony before the Senate Industry, Business, and Labor Committee
Presented by: Tim Wahlin, Chief of Injury Services
Workforce Safety & Insurance
March 19, 2013

Mr. Chairman, Members of the Committee:

My name is Tim Wahlin, Chief of Injury Services at WSI. I am here on behalf of WSI to provide information to the Committee to assist in the process. After review and analysis of the legal opinion giving rise to this bill, the WSI Board of Directors supports this bill.

We have met with various constituents to explain why this bill was submitted and what is intended by the language. There are various interpretations regarding the bills effects and intentions in circulation and we acknowledge that fact. I have attached a one page information sheet to provide additional clarification. Many of the issues within this bill illustrate profound ideological differences within the workers' compensation industry. Hopefully this testimony will help to explain the reasons behind the bill's creation and facilitate a discussion regarding a reasonable balancing of the potential increased scope of coverage and the costs this may generate.

This bill was submitted in response to the recent North Dakota Supreme Court opinion of Mickelson v. WSI, 2012 ND 164. I have provided a copy for your reference. The opinion was signed by two Justices; two Justices dissented with the main holding of the opinion; and the Chief Justice wrote a separate, concurring opinion. The Chief Justice indicated he was "disturbed' that the statutes and Supreme Court opinions have not done a better job explaining the application of the law at issue in the Mickelson case. ¶30. This bill is intended to provide the requested clarification.

The issue addressed by Mickelson is the extent to which North Dakota will be required to expand workers' compensation coverage of preexisting conditions. At least two Justices on the North Dakota Supreme Court have proffered a conclusion which would

broadly expand North Dakota coverage for these employees. This interpretation is contrary to WSI's, and if fully adopted, would significantly increase statewide premium rates. Obviously, our Supreme Court is the final word on statutory interpretation, but if the Court's conclusion is contrary to the Legislative Assembly's intent, this Body may clarify the statutes.

The governing law in this case is section NDCC 65-01-02(10)(b)(7), which provides, in relevant part:

> 10. "Compensable injury" means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings...
>
> b. The term does not include:...
>
> (7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.

Under WSI's interpretation of this statute, if an employee had a preexisting condition and an incident at work occurred which produced symptoms in this underlying condition, in most cases pain or discomfort, the incident would not qualify as a compensable injury. This would be categorized as a "trigger" under 65-01-02(10)(b)(7). However, if more than just symptoms occurred, and the medical evidence showed the occurrence at work substantially accelerated or substantially worsened the underlying condition, the claim would be compensable.

WSI has always taken the position this statutory scheme focuses the compensability determination on the underlying condition, not on the symptoms produced. In other words, if employment substantially accelerates the underlying condition's progression or

substantially worsens its severity, it is compensable. If employment simply causes symptoms to arise but did not progress the condition, it is not.

In Mickelson, a plurality of the Court has rendered an interpretation of 65-01-02(10)(b)(7) as follows:

> "When those terms are considered together to give meaning to each term, they mean injuries attributable to a preexisting injury, disease, or other condition are compensable if the employment in some real, true, important, or essential way makes the preexisting injury, disease or other condition more unfavorable, difficult, unpleasant, or painful, or in some real, true, important, or essential way hastens the progress or development of the preexisting injury, disease, or other condition." ¶20.

The two justices who authored this analysis suggest that when work creates unpleasantness or painfulness from an underlying condition, it has hastened the progress or development of the underlying condition. This conclusion may well mean pain triggered from a preexisting condition is now compensable because a worsening may be presumed.

For example, let's assume I have arthritis in my knees. My work requires walking. Walking causes soreness or pain. Under this analysis, because I experienced pain, my condition becomes compensable because a worsening may be presumed. Does this now make my pre-existing arthritis a compensable injury and is an employer now liable for my total knee replacement? Under WSI's analysis, the symptoms, pain and discomfort, would only become compensable when a physician can provide documentation that my employment acted to significantly worsen or progress the underlying condition.

If a worsening can be presumed because there is pain, this would essentially render the statute moot. Underlying conditions would be compensable and the commensurate

costs would dramatically increase. Cases adjudicated under the prior interpretation, which have become final, it is assumed, will not be required to be reopened. However, pending and future claims, even if generated from existing injuries, would be subject to this expansive interpretation of the term "compensable injury."

WSI actuaries at Bickerstaff, Ryan, Whatley & Burkhalter have used available claim information to analyze the economic effects on the fund should this more expansive reading be adopted. Using WSI's current claim data, they project the fiscal impact of this expansion would be somewhere in the range of 5.5% to 12.6% increase to the statewide premium rates. To illustrate this effect, for fiscal year 2011-12, WSI's net earned premium was roughly $250 million. A 10% increase would be $25 million per year increase to North Dakota premium payers.

No portion of this bill renders pain irrelevant or unimportant. No portion of this bill denies medical coverage for treatment of pain in compensable conditions. This bill simply refocuses our inquiry back to the industrial affects upon preexisting conditions. A substantial worsening of the underlying condition will remain compensable. A triggering of the symptoms consistent with the condition without the substantial worsening or progression is not.

WSI has consulted with one of our long term contract physicians in gathering and analyzing the bill's effects. Dr. Gregory Peterson is a local PM&R physician and Board Certified Pain Medicine specialist. He has done consulting with WSI for many years and maintains a medical practice in Bismarck. He was the physician who provided a medical assessment in the Mickelson case. His consultation in this matter has provided the agency insight into the differentiation between symptoms and the underlying conditions that may in fact cause them. WSI makes him available for you today to aid in your discussions regarding this bill.

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

2013 HB 1163 Information Sheet

- By law, WSI does not cover preexisting conditions unless employment substantially progresses or substantially worsens the condition. If work simply triggers symptoms in the preexisting condition, it is not a compensable event unless the underlying condition is substantially progressed. North Dakota law focuses on the underlying condition, not upon the symptoms.
- A recent North Dakota Supreme Court opinion has raised questions regarding the interpretation of this statute. Mickelson v. WSI, 2012 ND 164.
- Two of the five Justices in that case have raised the possibility that pain in and of itself may constitute a substantial progression. Two Justices refer to the plain language of the statute and conclude, as WSI has, that pain is a symptom and focus must remain on the underlying or preexisting condition to comply with the statute. A fifth Justice appears to have called for clarification of the legislative intent in this area.
- The opinion provided no clear majority; the case was remanded, continues through litigation, and at some point may ultimately be decided by the Supreme Court.
- WSI adjudicates claims based on changes to the preexisting or underlying condition. If pain itself eventually qualifies as a substantial worsening, the underlying rule effectively goes away. As a result, significantly more claims will become compensable.
- HB 1163 has been proposed to address the questions raised by the North Dakota Supreme Court by clarifying that pain is a symptom and inquiry still must be made into whether the underlying condition has substantially worsened. In other words, under this proposal, no change is anticipated in application of the law.
- This bill does not eliminate pain as a consideration. Pain remains a symptom to be considered in determining whether an underlying condition has substantially progressed. It remains relevant and a necessary indicator from which a physician's opinion can be based.
- Although implied in the current law, the bill explicitly provides that pain is a symptom and is not in itself a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition.
- The bill will not result in a change to the historical application of the statute; as a result, no fiscal impact is anticipated.
- Absent a change, perceived ambiguities with the law will remain, likely resulting in additional and unnecessary litigation and increased overall system costs.
- Absent a change, potential significant financial implications may exist depending on if and how the Mickelson v. WSI case is ultimately decided by the Court. To the extent the Court ultimately determines that pain could, in itself, be considered a substantial acceleration or worsening of a pre-existing condition, WSI coverage will expand. Initial actuarial analysis should this event occur indicates a 5.5% to 12.6% increase in premium rate levels.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2012 ND 164

James Mickelson, Appellant
v.
North Dakota Workforce Safety and Insurance, Appellee
and
Gratech Company, Ltd., Respondent

No. 20110232

Appeal from the District Court of McLean County, South Central Judicial District, the Honorable Bruce A. Romanick, Judge.
REVERSED AND REMANDED.
Opinion of the Court by Kapsner, Justice.
Dean J. Haas, P.O. Box 2056, Bismarck, N.D. 58502-2056, for appellant.
Jacqueline S. Anderson, Special Assistant Attorney General, P.O. Box 2626, Fargo, N.D. 58108-2626, for appellee.

Mickelson v. Workforce Safety & Insurance

No. 20110232

Kapsner, Justice.

[¶1] James Mickelson appeals from a judgment affirming a Workforce Safety and Insurance ("WSI") decision denying his claim for workers' compensation benefits. He argues WSI erred in deciding he did not suffer a compensable injury. We conclude WSI misapplied the definition of a compensable injury, and we reverse and remand for further proceedings.

I

[¶2] On December 17, 2009, Mickelson applied to WSI for workers' compensation benefits, claiming he "developed soreness in lower back due to repetitive motion over time using foot pedal and driving over rough terrain" on August 30, 2009, while employed as an

equipment operator for Gratech Company, Ltd. According to Mickelson, he began working for Gratech on July 29, 2009, as an equipment operator, and he generally worked twelve-hour days, sitting in a pay loader and operating it with his right foot. Mickelson reported he operated the pay loader over rough terrain, which resulted in significant jarring and jolting. He claimed that before working for Gratech, he had not had any lower back pain, or pain radiating into his right leg. According to Gratech, Mickelson did not miss any work because of an injury from July 29 through December 3, 2009, when he was laid off, and he did not report the injury to Gratech until December 14, 2009.

[¶3] On August 30, 2009, Mickelson saw Dr. Matthew Goehner, a chiropractor, and Dr. Goehner's contemporaneous office note stated Mickelson had "pain across the lower back and pain/numbness into the right thigh and calf to foot" and diagnosed "[l]umbosacral region dysfunction with associated soft tissue damage causing nerve root irritation, lumbosacral strain from repetitive foot control use." Mickelson did not seek further treatment from Dr. Goehner until December 7, 2009, and he also saw Dr. Goehner for treatment five more times in December 2009, and once in January 2010. Dr. Goehner's notes state Mickelson reported low back pain with right leg numbness after standing for ten minutes and describe a decreased range in motion. In January 2010, Mickelson received treatment from Linda Regan, a physician assistant. An x-ray indicated "[m]ild degenerative changes of the lumbar spine," and Regan's preliminary report stated "[n]o degenerative joint disease seen" and "[l]umbar strain with right radiculopathy on standing." A January 2010 MRI of Mickelson's lumbosacral spine revealed "moderate to severe degenerative disk disease with a central disk protrusion at L5-S1." Regan later wrote a letter "to whom it may concern," stating that because Mickelson did not have back pain before operating the pay loader, "the combination of the rough terrain, using heavy equipment, sitting in one position for several hours at a time and also only using his right leg has caused the back pain with right leg radiculopathy for which he originally sought care." Mickelson also received treatment from Julie Schulz, a physical therapist, and she wrote a letter "to whom it may concern," stating Mickelson's "injury is directly related to his work situation. He did not have prior back pain. This is a reasonable mechanism of injury for this problem."

[¶4] In April 2010, Dr. Goehner also wrote a letter "[t]o whom it may concern," stating Mickelson had

> not presented with any lower back problems prior to 8/30/09. [His] injury is directly related to his job duties at work which included repetitive foot control use which caused stress to the muscles, ligaments, and joints of the lower back and pelvis. Following the injuries to the lower back [Mickelson] was diagnosed with degenerative disk disease. As you know, degenerative disk disease is a

> condition that develops over time and is a normal part of the aging process. Mr. Mickelson did not have any of the symptoms of degenerative disk disease prior to performing his job duty of repetitively using the foot controls and driving over rough terrain.

[¶5] Meanwhile, in February 2010, WSI initially denied Mickelson's claim for benefits, stating the January 2010 MRI revealed preexisting degenerative conditions or arthritis and concluding his "one month employment with Gratech triggered symptoms of [his] pre-existing degeneration but did not cause the condition and [he] did not report an injury to Gratech until 12/14/2009." Mickelson requested reconsideration, claiming his work substantially worsened his condition and he had never had prior lumbar spine problems. In March 2010, Dr. Gregory Peterson, a WSI medical consultant, conducted a record review and reported Mickelson's condition of "lumbar degenerative disc disease [was] not caused by his reported work injury. Repetitive motion on rough ground while operating a loader may trigger symptoms associated with lumbar degenerative disc disease, but not cause, substantially worsen, or substantially accelerate the condition." In March 2010, WSI again denied Mickelson's claim, relying on Dr. Peterson's review and concluding Mickelson had "not proven that his work activities substantially accelerated the progression of or substantially worsened the severity of his lumbar spine condition."

[¶6] Mickelson sought a formal administrative hearing, and an administrative law judge ("ALJ") was designated to issue a final decision on his claim. See N.D.C.C. § 65-02-22.1. After an administrative hearing, the ALJ affirmed WSI's denial of benefits, concluding Mickelson failed to establish he suffered a compensable injury during the course of his employment. The ALJ explained Mickelson had preexisting degenerative disc disease and his low-back pain and right leg pain and numbness were symptoms of his degenerative disc disease. The ALJ said Mickelson's employment triggered his symptoms of degenerative disc disease, but there was no evidence his employment substantially accelerated the progression or substantially worsened the severity of the degenerative disc disease. The ALJ rejected Mickelson's argument that triggering of symptoms constitutes a substantial worsening of his degenerative disc disease, concluding that interpretation would render the "trigger" language of N.D.C.C. § 65-01-02(10)(b)(7) meaningless. The ALJ also rejected Dr. Goehner's assessment of a lumbosacral strain from repetitive foot control use, concluding his assessment was not consistent with his later opinion that Mickelson's symptoms stem from degenerative disc disease. The district court affirmed the ALJ's decision.

II

[¶7] Under the Administrative Agencies Practice Act, N.D.C.C. ch.

28-32, courts exercise limited appellate review of a final order by an administrative agency. Workforce Safety & Ins. v. Auck, 2010 ND 126, ¶ 8, 785 N.W.2d 186. Under N.D.C.C. §§ 28-32-46 and 28-32-49, the district court and this Court must affirm an order by an administrative agency unless:

> 1. The order is not in accordance with the law.
> 2. The order is in violation of the constitutional rights of the appellant.
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶8] In reviewing an ALJ's factual findings, a court may not make independent findings of fact or substitute its judgment for the ALJ's findings; rather, a court must determine only whether a reasoning mind reasonably could have determined the findings were proven by the weight of the evidence from the entire record. Auck, 2010 ND 126, ¶ 9, 785 N.W.2d 186. When reviewing an appeal from a final order by an independent ALJ, similar deference is given to the ALJ's factual findings, because the ALJ has the opportunity to observe witnesses and the responsibility to assess the credibility of witnesses and resolve conflicts in the evidence. Id. Similar deference is not given to an independent ALJ's legal conclusions, however, and a court reviews an ALJ's legal conclusions in the same manner as legal conclusions generally. Id. Questions of law, including the interpretation of a statute, are fully reviewable on appeal. Id.

III

[¶9] Mickelson argues he suffered a compensable injury, because his employment caused a substantial worsening of the symptoms of his previously asymptomatic degenerative disc disease. He argues pain can be a substantial worsening of his condition and the triggering of degenerative disc disease from no symptoms to a disabling condition that requires medical care is compensable as a significant worsening of the clinical picture of his condition.

[¶10] The parties agree the provisions for aggravation in N.D.C.C. § 65-05-15 are not applicable to Mickelson's claim, because the language of that statute applies to "a prior injury, disease, or other condition, known in advance of the work injury," or to the "progression of a prior compensable injury." N.D.C.C. § 65-05-15(1) and (2). See Mikkelson v. North Dakota Workers Comp. Bureau, 2000 ND 67, ¶¶ 12-17, 609 N.W.2d 74. There is no evidence in this record that Mickelson knew about his lower back injury, disease, or other condition before he operated the loader for Gratech, and the ALJ found "there is no evidence . . . Mickelson had these symptoms [of low back pain and right leg radiculopathy] before he operated the loader for Gratech." Rather, the issue in this case involves whether Mickelson suffered a compensable injury.

[¶11] Claimants have the burden of proving by a preponderance of evidence they have suffered a compensable injury and are entitled to workers' compensation benefits. N.D.C.C. § 65-01-11; Bergum v. Workforce Safety & Ins., 2009 ND 52, ¶ 11, 764 N.W.2d 178. To carry this burden, a claimant must prove the "condition for which benefits are sought is causally related to a work injury." Bergum, at ¶ 11. To establish a casual connection, a claimant must demonstrate the claimant's employment was a substantial contributing factor to the injury and need not show employment was the sole cause of the injury. Bruder v. Workforce Safety & Ins., 2009 ND 23, ¶ 8, 761 N.W.2d 588.

[¶12] Section 65-01-02(10), N.D.C.C., defines a "compensable injury" under workers' compensation law, and provides, in relevant part:

> 10. "Compensable injury" means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings.
> . . . .
>
> b. The term does not include:
> . . . .
>
> (7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.

[¶13] In discussing the language of N.D.C.C. § 65-01-02(10)(b)(7), this Court has said "a preexisting injury must have been substantially accelerated or substantially worsened by the claimant's employment in order for the claimant to be entitled to benefits," and a "compensable injury does not exist when the claimant's employment

merely triggers symptoms of the preexisting injury," disease, or other condition. Johnson v. Workforce Safety & Ins., 2012 ND 87, ¶ 8. See also Bergum, 2009 ND 52, ¶ 12, 764 N.W.2d 178. Under N.D.C.C. § 65-01-02(10)(b)(7), this Court's decisions about a compensable injury in the context of a lower back claim generally involve a history of back-related injuries before a work incident. See Curran v. Workforce Safety & Ins., 2010 ND 227, ¶¶ 1, 3, 791 N.W.2d 622; Bergum, at ¶ 2; Bruder, 2009 ND 23, ¶ 2, 761 N.W.2d 588. Those decisions have generally recognized that whether a compensable injury exists involves a factual determination, but we have not otherwise analyzed the distinction between compensability when employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition and noncompensability when employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition.

[¶14] In Geck v. North Dakota Workers Comp. Bureau, 1998 ND 158 ¶ 6, 583 N.W.2d 621, and Pleinis v. North Dakota Workers Comp. Bureau, 472 N.W.2d 459, 462 (N.D. 1991), this Court reviewed workers' compensation decisions under a prior definition of compensable injury, which said a compensable injury did not include:

> Injuries attributable to a preexisting injury, disease, or condition which clearly manifested itself prior to the compensable injury. This does not prevent compensation where employment substantially aggravates and acts upon an underlying condition, substantially worsening its severity, or where employment substantially accelerates the progression of an underlying condition. However, it is insufficient to afford compensation under this title solely because the employment acted as a trigger to produce symptoms in a latent and underlying condition if the underlying condition would likely have progressed similarly in the absence of such employment trigger, unless the employment trigger is also deemed a substantial aggravating or accelerating factor. An underlying condition is a preexisting injury, disease, or infirmity.

[¶15] In Pleinis, 472 N.W.2d at 463 (footnote omitted), this Court construed the prior definition and rejected a claimant's argument that a predicate requirement for rejecting a claim was that a preexisting condition must clearly manifest itself before a work incident:

> The third sentence describes the consequences when employment acts as a trigger to produce symptoms in a "latent and underlying condition." In that situation compensation is not allowed if the underlying condition would likely have progressed similarly in the absence of an employment trigger, unless the employment trigger is a

> substantial aggravating or accelerating factor.
>
> The statutory language unambiguously describes when compensation is allowed for injuries attributable to both a latent underlying condition and an underlying condition which clearly manifested itself prior to the compensable injury. In both situations injuries attributable to the preexisting condition are compensable if employment substantially aggravates or accelerates the condition. . . . [T]he statute focuses on whether the underlying condition would likely have progressed similarly in the absence of employment, or whether the employment substantially aggravated or accelerated the condition.

This Court upheld a decision rejecting a claim for benefits, stating the agency's findings were sufficient to understand that the claimant's employment was not a substantial or accelerating factor of his underlying arthritis and osteoarthritic change and the underlying condition would likely have progressed similarly in the absence of his employment. Pleinis, at 463. Under Pleinis and the prior definition of compensable injury, the focus was on whether the underlying latent condition would likely have progressed similarly in the absence of employment, or whether employment substantially aggravated or accelerated the condition.

[¶16] In Geck, 1998 ND 158, ¶ 10, 583 N.W.2d 621, in the context of a latent underlying arthritic condition that was asymptomatic until a sharp knee pain was triggered while kneeling at work, a majority of this Court said there was no evidence contradicting that the claimant's pain in her left knee was caused by her work activity and that kneeling at work resulted in her latent underlying arthritic condition becoming symptomatic and painful. The majority concluded pain could be an aggravation of an underlying condition of arthritis and remanded for appropriate findings on whether the claimant's employment substantially aggravated arthritis in her left knee. Id. at ¶¶ 10-15.

[¶17] The definition of compensable injury at issue in Pleinis and Geck was amended to its current form by 1997 N.D. Sess. Laws ch. 527, § 1. See Geck, 1998 ND 158, ¶ 6 n.1, 583 N.W.2d 621. The current provisions of N.D.C.C. § 65-01-02(10)(b)(7) do not include language referring to both a latent underlying condition and an injury, disease, or condition which clearly manifested itself before a compensable injury. See Geck, at ¶ 6; Pleinis, 472 N.W.2d at 462. According to a WSI representative, however, the 1997 amendment did "not significantly change the substance" of the definition of compensable injury; rather, the amendment

> removes unnecessary and confusing language. It also adopts language that better matches the language of the "aggravation statute" at 65-05-15. This will create a more

> workable progression of compensation with no gaps between the various statutes. If the workplace incident is a "mere trigger" of a preexisting condition then there is no coverage. If the work injury significantly aggravates a known preexisting condition then there is a partial coverage. If the work injury is not really affected by the presence of the preexisting condition then it is a "new and separate" injury and is covered at 100% of benefits.

Hearing on H.B. 1269 Before House Industry, Business and Labor, 55 N.D. Legis. Sess. (Feb. 5, 1997) (written testimony of Reagan R. Pufall, WSI Attorney).

[¶18] The issue in this case involves the meaning of the current language of N.D.C.C. § 65-01-02(10)(b)(7). Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. If the language of a statute is clear and unambiguous, the letter of the statute may not be disregarded under the pretext of pursing its spirit. N.D.C.C. § 1-02-05. If the language of a statute is ambiguous, however, a court may resort to extrinsic aids to resolve the ambiguity. N.D.C.C. § 1-02-39.

[¶19] Under N.D.C.C. § 65-01-02(10)(b)(7), the Legislature has used the disjunctive word "or" in the phrase about whether employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition. The word "or" is disjunctive and ordinarily means an alternative between different things or actions with separate and independent significance. State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, ¶ 14, 712 N.W.2d 828. The Legislature's use of two different phrases with the disjunctive "or" contemplates separate and independent significance for ascertaining whether an injury attributable to a preexisting injury, disease, or other condition is compensable because employment substantially accelerates the progression or substantially worsens the severity of the injury, disease, or other condition. See id. A commonly understood meaning of "substantial" is "consisting of or relating to substance, . . . not imaginary or illusory, . . . real, true, . . . important, essential." Merriam-Webster's Collegiate Dictionary 1245 (11th ed. 2005). That source also defines "accelerate" to mean "to bring about at an earlier time, . . . to cause to move faster, . . . to hasten the progress or development of." Id. at 6. That source also defines "worsen" as to make "worse," which in turn means "more unfavorable, difficult, unpleasant, or painful." Id. at 1445. Moreover, under the statutory definition of compensable injury, an injury attributable to a preexisting injury, disease, or other condition is not compensable when employment acts as a "trigger" to produce "symptoms" in the preexisting injury, disease, or other condition. A commonly

understood meaning of "symptom" is "subjective evidence of disease or physical disturbance, . . . something that indicates the presence of bodily disorder." Id. at 1267. That source defines "trigger" as "something that acts like a mechanical trigger in initiating a process or reaction." Id. at 1337.

[¶20] When those terms are considered together to give meaning to each term, they mean injuries attributable to a preexisting injury, disease, or other condition are compensable if the employment in some real, true, important, or essential way makes the preexisting injury, disease or other condition more unfavorable, difficult, unpleasant, or painful, or in some real, true, important, or essential way hastens the progress or development of the preexisting injury, disease, or other condition. In contrast, injuries attributable to a preexisting injury, disease, or other condition are not compensable if employment acts like a mechanical trigger in initiating a process or reaction to produce subjective evidence of a disease or physical disturbance or something that indicates the presence of a bodily disorder. We recognize, as did the ALJ and Dr. Peterson, that pain can be a symptom, or subjective evidence, of an injury, disease or other condition. Under the ordinary meaning of those terms, however, employment can also substantially worsen the severity, or substantially accelerate the progression of a preexisting injury, disease, or other condition when employment acts as a substantial contributing factor to substantially increase a claimant's pain. That conclusion is consistent with our decision in Geck, that pain can be a substantial aggravation of an underlying latent condition. 1998 ND 158, ¶ 10, 583 N.W.2d 621.

[¶21] Nevertheless, under the ordinary meaning of the language in N.D.C.C. § 65-01-02(10)(b)(7), the distinction between compensability and noncompensability for injuries attributable to a preexisting injury, disease, or other condition is not clear, and we may consider extrinsic aids, including legislative history and former statutory provisions, to construe the current language. N.D.C.C. § 1-02-39(3) and (4). When the language in N.D.C.C. § 65-01-02(10)(b)(7) is considered together and in conjunction with the statement in the 1997 legislative history that those amendments did not change the substance of the definition of compensable injury, we conclude part of the analysis for assessing compensability of injuries attributable to a latent preexisting injury, disease, or other condition is whether or not the underlying preexisting injury, disease, or other condition would likely have progressed similarly in the absence of employment. See Pleinis, 472 N.W.2d at 462-63. We decline to construe those terms so narrowly as to require only evidence of a substantial worsening of the disease itself to authorize an award of benefits. Rather, the statute also authorizes compensability if employment substantially accelerates the progression or substantially worsens the severity of the injury, disease, or other condition, which we conclude requires consideration of whether the

preexisting injury, disease or other condition would have progressed similarly in the absence of employment. Under that language, employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition when the underlying condition likely would not have progressed similarly in the absence of employment. That interpretation provides additional clarification and explanation for delineating between noncompensability when employment triggers symptoms in a preexisting latent injury, disease, or other condition and compensability when employment substantially accelerates the progression or substantially worsens the severity of the preexisting injury, disease, or other condition. That interpretation is also consistent with the purpose of workers compensation law to provide "sure and certain relief" for workers, see N.D.C.C. § 65-01-01, and with the principle that employment must be a substantial contributing factor for a compensable injury and need not be the sole cause of the injury. Bruder, 2009 ND 23, ¶ 8, 761 N.W.2d 588.

[¶22] Here, the ALJ relied heavily on Dr. Peterson's opinion and decided Mickelson's employment triggered his symptoms of degenerative disc disease, but did not substantially accelerate the progression or worsen the severity of the degenerative disc disease itself, stating:

> The greater weight of the evidence shows that Mr. Mickelson's low back pain and right leg radiculopathy are symptoms of his degenerative disc disease. There is no evidence that Mr. Mickelson had these symptoms before he operated a loader for Gratech Company Ltd.
>
> At the hearing, Dr. Peterson discussed the significance of Mr. Mickelson's degenerative disc disease symptoms and their relation to his alleged work injury. Dr. Peterson testified that Mr. Mickelson's degenerative disc disease was not caused by his reported work injury. Dr. Peterson explained that Mr. Mickelson's symptoms are consistent with the MRI findings and typical of degenerative disc disease, including radiation of pain into the right leg. And his symptoms upon standing, which are relieved by sitting, are also typical of degenerative disc disease. Dr. Peterson agreed with Dr. Goehner that degenerative disc disease develops over time and is an aging process. It is not the result of a repetitive injury (Dr. Goehner also characterized Mr. Mickelson's condition as "chronic" as opposed to an acute injury). According to Dr. Peterson, work activities have no significant effect on the development of degenerative disc disease and there is no evidence that repetitive stress accelerates or worsens degenerative disc disease. But, if you subject degenerative discs to the type of work Mr. Mickelson was doing, you may trigger symptoms of degenerative disc disease, but the degenerative disc disease itself is not substantially

> aggravated or worsened. In sum, Dr. Peterson opined that Mr. Mickelson's low back and right leg pain are symptoms of his degenerative disc disease. His work activities may have elicited these symptoms, but the work didn't substantially aggravate or worsen the degenerative disc disease.
>
> Drs. Peterson and Goehner agree that Mr. Mickelson has degenerative disc disease unrelated to his work duties and that his low back and right leg symptoms are related to the degenerative disc disease. They part company however, in that Dr. Goehner says that the degenerative disc disease is worse because Mr. Mickelson's work caused him to have symptoms, and he didn't have symptoms before. Dr. Peterson says that Mr. Mickelson's work may have triggered symptoms of the degenerative disc disease, but work didn't make the degenerative disc disease worse; it made it symptomatic.
>
> . . . Mr. Mickelson has preexisting degenerative disc disease and his low back pain and right leg pain and numbness are symptoms of his degenerative disc disease. Mr. Mickelson's employment triggered his symptoms of degenerative disc disease but there is no evidence that Mr. Mickelson's employment substantially accelerated the progression or substantially worsened the severity of the degenerative disc disease. Mr. Mickelson suggests that the triggering of symptoms constitutes a substantial worsening of his degenerative disc disease. If that were the case, the "trigger" language in 65-01-02[(10)](b)(7) would be meaningless. The language of section 65-01-02[(10)](b)(7) makes clear that a mere triggering of symptoms in a preexisting disease will not suffice as a compensable injury, in the absence of evidence that the disease itself is substantially worse. Here, the evidence shows that Mr. Mickelson's work acted as a trigger to make the underlying degenerative disc disease symptomatic, but there is no evidence that the underlying disease was made worse. Mr. Mickelson may think it unfair, but the legislature [has] made clear that a mere trigger of symptoms is not enough to establish compensability.

[¶23] We conclude Dr. Peterson's opinion and the ALJ's acceptance of that opinion misapplied the definition of compensable injury. The ALJ said Mickelson's condition itself, degenerative disc disease, must have substantially worsened. Although the ALJ made a conclusory statement there was no evidence Mickelson's employment substantially accelerated the progression of his degenerative disc disease, the ALJ's decision focused on whether the disease itself worsened without considering whether the underlying injury, disease, or other condition would likely have progressed

similarly in the absence of his employment. We conclude the ALJ misapplied the law by looking too narrowly at Mickelson's degenerative disc disease itself without considering whether his injury, disease, or other condition would likely not have progressed similarly in the absence of his employment so as to substantially accelerate the progression or substantially worsen the severity of his injury, disease, or other condition. We therefore reverse the judgment and remand for proper application of N.D.C.C. § 65-01-02 (10)(b)(7).

IV

[¶24] Mickelson argues the ALJ failed to address the August 30, 2009, opinion by Mickelson's treating physician, Dr. Goehner, stating Mickelson sustained a compensable soft tissue injury. WSI responds the ALJ adequately addressed that issue and could reasonably conclude Mickelson failed to establish a compensable injury to his lumbar spine in the context of resolving the issue about his degenerative disc disease.

[¶25] The ALJ's decision describes some inconsistency about the nature of Mickelson's injury, disease, or other condition in Dr. Goehner's August 30, 2009, office note and in his April 2010 letter "to whom it may concern." The ALJ found the "greater weight of the evidence shows that Mr. Mickelson's low back pain and right leg radiculopathy are symptoms of his degenerative disc disease." Contrary to the ALJ's conclusion, however, Dr. Goehner's April letter referenced stress to the muscles, and he did not specifically eliminate a muscle strain as an injury, disease, or other condition. Moreover, this issue is intertwined with the correct application of the definition of compensable injury, and on remand, WSI must adequately explain Dr. Goehner's soft-tissue or muscle strain diagnosis in the context of the correct application of N.D.C.C. § 65-01-02(10)(b)(7).

V

[¶26] Mickelson argues he adequately explained his failure to provide notice of his injury to his employer within seven days of the injury and that failure is not an independent ground to deny his claim. WSI responds the ALJ could reasonably decide WSI could consider Mickelson's failure to provide his employer with notice of injury within seven days of the injury.

[¶27] Section 65-05-01.2, N.D.C.C., provides an "employee shall take steps immediately to notify the employer that the accident occurred and . . . the general nature of the injury to the employee, if apparent," and "[a]bsent good cause, notice may not be given later than seven days after the accident occurred or the general nature of the employee's injury became apparent." Under N.D.C.C. § 65-05-

01.3, WSI "may consider" an employee's failure to notify an employer of an accident and the general nature of the employee's injury in determining whether the employee's injury is compensable. An obvious purpose of those statutes is to provide notice to an employer to allow the employer to alleviate dangerous conditions to prevent injuries. The plain language of those statutes allows WSI to "consider" a claimant's failure to notify an employer of an accident and the nature of the employee's injuries. Here, however, the ALJ did not decide Mickelson's claim on this issue, and we will not further address it.

VI

[¶28] We reverse the judgment and remand for proceedings consistent with this opinion.

[¶29] Carol Ronning Kapsner
Mary Muehlen Maring

VandeWalle, Chief Justice, concurring specially.

[¶30] I was part of the majority in Geck v. North Dakota Workers Comp. Bureau, 1998 ND 158, 583 N.W.2d 621, concluding that pain could be an aggravation of an underlying arthritic condition. While I agree with that conclusion, I am disturbed by the failure of the statutes and our opinions construing those statutes to distinguish those instances in which pain aggravates an underlying condition, i.e., substantially worsens the severity of the condition, from those instances in which, as the majority opinion here recognizes, pain is only a symptom of the condition triggered by employment. To the extent that is a factual, rather than a legal question, I am willing to remand the matter to WSI for further consideration under the facts of this case.

[¶31] Gerald W. VandeWalle, C.J.

Crothers, Justice, concurring in part and dissenting in part.

[¶32] I concur in Parts IV and V. I respectfully dissent from Part III in which the majority reverses the ALJ's decision based on what it concludes is an improper application of N.D.C.C. § 65-01-02(10)(b)(7). Majority opinion at ¶ 23. I would affirm because the ALJ correctly applied current law and because the ALJ reasonably could have found based on the evidence that Mickelson failed to prove a compensable injury.

[¶33] A "compensable injury" under workers' compensation law is defined as follows:

> "10. 'Compensable injury' means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings.
> . . . .
>
> "b. The term does not include:
> . . . .
>
> "(7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity."

N.D.C.C. § 65-01-02(10). This case focuses on exclusionary language in the statute to determine whether Mickelson's low back pain is compensable as a substantial acceleration or a substantial worsening of an existing injury.

[¶34] Mickelson's argument is substantially based on a law review article written by his lawyer and on a general Workers' Compensation treatise. The majority does not follow Mickelson down that path but spends considerable effort parsing the meaning of "symptom," "substantially" and "trigger" and applying two of this Court's decisions issued before N.D.C.C. § 65-01-02(10) was changed in 1997. Majority opinion at ¶¶ 14-21. I respectfully submit both Mickelson and the majority fail to focus on the plain words given by the legislature, which of course should direct our result. See N.D.C.C. § 1-02-02 ("Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained.").

[¶35] The statute applicable to Mickelson's claim says injuries attributable to a preexisting disease do not constitute a compensable injury. N.D.C.C. § 65-01-02(10)(b)(7). An exception to the limitation is if the injury attributable to a preexisting disease is proven to substantially accelerate or substantially worsen severity of the disease. Id. The ALJ's conclusion 2 succinctly, and I believe correctly, explains both a proper reading of the statute and why Mickelson's claim fails:

> "Mr. Mickelson has preexisting degenerative disc disease and his low back pain and right leg pain and numbness are symptoms of his degenerative disc disease. Mr. Mickelson's employment triggered his symptoms of degenerative disc disease but there is no evidence that Mr. Mickelson's employment substantially accelerated the progression or substantially worsened the severity of the

> degenerative disc disease. Mr. Mickelson suggests that the triggering of symptoms constitutes a substantial worsening of his degenerative disc disease. If that were the case, the 'trigger' language in 65-01-02(b)(7) would be meaningless. The language of section 65-01-02(b)(7) makes clear that a mere triggering of symptoms in a preexisting disease will not suffice as a compensable injury, in the absence of evidence that the disease itself is substantially worse. Here, the evidence shows that Mr. Mickelson's work acted as a trigger to make the underlying degenerative disc disease symptomatic, but there is no evidence that the underlying disease was made worse. Mr. Mickelson may think it unfair, but the legislature [h]as made clear that a mere trigger of symptoms is not enough to establish compensability."

[¶36] Rather than affirming the ALJ's straightforward application of the statute, the majority opinion seemingly grinds the meaning of ordinary words to powder and reshapes them to say "a preexisting injury, disease, or other condition are compensable if the employment in some real, true, important, or essential way makes the preexisting injury, disease or other condition more unfavorable, difficult, unpleasant, or painful, or in some real, true, important, or essential way hastens the progress or development of the preexisting injury, disease, or other condition." Majority opinion at ¶ 20. After reshaping, the statute is read by the majority to say "pain can be a substantial aggravation of an underlying latent condition," Majority opinion at ¶ 20 (citing Geck v. North Dakota Workers Comp. Bureau, 1998 ND 158, ¶ 10, 583 N.W.2d 621), and "employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition when the underlying condition likely would not have progressed similarly in the absence of employment." Majority opinion at ¶ 21. In simple terms, the majority holding appears to be that pain caused by current employment can be a compensable injury because it made an existing condition more "unfavorable," "difficult" or "unpleasant." But clearly, that is not what the legislature said or meant in N.D.C.C. § 65-01-02(10)(b)(7).

[¶37] A key part of the majority's result is based on this Court's outdated holding in Geck. The definition of compensable injury applicable to Geck's claim in July of 1996 was far different from the definition applicable to Mickelson's claim. In Geck, the definition of compensable injury applicable to the case was:

> "b. The term ['compensable injury'] does not include:
> . . . .
>
> (6) Injuries attributable to a preexisting injury, disease, or condition which clearly manifested itself prior to the compensable injury. This does not prevent compensation

> where employment substantially aggravates and acts upon an underlying condition, substantially worsening its severity, or where employment substantially accelerates the progression of an underlying condition. It is insufficient, however, to afford compensation under this title solely because the employment acted as a trigger to produce symptoms in a latent and underlying condition if the underlying condition would likely have progressed similarly in the absence of the employment trigger, unless the employment trigger is determined to be a substantial aggravating or accelerating factor. An underlying condition is a preexisting injury, disease, or infirmity."

Geck, 1998 ND 158, ¶ 6, 583 N.W.2d 621.

[¶38] The version of N.D.C.C. § 65-01-02(10) applicable to Mickelson's claim requires a "substantial acceleration" or "substantial worsening" of the severity of the preexisting injury, disease or other condition. The current statute no longer allows recovery for "aggravation" of a condition like that considered in Geck. Therefore, even following the Geck majority's view that pain could have been an aggravation of Geck's existing condition, the current statute eliminates the possibility for compensation when pain is no more than aggravation of an underlying disease.

[¶39] Rather than requiring us to dissect the statute, I believe this case is more like Bergum v. N.D. Workforce Safety & Ins., 2009 ND 52, 764 N.W.2d 178. There, the claimant alleged a recent work incident substantially worsened or substantially accelerated his chronic low back condition. Id. at ¶ 10. This Court applied the version of the statute applicable to Mickelson's claim and held:

> "A claimant seeking workforce safety and insurance benefits has the burden of proving by a preponderance of the evidence that the claimant has suffered a compensable injury and is entitled to benefits. N.D.C.C. § 65-01-11; Manske v. Workforce Safety & Ins., 2008 ND 79, ¶ 9, 748 N.W.2d 394. To carry this burden, a claimant must prove by a preponderance of the evidence that the medical condition for which benefits are sought is causally related to a work injury. Manske, ¶ 9; Swenson [v. Workforce Safety & Ins. Fund], 2007 ND 149, ¶ 24, 738 N.W.2d 892.
>
> "Under N.D.C.C. § 65-01-02(10), a compensable injury 'must be established by medical evidence supported by objective medical findings.' Section 65-01-02(10)(b), N.D.C.C., excludes preexisting injuries from what is defined as a 'compensable injury,' stating in part:
>
> > "10. 'Compensable injury' means an injury by accident arising out of and in the course of hazardous employment which must be

> established by medical evidence supported by objective medical findings.
> . . . .
>
> "(b) The term does not include:
> . . . .
>
> "(7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.

"(Emphasis added.) Thus, under N.D.C.C. § 65-01-02(10)(b)(7), unless a claimant's employment 'substantially accelerates' the progression of, or 'substantially worsens' the severity of, a preexisting injury, disease, or other condition, it is not a 'compensable injury' when the claimant's employment merely acts to trigger symptoms in the preexisting injury, disease, or other condition.

A

"Bergum argues that although a worsening of his preexisting condition is not apparent on x-ray or other radiological testing, Bergum's symptoms have worsened since the January 2006 incident and have more significantly impacted him. Bergum further argues his injury is compensable based upon this Court's decision in Geck v. North Dakota Workers Comp. Bur., 1998 ND 158, 583 N.W.2d 621. We disagree.

"In Geck, 1998 ND 158, ¶ 10, 583 N.W.2d 621, the claimant for workers compensation benefits suffered pain in her knee caused by kneeling at work, resulting in her underlying condition of arthritis becoming symptomatic and painful. Under the version of N.D.C.C. § 65-01-02 then in effect, this Court stated that when employment 'triggers symptoms in a latent and underlying condition, compensation is generally not allowed if the underlying condition would likely have progressed similarly in the absence of the employment trigger, unless the employment trigger is a substantial aggravating or accelerating factor.' Geck, ¶ 7 (emphasis omitted); see also Hein v. North Dakota Workers Comp. Bur., 1999 ND 200, ¶ 17, 601 N.W.2d 576 (quoting Geck). In Geck, at ¶ 13, this Court held that the ALJ had failed to reconcile favorable medical evidence and failed to set forth expressly the reasons for disregarding the favorable medical evidence. In light of the medical evidence, this Court remanded the Geck case to the Bureau to make findings whether the employment

> trigger 'substantially aggravated' the arthritis in the claimant's knee. Geck, at ¶ 14.
>
> "In this case, the issue is whether Bergum's work-related incident 'substantially accelerated' the progression of, or 'substantially worsened' the severity of, a preexisting injury, disease, or other condition. Unlike Geck, the ALJ's opinion here, adopted by WSI as its final order, made a number of specific factual findings addressing the competing expert physician opinions and ultimately accepted the opinion of WSI's examining physician, Dr. Joel Gedan, a board certified neurologist, over the opinion of Bergum's treating physician, Dr. Gomez. As will be discussed further, WSI's final order contains findings of fact and conclusions of law that explicitly explain why Dr. Gedan's expert opinion was accepted over Dr. Gomez's opinion. We conclude that our decision in the Geck case does not mandate a finding that Bergum has a compensable injury in this case."

Bergum, at ¶¶ 11-15.

[¶40] Like in Bergum, Mickelson's case is controlled by the current statute requiring proof of a compensable injury stemming from employment that substantially accelerates the progression of an existing disease or substantially worsens its severity. Like in Bergum, Mickelson's case had conflicting evidence which was considered and explained by the ALJ. Like in Bergum, Mickelson's case does not turn on the holding in Geck but instead requires affirmance under a plain reading of the law, the evidence in this case and our standard of review.

[¶41] Daniel J. Crothers
Dale V. Sandstrom

Top Home Opinions Search Index Lawyers Rules Research Courts Calendar Comments

2013 House Bill No. 1163
Testimony before the Senate Industry, Business, and Labor Committee
Presented by: Gregory Peterson, M.D.
Workforce Safety & Insurance
March 19, 2013

Good morning Mr. Chairman and Members of the Committee:

My name is Greg Peterson. I am here to testify in support of HB 1163 and provide a medical perspective as to why pain is not an appropriate measure for defining a work injury or "condition." In doing so I am not diminishing the importance of anyone's pain.

I am a Physical Medicine and Rehabilitation physician and a Board Certified Pain Medicine specialist. Since my departure from the Mayo Clinic where I served as the Co-Director of the Impairment Evaluation Center and later Director of the Mayo Spine Center in 1996, I have had a full time practice in Bismarck. Since 2000, I have worked to varying degrees as a medical consultant for WSI.

Patients expect doctors to know what causes their pain. There are times when we can meet that expectation, but in cases of back pain, a health care provider is often unable to absolutely localize the cause. Even our best test, an MRI, often fails to provide a clear answer. Our lack of scientific certainty, however, does not prevent us from providing accurate diagnostic labels. In fact, patients, payers, and other health providers generally demand it. So, a health care provider gathers all the evidence and makes his best guess based on what he believes is the underlying condition causing the symptoms.

You might think that surely doctors understand pain. In my experience the answer is, sort of. The most widely accepted definition of pain comes from the International Society for the Study of Pain.

> "Pain is an unpleasant sensory or emotional experience associated with actual or potential tissue damage, or described in terms of such damage."

That's it. No physician can reliably measure pain. A health care provider's assessment relies on the patient's report. I've seen thousands of pain patients. I don't know who has more pain and who has less pain. No one does, except the person with the pain. Basing a definition of injury entirely on the report of someone who is seeking medical and time loss benefits creates reliability issues.

That leads to my reason for being here. Simply stated, if the Mickelson case progresses to where a person's report of increased pain in a preexisting condition establishes a

compensable injury, unrealiability will become prevelant in the system. Without addessing the question of what is causing the pain and inquiry about whether work progressed or worsened the condition, liability will be established without the requisite tie to employment.

HB 1163 provides necessary clarification to prevent pain alone from defining a work injury. It does not eliminate the symptom of pain as an important evidence of a work injury.

I understand there are concerned physicians who may testify against this bill. But this bill is not an issue of medical practice. Nor does this bill limit diagnosis or treatment of patients. It simply re-establishes North Dakota's system of liability analysis when an injury occurs on top of a preexisting condition.

Contrary to some of the misinformation I have seen, this bill results in no change from the current determination of claim compensability. The importance of a treating physician's opinion is unchanged by this bill. The treating physician's opinion remains the paramount point of inquiry. This bill simply allows continued fair determination of who should pay for patient care.

This concludes my testimony. I'd be happy to answer any of your questions.

(4)

GNDC
Greater North Dakota Chamber

Testimony of Bill Shalhoob
Greater North Dakota Chamber of Commerce
HB 1163
March 19, 2013

Mr. Chairman and members of the committee, My name is Bill Shalhoob and I am here today representing the Greater North Dakota Chamber of Commerce, the champions for business in North Dakota. GNDC is working to build the strongest business environment possible through its more than 1,100 business members as well as partnerships and coalitions with local chambers of commerce from across the state. GNDC also represents the National Association of Manufacturers and works closely with the U.S. Chamber of Commerce. For this hearing we also represent a number of employers groups. A list of those groups is attached. As a group we stand in support of HB 1163 and urge a do pass from your committee on the bill.

Mr. Wahlin and Dr. Peterson did an excellent job framing the issue. Our support is based on two factors. First, the Supreme Court decision was narrowly based. In sports parlance it was 2-2-1. This strongly shows the legislature needs to further clarify and define the policy for the State on this issue. Second, as WSI stated we do believe the statutory interpretation focusing on the compensability determination on the underlying condition, not the symptoms produced, has been and should be the way WSI should treat this subject. The bill firmly and clearly places in statute the sound policy that has served us well since the mid 90's.

Thank you for the opportunity to appear before you today in support of HB 1163. I would be happy to answer any questions.

Champions (for) Business

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Patti Peterson, RN, Family Nurse Practitioner-Board Certified

I am here today as a health care provider in support of Bill # 1163.

In the ND Supreme Court ruling of Mickelson vs. WSI in August 2012, I noted several of the justices felt the wording of the current bill was inadequate. I support the House Bill # 1163 as it clarifies pain as a symptom rather than a cause of pre-existing problem.

Pain is a subjective finding that may be secondary to an objective underlying issue. In health care, pain is considered a subjective finding. A patient's level of pain is dependent on many factors-which can include:
-pain tolerance
-other health issues
-age

These and a number of other factors can impact how a patient perceives their level of pain. I deal with patients experiencing pain on a daily basis. Many of them will tell me they did not have any previous problems, when in fact, they may have simply learned how to live with their pain over the years. When looking at patients with degenerative back or neck issues, you have to remember that degeneration occurs over time. Symptoms may not be present in the early stages of degeneration, however, the degeneration is still occurring.

Patients with pre-existing injuries, diseases or conditions should be aware of their limits and/or restrictions and should practice these limits in their day to day activities. When a patient chooses activities they may have been advised to limit or avoid, they can most likely expect to have exacerbation of pain.

For these reasons I support the HB 1163 and urge a do pass out of this committee and will take any questions you may have.

(6)

2013 House Bill No. 1163

Testimony before the Senate Industry, Business, and Labor Committee

Michael R Moore, MD, NDMA Representative and

Member of WSI Board of Directors

March 19, 2013

Mr. Chairman, Members of the Committee:

My name is Michael Moore and I am the sole physician on the WSI Board of Directors. I was nominated by the North Dakota Medical Association and appointed by Governor Dalrymple. I have a concern about HB 1163 from a medical standpoint. I am here not as an advocate any particular group. I am here to draw attention to the apparent misunderstanding of medical evaluation that the bill evidences. The new language that I believe is problematic is this:

> "Pain is a symptom and is not a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition."

This new language is an attempt to clarify existing law on WSI's liability when a patient has a pre-existing condition. The language as it stands, however, can be interpreted as entirely dismissive of a patient's complaints of pain. This would be a complete violation one of the most fundamental tenants of medical tradition and practice. Diagnosis begins with listening to the patient.

Over the past 30 years or so a popular belief has developed that every condition can be detected or diagnosed with some sort of scan, blood test or an exotic imaging study. The fact is that many diagnoses are made purely on the basis of a patient's history, their complaints (which frequently concern pain), a physical examination, and the judgment of the physician. As a simple example, everyone I'm sure has sprained their ankle at some point in their lives and knows how painful that can be. The diagnosis of an ankle sprain is made based on the history (say, twisting the ankle), the patient's complaints of pain, and the presence of tenderness along the supporting ligaments of the ankle. In general it would be inappropriate to order an MRI or some other expensive test, but if it was ordered it would likely show no significant abnormality. That would not mean, however, that an injury had not occurred.

This legislation purports to deal with pain as a disabling condition and seeks to eliminate it from consideration in the evaluation of impairment for injured workers. In doing so it indicates that pain is just a symptom.

What exactly does this mean? In order to understand this properly, we must try to understand what is meant by the word "pain".

Pain when used in medicine is divided into two main categories: Acute pain and Chronic pain.

Acute pain is the type of pain that most people think of when they see the word "pain". This is the experience of an injury or illness that produces a distressing sensation that makes you feel like you are sick or injured. An example of this would be someone who breaks a bone in an accident. Immediately afterward there is pain at the site of the injury and probably also in the surrounding part of the body. This pain persists for a while. As the part heals, the pain decreases and typically will disappear entirely. Acute pain has a definite beginning, middle and end. It is limited

Chronic pain is something entirely different. It has a beginning, often from an injury, but has no end. It goes on even after healing of the body part has taken place.

Take again the example of a fractured bone. The person suffering from chronic pain will continue to experience pain even after the bone has healed and the x-ray findings have returned to normal. Usually the character of the pain experienced will also change into something like constant burning and aching, or sharp shooting pains that occur spontaneously without provocation.

For many years this experience was misunderstood by doctors and often still is misunderstood. Most physicians used to believe that chronic pain was a psychological problem or, worse yet, was intentional faking on the part of the patient. This added additional emotional pain and social stigma

to the patient suffering from chronic pain.

Many decades of medical and biological research have clarified what is actually happening to people with chronic pain. We now know that people with chronic pain are suffering from a disease process that affects the nervous system. This disease process is started by this initial injury and gradually and insidiously progresses to become severe incapacitating pain.

I would like to mention some evidence to support the statements that I have just made. As I said before, there is a very large body of medical research that supports this point of view and little or no biological research to support the idea that pain is "just a sensation" and nothing more (whatever that means).

If you say that pain is "just a sensation", what exactly are you saying? Biologically, a sensation is a group of nerve cells firing in the nervous system. Therefore when you say that pain is "just a sensation", you are saying that it is "just a group or nerve cells firing in the nervous system". Well, what are these nerve cells doing and what are they connected to?

We do have some answers to these questions.

Scientific research of a very high quality has demonstrated that the nerve cells of the part of the brain that perceives pain also connect to many other areas of the brain. It has also been demonstrated that nerve cells and other cells of the brain and spinal cord change both chemically and structurally in response to persistent pain. They change for the worse. The nerves become more efficient at carrying pain information to the brain. In addition, other nerve cells are recruited to begin sending pain information to the brain. Even nerves that normally would function to suppress pain get recruited to send pain signals.

Examples of this are well documented in medical and scientific journals. One example is a study done in the neurosurgery department of the State University of New York in Syracuse NY. This study was published in the Journal Pain in 2000. This Journal is one of the premier medical journals regarding the field of pain medicine.
In this study, the doctors took patients with chronic back pain and people with no pain either chronic or acute. Measurements were made with a

special type of MRI scan called f-MRI or functional MRI. This type of MRI actually measures the metabolic activity of groups of cells and indications levels of activity in the brain. They found that the brain functioning of patients with chronic pain had changed form the normal pattern and showed abnormal activity in many different areas of the brain. these included areas of the brain that are normally associated with thinking, reasoning and emotion as well as areas just devoted to the perception of pain. This indicates that just having pain over a period of time caused changes in the brain more than just the "feeling' of pain.

Another study which was published in the journal Neurology (another very highly regarded medical journal) addressed the structural changes in the brain that occurred in a pain disorder called Complex Regional Pain Syndrome or CRPS. This is a condition in which there is progressively worsening pain and impairment of a body part such a hand or foot typically following an injury. The degree of pain and impairment in this condition is not proportional to the severity of the injury. This is another condition that was thought to be a psychological disorder for many years before it was better defined by scientific study.
In this particular research study, people with CRPS of the hand were again studied using special MRI techniques to look at brain structure.

The way the brain works includes connection of every part of the body to a particular part of the brain. This means that the nerve endings in your big toe are connected to the part of the brain responsible for feeling the big toe, the nerve endings in the thumb are connected to the part of the brain responsible for feeling the thumb and so forth.
In this study they found that people with CRPS of the hand showed a structural change in the brain. The area responsible for feeling the hand had shrunk and the nerve showed evidence that they had reconnected to the area responsible for feeling the lower lip. Thus a person who originally had injury to a hand or forearm could eventually have pain that extended all the way up to the face. I have actually seen such a case here in North Dakota that was from work injury. Clearly pain can result in worsening physical impairment over time based on what we know to be changes that occur in the human nervous system. Furthermore, we know these changes to be related to the onset of the condition itself and not some pre-existing random disorder.

These are just a few examples of what we know to be happening in chronic pain. If it seems overly complex, that is because it is complex. Chronic pain is a very complex disorder of the nervous system that is still being elaborated in more detail by neurophysiologic research. It is far too complex to be dealt with by a brief, general, and poorly defined addendum to existing law.

The wording of this proposed legislation is based on a profound misunderstanding of what pain is. It mixes the idea of acute pain with chronic pain and does not reflect at all what we know about pain from contemporary scientific study. It is based on a perception of what pain is that was first discounted by the French scientist Rene Descartes in the 17th century. There is no need for the law to define pain in this way. The determination of what pain is and the significance of pain and its disabling effects should rightly be the province of medical practice. It is inappropriate for the law to try to place constraints on the considered judgment and determination of medical practitioners in matters of science unless there is a compelling matter of public good that can be narrowly defined in such law.
If there is a compelling need for a change in the law, I would urge that you consult with pain physicians and other medical specialists conversant with this aspect of neurophysiology in the wording of such legislation. As it stands now, this proposed legislation should not be passed. It is too broad and poorly defined and too imprecise of a tool to accomplish its intent.

If you are interested in seeing more about what we know about chronic pain explained in lay terms you may watch this video in the TED series online. It is from Dr Elliot Krane who is a professor of pediatric anesthesiology and pain medicine at Stanford University Medical School.

www.ted.com/talks/elliot_krane_the_mystery_of_chronic_pain.html

HOUSE BILL NO. 1163

Testimony of Shelley Killen, M.D.

Concerns with HB 1163:

-This does not take into account disease states such as Complex Regional Pain Syndrome or Reflex Sympathetic Dystrophy as it was previously know or problems like it where pain is the predominate feature. There is a set of criteria for initial diagnosis but as time goes on and the disease waxes and wanes the criteria are not all met at each exacerbation; but pain is always the presenting symptom. If this is not treated promptly it becomes an even more difficult if not impossible problem to treat and this bill would leave this group of patients not only out but without recourse as this problem goes on for years and would only worsen with increasing functional deficits as time goes by.

-This change is also so poorly worded that I can foresee many more of the patients I care for going before not only administrative law judges but as far as the Supreme Court for clarifications just because this is written in such vague terms.

Before the Senate Industry, Labor and Business Committee, March 19, 2013

Testimony of Dean J. Haas on House Bill 1163

Dear Chairman Klein and members of the Committee:

Those of us representing injured workers oppose House Bill 1163, which would amend a crucial definition of compensable injury in the 'trigger statute,' N.D.C.C. § 65-01-02(10)(b)(7). The statute would be amended to provide that the term compensable injury does not include:

> injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity. Pain is a symptom and is not a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition.

A significant increase in pain caused by the work injury—even chronic pain—would no longer qualify as a compensable injury. Moreover, this would be true even if the preexisting condition is simple aging (such as degenerative disc disease) so long as WSI calls an Independent Medical Examiner to testify that the MRI's are unchanged by the injury, so this is a natural progression of the 'disease.'

a. Employees must be taken 'as is.'

The bill reverses the most honored principle in all of workers' compensation law: the employee is taken 'as is.' North Dakota, like all states, follows the maxim that susceptibility to injury is not a bar to compensation under the Act. *Bruns v. North Dakota Worker's Compensation Bureau,* 1999 ND 116, ¶ 16 n. 2, 595 N.W.2d 298. This follows from a simple premise: most of us have some vulnerability to an injury, whether due to age or genetic susceptibility, but the disposition is not fate. But for a work injury, the susceptibility to an injury would have remained unknown.

The foremost authority on workers' compensation law, Professor Larson, notes that "nothing is better established in compensation law," than the rule that susceptible employees are entitled to the same "sure and certain" relief, as everyone else. 1 Larson, *Workmen's Compensation Law*, § 9.02[1], p. 9-15 (Revised November 2007). This is expressed by "saying the employer takes the employee as it finds that employee." *Id.*

HB 1163 reverses this central principle of workers' compensation law: that the industry that created the risk of damage to the employee must bear the loss. For make no mistake, many preexisting degenerative conditions would never have required medical care—would not have become painful—unless brought out by the injury.

And this natural aging (for example, due to degenerative discs) is in fact a mere susceptibility to injury. MRI's of the spine show a near universal affliction of aging discs by age 30. Yet, most people are not symptomatic. Moreover, DDD itself does not necessarily correlate with its appearance on the MRI. But a work injury may cause

chronic pain. This pain in turn requires medical care; it may impel the doctor to place the employee under work restrictions. Employees whose lives are shattered by pain, unable to engage in the activities of daily living, to work, to sleep, to do anything at all without constant use of pain medications, have described this ruinous existence as a living hell. Who among us would not recognize this as a significant worsening in the life of a family member?

HB 1163 denies the general rule providing benefits to an aging employee whose life is changed by a work injury. To be frank, the legislation mocks sure and certain relief. Even if we lawyers, judges and legislators (and our families) are not at the same risk as employees in heavy labor occupations, surely we want to treat fellow citizens better than that.

b. The issues presented in this legislation present profound philosophical questions, and are quintessentially medical ones requiring input from physicians.

WSI has minimized the significance of this bill. For example, it is supposed that all a claimant need do to obtain benefits is show something more than that a 'mere symptom of pain' was caused by the injury, such as loss of range of motion. But loss of motion in the spine is itself largely due to pain. Of course pain is subjective. But we all know it exists. Science has traced the nerve pathways, and pain reception in the brain. The study of chronic pain is a science onto itself.

North Dakota physicians have testified today against this bill. Physicians recognize that an injury that 'merely triggers' significant pain is an important factor in determining patient health. Pain is one of the best indicators of the seriousness of an injury or condition. Much of the practice of medicine consists of pain treatment, and it is a breach of medical ethics to ignore pain treatment.

This legislation creates a dramatic shift of the risk of work injury away from the employers who created the risk, to the employees. This legislation does not present a simple legal question, but presents a profound philosophical question. Most importantly, it presents the quintessential medical question: what is the medical significance of pain in our society? Is it real? Can it be measured? Does it change lives? Can it be treated? Can employees recover and work again? Physicians have answered these questions. North Dakota lawmakers cannot deny that pain is reflective of the seriousness of an injury.

c. The law requiring recognition of pain as a worsened condition had not changed since 1998, and has not had any financial consequences.

Even though it is admitted by all that North Dakota already is among the most conservative of all states in how the Act treats preexisting conditions, many do not understand the significance of this change excluding pain as showing a significant worsening. First, it is simply not true that the bill is necessary so that WSI does not become a general insurance carrier, on the theory that simple triggering of any

symptom will be compensable. Preexisting conditions that are progressing of their own accord and on their own natural timetable are not worsened beyond their normal progression by simple manifestation of symptoms in the workplace. I'm not aware of anyone making that argument from 1984-1995 when I was Bureau counsel, and there is no reported case since *Geck v. North Dakota Workers Comp. Bureau,* 1998 ND 158, 583 N.W.2d 621, was decided that allow application of this theory outside the narrow frame of reference regarding pain. Pain is what the legislation is about, and pain uniquely has the power to alter the employee's very need for medical care and disability status.

This legislation would reverse law in effect since 1998. The Court first held that a compensable aggravation of a preexisting arthritis does include a worsening of symptoms in *Geck v. North Dakota Workers Comp. Bureau,* 1998 ND 158, 583 N.W.2d 621. Rejecting the ALJ's legal conclusion that the employee's employment injury was not compensable because it was "merely a trigger," to pain, *Geck*, ¶ 11, the Court said that "Pain can be an aggravation of an underlying condition of arthritis," finding the distinction between worsening the "condition itself" and the symptoms to be without significance. *Id.* ¶ 10.

Similarly, during its testimony on housekeeping changes to the trigger statute in 1997, WSI told the House IBL committee that the trigger exclusion means that a condition that is getting progressively worse is not compensable if it *merely takes a turn for the worse at work,* but *is compensable* if the employment significantly alters the *significance of the condition*. *See* Hearing on H.B. 1269 Before House Industry, Business and Labor Committee, 55th N.D. Legis. Sess. (February 5, 1997)(prepared testimony of Reagan Pufall.) The degenerative changes inherent to aging are not of much concern unless there are symptoms. Mr. Pufall's testimony illustrates this as he contended that a workplace injury that substantially accelerates or worsens a condition "so that it got much worse more quickly than it would have otherwise," is compensable. *Id.* WSI also claimed that "*[t]his bill does not significantly change the substance of this paragraph.* It removes unnecessary and confusing language."

The statute has had the same legal meaning from the time *Geck* was decided in 1998, and through the date of the decision of the Court in *Mickelson v. North Dakota Workforce Safety and Insurance*, 2012 ND 164, 820 N.W.2d 333. Yet, no dire financial consequences have befallen the fund. In any event, what counts most is the violation of the central purposes of workers' compensation by this legislation.

d. There is no need to amend the trigger statute.

It has been suggested that employees feigning injury will be entitled to compensation if subjective pain complaints can ground a claim. This is a cry of wolf. Physicians are competent at evaluating pain. Moreover, the statute is extremely strict even without this change. Unfortunately for employees injured in our State, any hint of prior symptoms has been enough for the ALJ's to conclude that the condition is simply a natural

progression of the preexisting condition. There is simply no need to take this severely retrograde step.

This bill is not necessary. WSI has prevailed in most of the litigation whether the preexisting condition was worsened by work injury. See e.g., *Pleinis v. North Dakota Workers Comp. Bureau,* 472 N.W.2d 459, 462 (N.D. 1991); *Hein v. North Dakota Workers Compensation Bureau*, 1999 ND 200, 601 N.W.2d 576; *Bruder v. Workforce Safety & Ins.*, 2009 ND 23, ¶ 8, 761 N.W.2d 588; *Bergum v. N.D. Workforce Safety and Insurance*, 2009 ND 52, ¶ 12, 764 N.W.2d 178; *Curran v. North Dakota Workforce Safety and Insurance*, 2010 ND 227, 791 N.W.2d 622.

Thus, Professor Larson observes that "denials of compensation in this category [due to a preexisting condition] are almost entirely the result of holdings that the evidence did not support a finding that the *employment contributed to the final result*." 1 Larson, *Workers' Compensation Law*, § 9.02[4], p. 9-19 (Revised November 2007). As will be discussed in the cases from Wisconsin *discussed infra*, part e-1, the focus is on the whether the injury contributed to the employee's need for medical care and disability benefits.

Whether the claim is compensable depends upon whether, as a factual matter, the employment "contributed to the final result," *i.e.*, whether employment contributed to the employees' *damages*. WSI's conclusion that a worsening of the condition itself must be a worsening shown via x-ray or MRI is illogical and not grounded in any compensation principle.

e. As shown from prior Performance Audits of WSI, North Dakota law already is more conservative than other states in how it treats preexisting conditions.

I am not aware of any other state that has such a harsh construction of preexisting conditions. This is because we all age, and over time, we will all develop degenerative changes; as you know, for example, we all develop degenerative disc disease at some point. But many people have these aging discs without having any symptoms. Thus, OSHA is of the view that an employment injury that *substantially alters the need for medical attention* is a significant worsening of a preexisting condition. *See* Segwick, 2010 Performance Evaluation of North Dakota Workforce Safety and Insurance, at 92, citing the OSHA Handbook.

In 2009, the legislature agreed that the preexisting condition issue required study, recognizing that North Dakota law excluding coverage for preexisting conditions is more restrictive than other jurisdictions. *See* House Concurrent Resolution No. 3008 (2009).

The 2008 Performance Evaluation Report of Berry, Dunn, McNeil & Parker and the 2010 Performance Evaluation conducted by Sedgwick both noted the extremely conservative nature of the preexisting condition exclusion in North Dakota. Berry et al. noted in their 2008 Evaluation that WSI's claims adjusters reported a "shift in management focus to a more aggressive and in-depth search for prior injuries or pre-

existing/degenerative conditions, *which could possibly reduce WSI liability for the injury*." *Id*. at 108.

Study Recommendation 6.6 of the 2008 Performance Evaluation noted "that the North Dakota statute is more conservative than most other jurisdictions as it relates to prior injuries, pre-existing or degenerative conditions, triggers and aggravations." The recommendation was to create a "study group formed of *all the stakeholder groups* ... to review how other jurisdictions' statutes handle these *important* Workers' Compensation issues." *Id*. at 111. The renowned Mr. Welch on Workers Compensation was suggested as one source to consult. This did not happen.

Rather than engage all "stakeholder[s]" WSI simply asked the next performance evaluator, Sedgwick, to address the issue. *See* Sedgwick 2010 Performance Evaluation at pp. 88-98. No stakeholders were engaged, nor was an expert with acknowledged workers' compensation expertise consulted. There is nothing that suggests that Sedgwick has any particular expertise in workers compensation matters that involve this crucial interplay of medicine and law. Rather, Sedgwick's expertise is in auditing.

1. The Wisconsin example.

In any event, Sedgwick concurred that North Dakota has one of the most restrictive laws in the country regarding the treatment of preexisting conditions. But Sedgwick contends that other states are as strict, claiming Wisconsin as an example. *Id*. at p. 93. ("Wisconsin precludes benefits for any injury or condition pre-existing at the time of employment with the employer against whom a claim is made."). An examination of the cases in the states cited by Sedgwick as equally conservative shows that all of these states recognize as compensable a work injury that acts upon a preexisting condition so as to worsen an employee's disability and increase his need for medical care.

In Sedgwick's first example, Wisconsin, the Court, in *Greenfield Pontiac-Buick, Inc. v. Labor and Industry Review Com'n,* 322 Wis.2d 574, 776 N.W.2d 288 (Wis.App. 2009), held compensable an injury that acted on a preexisting condition, as the employee

> credibly testified that 'something tore loose' in his back while performing his work duties ... on that date, and that this incident caused a *substantial change in his low back symptoms*. His credible testimony and the record of his medical treatment support the inference that the January 2003 work incident constituted a *causative, traumatic work injury in the form of a precipitation, aggravation, and acceleration of the applicant's preexisting back condition beyond normal progression.*

Greenfield, at ¶ 10 (emphasis added).

Similarly, in *Aurora Health Care Metro, Inc. v. Labor & Industry Review Com'n,* 321 Wis.2d 750, ¶ 7, 776 N.W.2d 101 (Wis.App. 2009), the Court said that an increase in the limitations on the employee's daily living and work restrictions showed an "aggravation, acceleration and precipitation of her preexisting condition beyond its normal progression." In *Emerson Elec. Co. v. Labor & Industry Review Com'n,* 276

Wis.2d 311, ¶ 6, 686 N.W.2d 456, the court found incredible the employer's contention that the employees' condition is simply due to preexisting degenerative disc disease, stating "[t]he applicant's history subsequent to the work injury was one of an ongoing and worsening back condition. It ultimately led to a two-level fusion. Consistent with [the medical opinions] the applicant's preexisting back condition was aggravated, accelerated, and precipitated beyond normal progression by the work injury." There is no doubt that Wisconsin courts look at the change in symptoms as it impacts the need for medical care, the need for work restrictions, and the impairment or disability ratings.

In discussing 'normal progression,' to determine compensability, the Wisconsin Courts use a similar test as expounded in *Mickelson v. Workforce Safety and Insurance*, 2012 ND 164, ¶ 21, 820 N.W.2d 333. That is, compensation depends upon:

> whether or not the underlying preexisting injury, disease, or other condition would likely have progressed similarly in the absence of employment. ... *We decline to construe those terms so narrowly as to require only evidence of a substantial worsening of the disease itself to authorize an award of benefits.*

Mickelson, ¶ 21. (Emphasis added).

Like the Wisconsin Courts, the *Mickelson* Court held that pain can establish the compensable aggravation or worsening of an underlying arthritic condition. *Id.*, ¶¶20-23; 30. In sum, Sedgwick is not reliable for the claim that North Dakota law is not an outlier. Even without enactment of this legislation, North Dakota remains more conservative than other states. But even if Sedgwick is right that North Dakota is not a lone outlier, if sure and certain relief has any meaning, we should strive for more than that.

HB 1163 would expressly deny for all employees any opportunity to establish that a significant increase in pain from an employment injury constitutes a significant worsening in a preexisting degenerative condition. This offends basic compensation principles, and North Dakota law has never so held. The legislation is a severely retrograde step, and should not be done without the input of stakeholders and expert study the legislature ordered in 2009.

f. A concrete example: the Claim of Warren Parsons.

The extent to which this preexisting condition 'trigger exclusion' has already swallowed the rule allowing for compensation where a work injury alters an employee's life is well illustrated by Warren Parsons' claim. Parsons injured his neck and trapezius as a result of operating a dump truck over uneven washboard-like gravel roads, which bounced his shoulder, hard, into the shoulder harness seatbelt. There is absolutely no dispute that he was entirely asymptomatic prior to developing what has become a chronic pain syndrome from his repetitive employment duties. His claim has been denied under the trigger statute.

Parsons sought medical care from Dr. Fleissner, and Dr. Podduturu. Dr. Fleissner, an occupational health specialist, diagnosed Parsons as having sustained a "*cervical sprain and left shoulder strain* associated with repetitively bouncing up and down in a truck seat against seatbelt." Parsons treated with several providers, and numerous exams showed neck stiffness—i.e, reduced motion—and a neurological exam was "positive for weakness and numbness in the left upper extremity." There are other signs of injury as well. Dr. Fleissner also found "tenderness and tightness … a few trigger points. … This is all on the upper aspects of the trapezius musculature." Parsons had extensive physical therapy for his injuries.

However, an EMG showed no evidence of left brachial plexopathy or cervical radiculopathy, and an MRI showed "mild" degenerative disc disease in the cervical spine. Parsons was 57 on the date of injury, and mild DDD is normal for a man of his age. The EMG and MRI are not diagnostic of Parsons' neck and left shoulder pain—as neither and EMG or an MRI can discern the microscopic tear to the disc that Parsons sustained from his work that is causing his chronic pain.

Dr. Podduturu, a physical medicine and rehabilitation physician, found objective evidence of "*trigger points in the left supraspinatus muscle*." In addition to the natural aging of mild degenerative disc disease, Dr. Podduturu diagnosed Parsons with: (1) myofascial pain (ICD Code 729.1: "an acute, sub-acute, or chronic painful state of muscles, subcutaneous tissues, ligaments, tendons, or fasciae"; and, (2) neck sprain and strain (ICD Code 847.0: "[s]oft tissue injury of cervical spine due to sudden hyperextension or hyperflexion or hyperrotation of neck or limbs.")

Dr. Podduturu, noting pain and muscle spasm, ordered continuation of physical therapy, use of heat, ice, pain medications and flexeril for the muscle spasm. Dr. Podduturu repeated that while Parsons has the normal aging of degenerative disc disease, his "[p]rimary" diagnosis is myofascial injury, ICD 729.1. Dr. Podduturu thought that Parsons should consider a TENS unit and traction, continue physical therapy and medications (Flexeril and Tramadol), and that he would benefit from an epidural steroid injection.

In his letter to counsel, Dr. Fleissner affirmed his many medical notes, opining that Parsons' job duties bouncing in the truck over uneven terrain were likely a substantial contributing factor to Parsons' cervical and left shoulder soft tissue (strain) injuries. He opined that Parson's pain, which required the above documented significant medical treatments, was caused by his employment, and that it is much worse to have degenerative disc disease that is chronically painful because of an injury, than having mere radiographs showing an asymptomatic existence.

WSI obtained an Independent Medical Evaluation from Dr. Janssen. Dr. Janssen admitted that on exam, Parsons had evidence of an injury: "cervical spine examination did reveal areas of taut bands over the left trapezius muscle, as well as the left levator scapulae muscle."

Regarding the question on diagnosis, the IME examiner said that "Parsons has chronic left neck, trapezius and shoulder pain." He explained, "Parsons has developed chronic cervical discogenic pain secondary to the microscopic injury" to the disc from the work injury. Dr. Janssen also noted that, consistent with the medical records, that Parsons reported "two [employment] injuries," both with the same "mechanism of injury," due to bouncing hard in his seat with the safety belt pressed tight "against his trapezius." Dr. Janssen further admitted that "the impact of the safety belt over the trapezius area, to a reasonable degree of medical certainty ... caused cervical strain over the left trapezius area."

Dr. Janssen noted that Parsons "did not have any neck or shoulder pain prior to [the employment injury date] October 12, 2010." Dr. Janssen opined that "[t]o a reasonable degree of medical certainty, Mr. Parsons suffered a cervical strain, which triggered the cervical degenerative disc disease to be symptomatic." He stressed this again: "In October 2010 and November 2010, he suffered the alleged injuries as noted above, which resulted in cervical strain, which aggravated the prior condition. To a reasonable degree of medical certainty, he now has *chronic discogenic and myofascial pain secondary to his aggravation."*

Dr. Janssen said that there was indeed medical evidence to support that Parsons had also developed a cervical strain:

> Mr. Parsons had pain in his left neck and shoulder immediately after he describes injury on October 12, 2010, and as well the injury in November 2010. *Physical exam findings* from physical therapy, Dr. Fleissner, and the physiatrist noted muscle tightness and trigger points over the left neck and shoulder area. To a reasonable degree of medical certainty, the impact of the safety belt on to [sic] the trapezius area *did cause cervical strain* in October 2010 and November 2010.

Dr. Janssen thought a normal strain would resolve itself, but also noted that "[t]o a reasonable degree of medical certainty, he now has *chronic discogenic and myofascial pain*," due to his work injury. Dr. Janssen acknowledged that he did find an injury, as during his physical examination of Parsons he found the taut bands over the trapezius. He further noted that Parsons' pain was not resolved, "[c]urrently, Mr. Parsons continues to have pain in his left neck and shoulder."

WSI asked follow-up questions regarding the preexisting mild asymptomatic degenerative disc disease and the trigger statute. Dr. Janssen confirmed that degenerative disc disease is part of natural aging—i.e., that DDD is "age-dependent." He confirmed that "[d]egenerative disc disease may or may not be symptomatic. The above MRI findings have been found in studies of asymptomatic individuals."

Dr. Janssen's reply confirmed that Parsons' "*injury* involved a scenario," wherein bouncing in his seat against the seatbelt damaged his trapezius muscle and disc. He explained:

> *this impact caused strain in his left trapezius muscle*. A strain can be defined as over-stretching or tearing of a muscle or tendon. This was confirmed by increasing pain in the left trapezius muscle as well as physical exam findings and taut bands over that area. *To a reasonable degree of medical certainty, the stretching of the trapezius muscle caused compression and torsional forces on the cervical spine.* The trapezius is directed connected to the cervical spine, and the increasing impact on this muscle caused the cervical spine to left lateral flex, which caused compression and torsional forces on the cervical intervertebral discs which already had some level of degeneration. *To a reasonable degree of medical certainty, these forces caused an injury to the disc such as a stretch or microscopic tear of the annulus fibers that would not be seen on an MRI.*

Dr. Janssen opined said that Parsons' work injury caused the symptoms that now require treatment, but that an injury will not "substantially accelerate the progression" of *preexisting degenerative disc disease itself*—that is the "imaging findings." Nevertheless, Dr. Janssen agrees with Dr. Fleissner that Parsons' job duties bouncing in the truck over uneven terrain were likely a substantial contributing factor to Parsons' cervical and left shoulder soft tissue (strain) injuries.

IME examiner Janssen actually admitted that Parsons' work injury caused his strain injuries, which diagnosis is "confirmed by increasing pain in the left trapezius muscle as well as physical exam findings of tenderness and taut bands over that area." Dr. Janssen repeated this a second time:

> To a reasonable degree of medical certainty, the stretching of the trapezius muscle caused compression and torsional forces on the cervical spine. The trapezius is directly connected to the cervical spine, and increasing impact on this muscle caused the cervical spine to left lateral flex which caused compression and torsional forces on the cervical intervertebral discs which already had some level of degeneration. *To a reasonable degree of medical certainty, these forces caused an injury to the disc such as a stretch or microscopic tear of the annulus fibers that would not be seen on an MRI.* To a reasonable degree of medical certainty, this level of trauma to the disc triggered his symptoms, but did not substantially accelerate the progression of Mr. Parsons' preexisting degenerative disc disease as it is defined above [that is, DDD is age-dependent, and may or may not be symptomatic]. Even though this type of injury is unlikely to cause worsening degeneration over time, Mr. Parsons has *developed chronic discogenic pain secondary to the microscopic injury described above.* To a reasonable degree of medical certainty, *because part of the disc has been injured*, it is no longer able to bear its part of the load, causing increased stress on the remainder of the disk. In this case, this is unlikely to cause further degeneration, but it is causing chronic pain.
>
> Dr. Janssen repeated that:

> The injuries that Mr. Parsons sustained in October 2010 and November 2010 *caused a cervical/left trapezius* strain which, to a reasonable degree of medical certainty, caused compression and torsion forces that *caused an injury to an already degenerated cervical intervertebral disc*, most likely at C4-5 or C5-6. His current neck and periscapular pain are consistent with cervical discogenic pain secondary to this *injury to the cervical intervertebral disc*.

Incredibly, WSI did not amend its order to accept as compensable the acknowledged cervical/left trapezius strain and injury to the cervical intervertebral disc. Instead, WSI elected to take its chances with a conservative Administrative Law Judge.

The ALJ affirmed the denial of all benefits—including for the admitted strain injuries. But, the ALJ's factual findings and conclusion of law conflict. The first five factual findings require an award to Parsons, since the ALJ found, in pertinent part, that:

> 1. On or about October 12, 2010, Warren Parsons *was injured* while working for [employer].
>
> 2. The *injury caused cervical strain and a microscopic tear to his disc at C4-C5 of C5-C6, resulting in discogenic and myofascial pain.*
>
> 3. At the time of the work injury, Parsons had a preexisting condition of cervical DDD … making them *especially vulnerable to injury*. In effect, Parsons' cervical DDD created a "weak link" in his back, which *resulted in a microscopic tear to the disc* from bouncing on the truck seat and hitting the seat belt.
>
> 4. The *cervical strain* has resolved, and Parsons' taut bands and pain in the area of his left shoulder is the result of *damage to his disc and discogenic pain*.
>
> 5. The work injury did not cause *significant* damage to Parsons' disc.
>
> 6. Parsons' pain after the work injury was not a substantial worsening of his DDD.

The ALJ admits in finding 2 that Parsons' work injury caused cervical strain and a microscopic tear to his disc at C4-C5 of C5-C6, resulting in discogenic and myofascial pain, but in finding four, he finds that given the trigger statute, it is not "significant" enough to be compensable. The Workers Compensation Act does not require that an identifiable injury to the body that requires medical care—here, trapezius/cervical strain and injury to the intervertebral disc—be characterized as a structurally "significant," to afford compensation. If it did, no strain injury or disc injury involving a microscopic tear of the annulus fibers would ever be compensable; they are not visualized on an MRI or x-ray.

The ALJ admits in finding 3 that he thinks Parsons' claim is not compensable because at age 57, Parsons is thought to be more *vulnerable to* an injury because of his aging discs. As noted supra, susceptibility to injury is not relevant, as the employer takes the employee as he finds him. *Bruns v. North Dakota Worker's Compensation Bureau,* 1999

ND 116, ¶ 16 n. 2, 595 N.W.2d 298. The Court, in *Satrom* v. *North Dakota Workmen's Compensation Bureau,* 328 N.W.2d 824, 831 (N.D. 1982), pointedly excluded such susceptibility to injury as grounds to deny a claim.

The *Satrom* Court held that "[t]he fact that an employee may have physical conditions or personal habits which make him or her more prone to such an injury does not constitute a sufficient reason for denying a claim. … To the contrary, the work injury need only be a 'substantial contributing factor.'" In *Satrom*, the Court held compensable a disc injury that according to the treating physician resulted from "minute trauma," from her hair-dressing job, causing the annulus "fibers supporting the disc give way." *Id.*, at 830. While the natural aging process of degenerative disc disease may render an individual more prone to an injury to the intervertebral disc, aging is not a defense in any state.

Based on the findings above, the ALJ entered his conclusion of law:

> Warren Parsons had a preexisting degenerative condition of cervical DDD at the time of his work injury, and the work injury did not substantially accelerate the progression or worsen the severity of the condition. The greater weight of the evidence fails to show that Parsons' preexisting cervical DDD would likely not have progressed similarly in the absence of the work injury. Therefore, under N.D.C.C. § 65-01-02(10)(b)(7), his work injury is not a compensable injury, and he is not entitled to benefits.

The ALJ's conclusion of law does not address the actual injury—the tear to the intervertebral disc and the acknowledged cervical/trapezius strain. Instead, the ALJ simply concluded that an undisputed soft tissue injury and chronic myofasical pain syndrome from a work injury is not compensable in the presence of mild DDD of the cervical spine. *The ALJ shows absolutely no comprehension of the significance of chronic pain, which is a physiological reaction of the body to the disc injury.*

House Bill 1163 shares this lack of comprehension of chronic pain. *The legislation actually invites and propels this very harsh construction of preexisting conditions—one that would swallow up and deny most claims for injury to the back and neck.* Soft tissue injuries, tears to an intervertebral disc, and yes, pain, are not visualized on an MRI. In all due respect, the Parsons case is vivid proof that this issue must be re-thought.

g. Summing up.

The Act "declares that the prosperity of the state depends in a large measure upon the well-being of its wageworkers, and, hence, for workers injured in hazardous employments, and for their families and dependents, sure and certain relief is hereby provided." N.D.C.C. § 65-01-01. HB 1163 violates this promise and assurance, for pain acts on preexisting susceptibilities to the degree it alters lives. As pain is the symptom by which back strains are diagnosed, and how physicians measure the seriousness of aging discs, it is apparent that this legislation may disallow compensation for most back claims.

North Dakota policy makers must listen to its physicians, who oppose this legislation on simple recognition of the medical seriousness of pain.

Thank you for your consideration of this important issue.

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(10)

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March 14, 2013

To Whom It May Concern.

This is a letter against house bill #1163. To the uninitiated observer, this may appear to be a reasonable law, but it is not. This law, in fact, may have unintended consequences. This law may prove more costly and may force physicians to perform unnecessary and expensive testing. If the law requires a finding on an x-ray or some other type of test, the physician or provider may continue just ordering more and more tests until some abnormality is found. This may end up costing significant amounts of money and may lead to unnecessary testing.

Very often we see patients who are having significant pain without any obvious objective test findings. The patients may have normal x-rays, CT scans, MRIs, EMGs, bone scans, lab tests, etc., but still have a significant amount of pain.

We think it is wrong to say just because there is not a finding on a test that the patient does not have any injury. Test results do not necessarily show what happens at the molecular, cellular, and/or biochemical level to produce pain symptoms. Numerous diseases have no obvious medical findings that you can perform a test on, such as anxiety, depression, tinnitus, vertigo, plantar fasciitis, irritable bowel, and migraine headaches just to name a very few.

We are the busiest occupational medicine clinic in the state of North Dakota and all we do is Workers Compensation injuries. On a daily basis, we see patients who have obvious acute injuries with normal testing. As far as we are concerned, acute pain does not come without injury. Please consider our letter against house bill #1163.

Sincerely,

John Mickelson, D.O.

9036640/cao2

Prepared by the Legislative Council

March 19, 2013

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1163

Page 1, line 11, remove "Pain is a symptom and is not a substantial acceleration or"

Page 1, replace line 12 with "Pain that can be reasonably attributed to the natural consequences of aging or the natural history of a preexisting injury, disease, or other condition is not in and of itself proof of a compensable injury."

Renumber accordingly

(2)

13.0220.02003
Title.

Prepared by the Legislative Council staff for
Senator Klein

March 25, 2013

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1163

Page 1, line 11, after "and" insert "may be considered in determining whether there"

Page 1, line 11, remove "not"

Page 1, line 12, after "condition" insert ", but pain alone is not a substantial acceleration or a substantial worsening"

Renumber accordingly

Klein Amendment.

(5)

New language

Pain is a symptom and may be considered in determining whether there is a substantial acceleration or a substantial worsening of a preexisting injury, disease, or other condition, but pain alone is not a substantial acceleration or a substantial worsening.

Amendment form

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1163

Page 1, line 11 after "and" insert "may be considered in determining whether there" and remove "not"

Page 1, line 12 after "condition" insert ",but pain alone is not a substantial acceleration or a substantial worsening"

Renumber accordingly