2013 SENATE INDUSTRY, BUSINESS, AND LABOR

SB 2297

2013 SENATE STANDING COMMITTEE MINUTES

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

SB 2297
January 29, 2013
Job Number 17872

☐ Conference Committee

Committee Clerk Signature	

Explanation or reason for introduction of bill/resolution:

An Act to provide for a legislative management study of the state's workers' compensation system's treatment of preexisting medical conditions

Minutes: Testimony Attached

Chairman Klein: Opened the hearing.

Senator Kilzer: Said this is in regard to senate bill 2297 and the bill requests a study. Medicine is changing and the laws are changing and the medical research in underlying or medical conditions is also changing. The bill is brought to study the relationship and the liability of employers for workers who are injured who have a preexisting medical condition that may or may not be a component in the recovery of the injured worker. (:20 - 5:32)

Dean Haas, Attorney at Larson Latham Huettl, LLP. He also practices in worker's compensation law. Written Testimony Attached (1). Attachment 2: House concurrent resolution 3008. Attachment 3: State of ND WSI, 2008 Performance Evaluation Report. Attachment 4: Sedgwick CMS, Performance Evaluation of the ND WSI 2010 Report. (5:56 - 12:40)

Stefan Little: Said he is in support of the bill and that this issue needs legislative study. He wants to know why injured workers' are treated differently, held to a different standard than the regular man or woman on the street. He referred to the century code. (12:52 - 15:30)

Senator Andrist: Asked if he could put a time frame on this decision you made reference to.

Stefan: Said probably ten years ago.

Anne Green, Staff Counsel with Workforce Safety and Insurance: Written Testimony Attached (5). (16:40 - 19:27) In opposition and WSI board recommends a do not pass.

Chairman Klein: Asked how many claims were filed in 2012 with WSI, how many were settled and how many reached ALJ.

Anne: Said generally WSI issues about twenty thousand notices of decision, they call it a nod.

Chairman Klein: Said when we get down to IME's and ALS's how many?

Anne: Said they litigate approximately 150-170 files per year that go to an administrative law judge. She addressed the Sedgwick study.

Discussion and questions (21:25 - 35:35)

Chairman Klein: Closed the hearing.

2013 SENATE STANDING COMMITTEE MINUTES

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

SB 2297
January 30, 2013
Job Number 18012

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

An Act to provide for a legislative management study of the state's workers' compensation system's treatment of preexisting medical conditions

Minutes:

Discussion and Vote

Chairman Klein: Opened the meeting.

Senator Murphy: Said that because Senator Kilzer and Senator Carlisle, the sponsors of the bill, both worked for WSI at one point and given their expertise he is in favor of moving this along in a positive way. He would make a motion and moves a do pass recommendation on the study, Senate Bill 2297.

Senator Sinner: Seconded the motion.

Discussion and comments followed (1:47-11:22)

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

Floor Assignment: Senator Murphy

Date: 01/30/13
Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2297

Senate Industry, Business, and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number ______

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
Chariman 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 Murphy

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

REPORT OF STANDING COMMITTEE

SB 2297: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **DO PASS** (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2297 was placed on the Eleventh order on the calendar.

2013 HOUSE INDUSTRY, BUSINESS, AND LABOR

SB 2297

2013 HOUSE STANDING COMMITTEE MINUTES

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

SB 2297
March 20, 2013
Job 20216

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

An Act to provide for a legislative management study of the state's workers' compensation system's treatment of preexisting medical

Minutes:

Testimony, attachment 1

Hearing opened.

Anne Green, staff counsel with Workforce Safety and Insurance: Refer to written testimony, attachment 1. Clarified that while she typically testifies in support of a WSI bill, this time the recommendation is a Do Not Pass.

3:31 **Representative Kasper:** Requested copies of studies cited in the testimony.

3:47 **Representative Gruchalla:** Did you present the same testimony in the Senate hearing?

Anne Green: Yes.

3:58 **Representative Boschee:** You referenced the 2010 study and that WSI concurred with the acknowledgement of recommendations for improvement. Can you talk about what some of those recommendations were and what improvements may or may not have been made?

4:13 **Anne Green:** I have with me only the section of the 2010 Sedgwick Study that dealt with pre-existing conditions. We have others here who might be able to speak to the specifics of the study.

Chairman Keiser: I apologize to new committee members. WSI is required to give a report a joint committee after all studies. We did receive all of these reports at various times. Requested copies for review.

Anne Green: I can do that.

5:22 **Representative Amerman:** When the board of directors recommends a do pass or do not pass, does that have to be unanimous or just a majority?

Anne Green: It is a majority vote.

Chairman Keiser: Do you know what the vote was on this one?

Anne Green: I do not know, but I can find out.

Chairman Keiser: It would give us the information I think that Representative Amerman is really asking for.

5:55 **Representative Kasper:** Requested copy of the 2010 study.

Anne Green: I referenced two studies in my testimony. There is a 2008 BDMP as well as the 2010 Sedgwick James. I can provide both of those.

Representative Kasper: You cite Evaluation 88, Evaluation 92, and that workers compensation law regarding pre-existing conditions was studied in 2010. I want all three.

Anne Green: The citations within my testimony reference page numbers in the Sedgwick study. So the two I reference in my testimony are the 2008 BDMP and the 2010 CMS Sedgwick.

Support:

Opposition:

Neutral:

Hearing closed.

Representative Ruby made a **motion for a Do No Pass**. Seconded by Representative Kasper.

Roll call vote on motion for a Do Not Pass. Motion carries.
Yes = 13
No = 1
Absent = 1

Carrier: Kasper

Date: 3-20-2013

Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2297

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 Ruby Seconded By Kasper

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	ab	
Rep. Robert Frantsvog	✓				
Rep. Nancy Johnson	✓				
Rep. Jim Kasper	✓				
Rep. Curtiss Kreun	✓				
Rep. Scott Louser	✓				
Rep. Dan Ruby	✓				
Rep. Don Vigesaa	✓				

Total (Yes) 13 No 1

Absent 1

Floor Assignment Kasper

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

REPORT OF STANDING COMMITTEE

SB 2297: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **DO NOT PASS** (13 YEAS, 1 NAYS, 1 ABSENT AND NOT VOTING). SB 2297 was placed on the Fourteenth order on the calendar.

2013 TESTIMONY

SB 2297

Before the Senate Industry, Labor and Business Committee

Testimony of Dean J. Haas on 2013 Senate Bill 2297, January 29, 2013

Hon. Chairman Jerry Klein and Members of the Senate Industry, Business and Labor 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 favor of SB 2297.

This bill would require study of the crucial definition of compensable injury in the 'trigger statute,' N.D.C.C. § 65-01-02(10)(b)(7). The bill must be considered in connection with HB 1163, which would skip past the long-recommended study of this issue and simply but dramatically amend the law to exclude pain as sufficient to prove a compensable injury. It is remarkable that WSI opposes this study because it favors HB 1163, despite the fact that North Dakota law is already the most restrictive in the country. In 2009, WSI agreed with the legislative recommendation that this restrictive approach to denying claims based on preexisting conditions required study. (*See* House Concurrent Resolution No. 3008 (2009) (recommending that the study group include all stakeholders in light of the fact that: "North Dakota law is more conservative than most other jurisdictions as it relates to prior injuries, preexisting or degenerative conditions, triggers, and aggravations.")) The House Concurrent Resolution recognized that the law should be made consistent with other jurisdictions, not made more restrictive still.

It is incomprehensible that this sharp turn from a study to bring North Dakota law into line with the industry standard has become, instead, a significant tightening of the already restrictive standard. HB 1163 contradicts the most basic principle undergirding the workers compensation bargain: the employer takes the employee 'as is.' It is imperative that the legislature study this issue before rushing into this drastic and restrictive change in the law, and there should be broad support for SB 2297.

As noted, the competing House Bill 1163 would amend the law to preclude pain from proving an injury. The law that WSI would like to further restrict in HB 1163 determines the circumstance in which the worsening of a preexisting condition by a work injury is compensable, and when it is not. The central question is whether the worsening of a preexisting condition by injury must be proven only by changes shown on an x-ray or MRI, or whether the significant change can be the significant increase in pain and need for medical care that resulted from the injury. Anyone injured knows the answer: we care about our pain, not about the picture on an MRI.

In accordance with every other state, 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, other 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).

As noted, 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.

WSI contends that this study should not be done, and that the legislature should instead amend the law to be more restrictive than it already is. In support of HB 1163, WSI testified before the House IBL Committee that the amendment it seeks simply incorporates WSI's interpretation of the statute, and is not really a change in the law. This is incorrect. The statute had long been interpreted as set out in *Mickelson*—at least since 1998—as allowing a significant increase in pain complaints to prove a compensable worsening due to a work injury. In that 1998 case, *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.

While the statute was amended after the *Geck* case, WSI told the House IBL Committee that the legislation "*does not significantly change the substance* ... It removes unnecessary and confusing language." *See* Hearing on HB 1269 Before House Industry, Business and Labor Committee, 55th N.D. Legis. Sess. (February 5, 1997)(prepared testimony of Reagan Pufall.) In fact, WSI told the Committee that the amendments to the trigger exclusion were meant to simply underscore that a preexisting 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 substantially alters the significance of the condition. *Id.* Any person injured understands and feels in their bones that their so called preexisting condition is significantly altered if his or her pain, need for medical care and work status are dramatically changed by the work injury.

This testimony in 1997 recognized that the degenerative changes inherent to aging are not of much concern to any living breathing human being unless he or she has, or will have, symptoms. Despite *Geck*, WSI was prevailing in the cases, convincing ALJ's that even minor symptoms prior to a work injury are sufficient to prove a non-compensable 'trigger' rather than a compensable significant worsening. In fact, the 2008 Performance Evaluation of WSI by Berry, Dunn, McNeil & Parker explicitly noted that "[e]mployees consistently commented on the 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 p. 110.

At the time, WSI actually agreed with its 2008 Performance Evaluation that the preexisting condition statute required study. Recommendation 6.6 was: "Review the North Dakota Statute in relation to other jurisdictions. (High [Priority]) In our work, BDMP observed 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 and impairment rating percentages. BDMP recommends that a study group formed of *all the stakeholder groups* be brought together to review how other jurisdictions statutes handle these *important* Workers' Compensation issues." 2008 Performance Evaluation at p. 111. The 2009 legislature agreed that the preexisting condition issue required study, given that WSI's 2008 performance evaluation showed that North Dakota law was—and remains to this day—much more restrictive than other jurisdictions. *See* House Concurrent Resolution No. 3008 (2009).

In its recent testimony before the House IBL Committee on HB 1163, WSI also ignored that the 2010 Performance Evaluation conducted by Sedgwick provided Recommendation

5.2: At the time a compensability decision is made for a claim with a preexisting/ trigger defense, WSI claims adjusters and supervisors should determine if the underlying condition would have progressed similarly absent the work injury. ... Priority Level: High WSI Response: Concur. When pre-existing conditions are present ... the organization must determine whether the condition would have progressed similarly absent the industrial incident. Sedgwick CMS Reply: *WSI responds to this recommendation in a fashion suggesting staff already does what is intended by the recommendation. We disagree.* ... there is no documentation regarding whether the claims adjuster/supervisor considered whether or not the underlying condition would have progressed similarly absent the work injury...." Sedgwick, at p. 97. WSI has simply ignored that the question is whether the condition would have similarly progressed even absent the injury. **Quite obviously whether the condition would have progressed similarly depends on how the employee's health is changed by the injury—whether there is now chronic and disabling pain that requires medical treatment and work restrictions.**

In legal terms, whether the claim is compensable depends upon whether, as a factual matter, the employment "contributed to the final result," (*see* 1 Larson, *Workers' Compensation Law*, § 9.02[4], p. 9-19 (2007)), that is, whether the employment injury contributed to the employees' *damages*—the need for medical attention and related disability. WSI's conclusion that a worsening of the condition itself must be a worsening shown via x-ray or MRI is illogical and violates fundamental compensation principles.

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. The Court emphasized that the question depends on the very thing that Sedgwick pointed out, that in determining compensability it is crucial to assess "whether or not the underlying preexisting injury, disease, or other condition would likely have progressed similarly in the absence of employment." *Mickelson,* at ¶ 21. Thus, the Court confirmed that "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." *Mickelson*, at ¶ 20.

WSI portrays Justice VandeWalle's concurrence in that case as if he asked the legislature to overturn the decision. That is a very strange reading. In fact, Justice VandeWalle noted that he was part of the majority in the *Geck* case concluding that pain could be an aggravation of an underlying arthritic condition, and that he still agrees with the conclusion. *Mickelson*, at ¶ 30. He was simply disturbed that the aggravation statute, N.D.C.C. § 65-05-15, and trigger statute, N.D.C.C. § 65-01-02(10)(b)(7), are difficult to reconcile, since the aggravation statute awards benefits at a reduced 50% presumed rate if a work injury worsens a preexisting injury while the trigger statute denies all benefits if there is deemed to be an insufficient employment contribution to the worsening. Justice VandeWalle did not suggest that the statutes should be made

even more unusually restrictive, in violation of the central principle of workers compensation law, that the employer takes the employee as he finds him.

Finally, WSI threatens that absent this draconian tightening of the law, there will be fiscal consequences. First, this is simply not believable, given that this did not happen after the *Geck* case. WSI has won most of the cases, pointing out any kind of prior symptoms from a preexisting condition as sufficient to prove that the work injury was a mere trigger, rather than a significant worsening.[1] WSI did not ask the legislature to overrule *Geck* at the time of the performance appraisals, and no dire financial consequences have occurred. Even more basically, simply excluding certain kinds of injury from coverage, as would happen here to most claims for injury to the spine, might save some money, but violate the most basic and fundamental principle of workers compensation law: the legislature promised employees "sure and certain relief," in exchange for which employers cannot be sued for work injuries. *See* N.D.C.C. § 65-01-01. North Dakota should not be excused from applying the industry standard that pain can show a significant worsening of a condition simply to save money, literally on the backs of injured employees.

The competing HB 1163—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. The entire claimant's bar and medical profession appear to be in unanimity about this.

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.

Dean J. Haas
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[1] 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* [damages]." 1 Larson, *Workers' Compensation Law*, § 9.02[4], p. 9-19 (Revised November 2007).

(2)

98233.0100

Sixty-first
Legislative Assembly
of North Dakota

HOUSE CONCURRENT RESOLUTION NO. 3008

Introduced by

Representatives Keiser, Wald

Senator Klein

1 A concurrent resolution directing the Legislative Council to study workers' compensation laws in
2 this state and other states with respect to prior injuries, preexisting conditions, and degenerative
3 conditions.

4 **WHEREAS**, under North Dakota Century Code Section 65-02-30, Workforce Safety and
5 Insurance is required to undergo a biennial independent performance evaluation to determine,
6 among other things, whether the agency is providing quality service in an efficient and
7 cost-effective manner; and

8 **WHEREAS**, an element of the 2008 performance evaluation focused on claims for
9 benefits by injured workers who have degenerative conditions; and

10 **WHEREAS**, the 2008 performance evaluation included conclusions indicating that none
11 of the claims reviewed which involved preexisting or degenerative conditions were
12 inappropriately denied, but that North Dakota law is more conservative than most other
13 jurisdictions as it relates to prior injuries, preexisting or degenerative conditions, triggers, and
14 aggravations; and

15 **WHEREAS**, the performance evaluation also recommended the creation of a study
16 group of all the stakeholder groups to review how other jurisdictions' statutes handle those
17 issues;

18 **NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES**
19 **OF NORTH DAKOTA, THE SENATE CONCURRING THEREIN:**

20 That the Legislative Council study workers' compensation laws in this state and other
21 states with respect to prior injuries, preexisting conditions, and degenerative conditions; and

22 **BE IT FURTHER RESOLVED**, that the Legislative Council report its findings and
23 recommendations, together with any legislation required to implement the recommendations, to
24 the Sixty-second Legislative Assembly.

(3)

State of North Dakota
Workforce Safety & Insurance

2008 Performance Evaluation Report

October 8, 2008

BERRY, DUNN, MCNEIL & PARKER

Report prepared by:
Berry, Dunn, McNeil & Parker
Certified Public Accountants ▪ Management Consultants

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Conclusions

BDMP's evaluations of denied claims uncovered no evidence of inappropriate claims handling processes or decisions inconsistent with state law or WSI claim policies. In our analysis of this element we concluded the following:

- When compared to other jurisdictions, the North Dakota statute is aggressive in empowering the claims payer to deny claims based on prior injuries or pre-existing conditions. None of the claims evaluated appeared to have been denied inappropriately based on what appears to BDMP to be a conservative state law, administrative code and supporting WSI claim policies as related to the definition of "compensability". (See Recommendation 6.5.)

- An analysis of historical WSI data revealed an increase in the percent of new claims denied after the initial adjuster's investigation, beginning in fiscal year 2005. However, the majority of this increase appeared to be related to a new program designed to improve the timeliness of first reports of injury rather than to any major shift in organizational philosophy.

- The amount of time it takes WSI to reach an initial adjudication decision increased to 16.4 days in FY2007, up from 11.4 days in FY2003. The management and philosophy change during the time period evaluated required adjusters to perform a more rigorous investigation as it related to prior injuries and pre-existing or degenerative conditions. In order to give the injured employee and the medical provider time to respond to the requested forms and letters, this investigation added time to the initial adjudication decision making.

- WSI staff consistently reported experiencing a change in philosophy surrounding the investigation of prior injuries, pre-existing or degenerative conditions during the 2006-2007 period of time. They described:

  - Being encouraged by management to become "more focused" on their investigations; and

  - Being more likely to be asked to request or review medical reports on these claims and/or to review them with the Medical Director before making a compensability decision.

  Although, WSI staff described how this change in philosophy changed their overall claims handling processes and delayed their initial adjudication decision, according to the interviews with claims personnel, it did *not* affect their ultimate decisions regarding claims compensability. However, BDMP noted in the claims evaluations that a more rigorous investigation clearly led to more information on previous injuries or pre-

- While overall claims handling performance was clearly above average, WSI staff at multiple levels throughout the organization struggled to articulate their performance goals or how their individual performance was measured.

Evaluation of Claims with Degenerative Conditions

Objective

This component of Element Six entailed evaluating WSI's decisions regarding claims with degenerative conditions to determine whether they reflect industry norms.

Observations & Findings

BDMP identified a total of 72 claims from fiscal years 2006 and 2007 that had degenerative diseases/conditions according to ICD-9 diagnosis codes submitted by treating providers on medical bills for the relevant injured workers. Of those 72 claims with degenerative conditions, a random sample of 25 was selected for evaluation purposes. We found:

- The claims evaluated for this section showed consistent efforts by adjusters to identify and understand prior medical history.

- Rather than relying upon the First Report of Injury notation from the Injured Worker on whether or not he/she had a prior injury or pre-existing condition, 84% of the degenerative disease claims evaluated contained file documentation suggesting that claim history and/or index bureau services were searched for potential prior claims, indicating that adjusters were thoroughly investigating claims before making compensability decisions.

- Adjusters sent the C96a (Prior Injury Questionnaire) to the injured worker for completion on 44% of the claims with degenerative conditions and requested prior medical records via the FL304 form from medical providers on 56% of the evaluated claims, again indicating that the investigations on these claims were rigorous.

- Largely as a result of these efforts, adjusters documented prior injuries/pre-existing conditions in 56% of the claims identified as having degenerative conditions. On 31% of these claims with prior injuries or pre-existing conditions adjusters (using the FL332 form) communicated in writing to treating providers in an effort to determine if prior conditions were significant and if employment substantially accelerated or worsened an underlying condition.

- Ultimately, adjusters identified 18% of the claims with degenerative conditions as aggravations of prior injuries.

As a whole, the degenerative condition claims demonstrated a significantly higher level of documented involvement of the claims supervisors and/or the WSI Medical Director when compared against the population of general claims evaluated.

- Sixty percent (60%) of the claims with degenerative conditions contained documentation suggesting the claim was staffed with a supervisor versus only 15% of the claims in the general evaluation population.

- Similarly, 38% of the claims with degenerative conditions had documented referrals to and/or staffings with the WSI Medical Director before an initial compensability decision was made versus only 8% of the claims in the general evaluation population.

At the end of the initial claim investigation process, a total of 44% of the claims with degenerative conditions were accepted as compensable workers' compensation claims, while nearly double that figure (83%) of the general population of WSI claims were accepted after the initial investigation.

All of the degenerative disease claims evaluated did contain documentation of the acceptance/denial rationale and all of those decisions appeared appropriate per state law, administrative code and WSI policies. Adjusters documented their search for prior injuries or pre-existing conditions on every evaluated degenerative claim, and the WSI Medical Director also reviewed nearly 40% of the claims before an initial compensability decision was made.

While all claims followed the required investigation and documentation process, there was some variability in how the compensability decisions were applied to the evaluated degenerative condition claims.

- In some instances, when the adjuster's investigation revealed a pre-existing or degenerative condition, the adjuster would accept compensability for just the medical treatment relating to the new, specific injury, while explicitly excluding any treatment required by the underlying pre-existing condition.

    - For example, in one claim in which an injured worker slipped on the ice and bruised their knee, subsequent diagnostic imaging revealed a pre-existing degenerative knee condition that was likely to require a knee replacement surgery.

    - The adjuster accepted compensability for the knee contusion as work-related and agreed to pay for the associated medical treatment (ice packs and limited physical therapy), but explicitly denied compensability for a future knee replacement.

- In other instances, once it was determined that a prior injury or a pre-existing, degenerative condition existed, the entire claim was denied due to lack of clear evidence that the injury was work related.
- Results in each of these instances still appeared to conform to state law, administrative code and WSI policies, as the language of the existing North Dakota statute and the complexity of determining causality in cases with prior injuries or pre-existing degenerative conditions leave significant room for interpretation up to the individual adjusters.

These results point to the challenges inherent in determining compensability on claims with pre-existing conditions, particularly those that relate to degenerative conditions. While many jurisdictions have begun to try to address the issue of the compensability of claims with pre-existing injuries and/or conditions related to the aging process, few have gone as far as the North Dakota statute, which explicitly excludes as non-compensable:

> *Injuries attributable to a pre-existing injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the pre-existing injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.*[27]

This language, together with the additional explicit exclusion of "ordinary diseases of life to which the general public outside of employment is exposed,"[28] in the North Dakota Workers' Compensation Century Code, provides WSI adjusters with a clear ability to deny claims that they determine are either a trigger/aggravation of a prior injury or are due to pre-existing/degenerative conditions. However, the WSI Claims Procedure Manual does require the adjuster to clearly document the rationale for their denial and include any evidence, such as medical records, suggesting that an injury was related to a pre-existing or degenerative condition. (See Recommendations 6.1 & 6.5.)

Comparison to Others on Degenerative Disease Claims

BDMP interviewed a variety of industry experts and staff at other monopolistic funds/large payers in an attempt to determine whether WSI's treatment of claims with degenerative conditions was consistent with current best practices in workers' compensation.

- The Vice President at the Property Casualty Insurers Association (PCIA) reported that the handling of degenerative condition claims is dictated by the jurisdictional statutes in place within each state and that many states' statutes support the acceptance of the injured employee "the way the employer found him/her." If a work injury magnified the

[27] N.D.C.C. § 65-01-02(10)(b)(7)
[28] N.D.C.C. § 65-01-02(10)(b)(1)

symptoms of an underlying condition, the employer is typically responsible for the entire medical/disability claim. The fight for limiting a payer's liability or apportionment then typically only occurs if/when the issue of permanent disability is raised, not during the initial claim compensability investigation.

- The Vice President of Risk Management and Workers' Compensation for Safeway, Inc. and an active participant in workers' compensation reform initiatives across multiple jurisdictions, noted that "there are wide variances in how states define compensability." He used the example of a work-related orthopedic injury that exacerbates an underlying debilitating chronic disease such as AIDS or diabetes. In California and many other states, medical care associated with the underlying pre-existing condition would typically be paid for as the intent of the workers' compensation system would be to return the injured employee to work and pre-injury status. He agreed with PCIA that in most instances "the medical care would be covered, but any permanency would be apportioned."

  He went on to point out that there are typically also statutory differences in the language used to define compensable injuries as either arising out of employment (AOE) or in the course of employment (COE). In most cases, statutes that utilize "AOE" language focus primarily on whether an injury occurred while an employee was at a location relevant to their employment while "COE" statutes tend to focus on whether the activity being performed by the employee at the time of the injury was related to their job rather than just a routine "activity of daily living." For example, if an injured worker strained their back while lifting a box of parts on a loading dock, that would be considered a compensable injury in both types of jurisdictions. If that employee suffered the same back strain while bending over to pick up a pencil off the floor in the hallway, it might be considered a compensable injury in an AOE state, but would likely be deemed an activity of daily living in a COE state and judged non-compensable. The North Dakota statute actually includes both requirements in its definition of compensability:

  > *"Compensable injury" means an injury by accident <u>arising out of and in the course of hazardous employment</u>, which must be established by medical evidence supported by objective medical findings.*[29]

- In the monopolistic state of Washington, even if there was a pre-existing/degenerative condition, the state fund is typically forced to accept full liability for the whole claim so long as the injury occurred at work.

  - According to the Deputy Director of the Washington Department of Labor & Industry, there are very few instances where the fund would not accept a claim

[29] N.D.C.C. § 65-01-02(10)

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that was determined to occur while the employee was working; even a broken tooth while chewing is an accepted claim for a salaried employee.

- In Washington, the standard claims process is to check for priors/pre-existing conditions generally only if subrogation is involved as the Deputy Director noted, "since the statute in the state of Washington is relatively liberal relative to pre-existing conditions, the Department does not take much action on pre-existing conditions and generally just accepts the claims." He previously led the Illinois Workers Compensation Commission and he shared that the Illinois statute is very similar to the Washington statute, as it relates to pre-existing/degenerative condition claims and claims payers do not typically challenge at intake.

- The Louisiana Workers' Compensation State Fund (LWCC) told BDMP, *". . . the way we handle it [claims with pre-existing conditions] is to work with the physician to determine at what point they are treating the pre-existing condition versus the aggravating injury. Those lines are often not clear. The bottom line is if they [workers] are injured we would probably even pay for the pre-existing situation until it is established that the physician is only treating the back problem that existed prior to the injury."*

  - Louisiana also has a Second Injury Fund, established to encourage employers to hire workers with pre-existing conditions. Each claims payer in the state is assessed an amount that is contributed to the fund.

  - If an injured worker's injury is exacerbated or complicated due to a pre-existing condition, the workers' compensation payer pays for any necessary medical treatment but can apply to the Fund for reimbursement of care that was attributable to the pre-existing condition. This process is designed to help ensure that employers do not discriminate against potential workers with pre-existing conditions in the hiring process and that if an injury does occur the injured worker receives the appropriate medical care they require.

- A study commissioned in 2000 by the Workers' Compensation Division of the Oregon Department of Consumer and Business Services in which researchers conducted a comprehensive analysis of the statutory compensability standards for workers' compensation injuries found that:

  - The actual statutory language is often critical to a clear understanding of compensability standards. The danger in not looking at the precise language is that different standards may be incorrectly lumped together and variations may

not be understood. In addition, states sometimes have different standards depending on the particular physical or mental condition involved.[30]

- In addition, their review found that some states "have specifically eliminated compensability for the natural aging process, conditions caused by daily living, the ordinary diseases of life, or degenerative conditions."[31]

All of the industry experts and other claims payers contacted by BDMP regarding the question of pre-existing injuries or degenerative conditions commented that decisions regarding pre-existing/degenerative conditions are dictated by the state statute and the interpretation of that statute by the courts within that state. (See Recommendation 6.5.)They made a point of saying that due to the different nature of both the statutes and the interpretations of each statute, there is currently no industry-wide norm for dealing with degenerative condition claims.

Conclusions

During the interview phase of BDMP's evaluation, WSI staff consistently noted a change in claims philosophy that occurred during FY2006-2007 in which adjusters were encouraged to investigate all new claims for prior injuries or pre-existing conditions much more thoroughly. In addition:

- BDMP's claim evaluations suggest that there was additional scrutiny applied to new claims in this regard, but at the same time, BDMP did not find any inappropriate denials given the definition of "compensability" in the state law, administrative code and WSI policies. The claims evaluation and trending analysis did however suggest that there was a push to have adjusters follow the statute regarding the investigation into the compensability of pre-existing or degenerative conditions more rigorously than had previously been the norm.

- While all claims followed the required investigation and documentation process, there was some variability in how the compensability decisions were applied to claims with pre-existing and/or degenerative conditions. (See Recommendation 6.1.)

The way compensability decisions are made at other state funds and large payers regarding pre-existing or degenerative conditions is driven almost entirely by the language of the statute(s) in which they administer claims. The North Dakota statute is conservative and it provides adjusters with direction to deny claims with pre-existing injuries and/or degenerative conditions than most other jurisdictions. (See Recommendation 6.5.)

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[30] Edward M. Welch, Workers' Compensation Center Michigan State University, *Oregon Major Contributing Cause Study*, http://www.cbs.state.or.us/wcd/administration/finalmcc.pdf, (Oct, 2000), p. 106
[31] Welch, *Oregon Major Contributing Cause Study*, p. 109

Evaluation of WSI Claim Philosophy

Objective

This component of Element Six directed that BDMP determine whether there had been a change in the organization's claims management philosophy between fiscal year 2004 and fiscal year 2007. We also were asked to provide a comparison of WSI's claims management "philosophies" to those of other monopolistic funds and large workers' compensation payers.

Observations & Findings

Each WSI employee BDMP interviewed was asked about changes in the claims handling philosophy and the timeliness of adjudicating a claim. We found:

- Employees consistently commented on the 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.

- According to the interviews and the data included in this report, this change in philosophy did lengthen the initial investigation process with new claims and helped drive a 25% increase in the adjusted denial rate from fiscal year 2005-fiscal year 2007. The Chief of Injury Services said, "We were losing focus on the test of compensability. We need to go back to our basics and make the call based on our training and get the claim accepted or denied without all the extensive analysis," and reported that the extent of the analysis spent on priors/pre-existing conditions was keeping claims pending for longer periods of time.

Claim evaluations suggest that, despite these philosophical changes, overall claims handling remained extremely strong during the period and there was no evidence that claims were being denied inappropriately.

Investigation of prior injuries and pre-existing conditions including obtaining and reviewing all previous relevant medical records is "best practice" in Workers' Compensation claims handling, although many state statutes support apportionment only as it relates to permanency. Given the unusual but explicit direction given by the North Dakota statute to deny compensability based on a work-related injury acting as a trigger for a prior injury or pre-existing condition, the denials reviewed by BDMP appeared reasonable.

Conclusions

As noted elsewhere, WSI staff consistently referenced experiencing a change in claims philosophy during FY2006-2007. They reported that adjusters were more frequently encouraged to investigate all new claims for prior injuries or pre-existing conditions much more thoroughly. Of note were the following:

- The philosophical change within WSI appears to have been real. However, this shift appears to have been motivated by a desire to follow the language of the statute more closely and to leverage the power it provides the claims organization to reduce WSI's liability for a specific subset of claims with prior injuries or pre-existing conditions. The North Dakota statute is conservative in its definition of "compensability" as compared to other jurisdictions. (See Recommendation 6.5.)

- There was evidence of some variability in adjuster judgment in relation to the compensability of those claims, yet all decisions appeared to be well within the scope of state law, administrative code and WSI procedures. (See Recommendation 6.1.)

Recommendations

Recommendation 6.1: Revise the WSI Claim Procedure Manual to standardize "best practices" and train claims adjusters on new practices. (High)

WSI should clarify claims handling processes and procedures regarding the acceptance or denial of claims with prior injuries and/or pre-existing/degenerative conditions and train or re-train all existing claims adjusters on these new practices.

WSI Response: CONCUR
Adjudicating claims involving prior injuries, diseases and conditions has, and remains a challenge within North Dakota. Establishing training on this issue is extremely important to ensure consistency. Claims training has been conducted and is scheduled on an ongoing basis. Updating the claims procedure manual is an ongoing process as well.

Recommendation 6.2: Implement the Injury Management pilot program across all 7 claim units by ensuring better utilization of the WSI Medical Director. (High)

WSI Response: CONCUR
Currently, the Medical Director, Pharmacy Benefit Director, Return to Work Manager, and Claims Director are involved in the Triage for Units 2, 6, and 7. Plans are being developed for implementation of Injury Management into the remaining units. Additionally, WSI has hired three new nurse case managers to imbed within each unit.

Recommendation 6.3: Decrease the amount of time the WSI Medical Director dedicates to the Utilization Review unit. (High)

Suggestions on how this may be accomplished include:

- Limiting the procedures/treatments that require pre-authorization to those where utilization review appears to be having an impact (e.g. chiropractic care, chronic pain evaluation, etc); and,
- Utilizing external physician advisor services, rather than the Medical Director, to assist the utilization review process.

WSI Response: CONCUR
Effectively using the Medical Director's time is a challenge and requires balance. WSI has begun altering his assignments with the intention of increasing availability. Since Jan. 05 through June 06 the average monthly UR requests completed by the medical director was 303. From Jan. 07 through May 08, the average monthly UR requests completed by the medical director were 122. This was a reduction of 60%. Long term goal is to reduce the number by approximately another 20 to 30%.

We have also trained and started having the UR Nurses conduct some of the reviews that were previously completed by the Medical Director. Expansion of allowing Medical Case Managers to conduct Utilization Review on the claims they are assigned is planned. Initial training has been completed.

On July 1, 2008, a pilot program was established that CT scans done in the first 30 days from the date of injury will no longer require pre-authorization from WSI.

Recommendation 6.4: Investigate additional sources for North Dakota IME providers and peer review. (Low)

This may be accomplished by publishing a request for information to determine the ability of the new national Peer Review/IME firms to provide Peer Review/IME services utilizing providers in North Dakota.

WSI Response: CONCUR
The Service Requisition for IME services has been signed and approved accordingly by WSI staff. This requisition is the first step in the process of developing a Request for Proposal (rather than a Request for Information) for IME services. Plans are to include many of the current IME needs but to also take into account the proposed recommendations from the 2007 IME audit.

Recommendation 6.5: Enhance WSI's knowledge of industry best practices through staff attendance at appropriate industry conferences. (Medium)

Regular attendance at workers' compensation industry trade events is an important means for WSI management and staff to stay informed on industry benchmark standards, new processes and procedures, current and future trends, and general industry dynamics. Examples of these learning opportunities include:

- Workers' Compensation Research Institute Conference
- National Workers' Compensation & Disability Conference
- Annual National Workers' Compensation & Occupational Medicine Conference

WSI Response: CONCUR

North Dakota is a monopolistic insurer. In order to continue performance at the highest levels, WSI recognizes the need for continual training of staff at all levels. Due to WSI's monopolistic nature, these training opportunities often occur outside of the state of North Dakota. This increases the expense of training due to travel costs but resources have been, and will continue to be focused on this area. Historically staff has participated in various AASCIF workshops, NCCI conferences, and the National Workers' Compensation & Disability Conference and will continue to do so.

Recommendation 6.6: Review the North Dakota Statute in relation to other jurisdictions. (High)

In our work, BDMP observed 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 and impairment rating percentages. BDMP recommends that a study group formed of all the stakeholder groups be brought together to review how other jurisdictions' statutes handle these important Workers' Compensation issues. Suggested sources of information for this study group include:

- Edward M. Welch, Workers' Compensation Center Michigan State University, *Oregon Major Contributing Cause Study,* http://www.cbs.state.or.us/wcd/administration/finalmcc.pdf, (Oct, 2000)
- Clayton, Ann, *Inventory of Workers' Compensation Laws - Beta Version, March 2007,* Workers' Compensation Research Institute, Cambridge, MA : Only available to members of WCRI and/or IAIABC.

WSI Response: CONCUR

WSI will undertake a study of the adequacy of the current law in these areas. Currently, this issue is being reviewed with WSI by the North Dakota Industry Business & Labor interim committee. Whether any legislative changes will occur as a result of insights gained is not known but WSI will continue to monitor.

BDMP Concluding Remarks

While it is beneficial that the WSI and IB&L committee consider this, we re-iterate the importance and benefit to the State of North Dakota that a multi-perspective stakeholder group be assembled to specifically study this issue.

(4)

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2010

Performance Evaluation of North Dakota Workforce Safety and Insurance

August 9, 2010

Element Five: Comparison of Other State's Workers' Compensation Laws

Introduction:

The objective of Element Five is to compare other state's workers' compensation laws with respect to prior injuries, preexisting conditions and degenerative conditions. In that process we are to evaluate North Dakota's workers 'compensation laws, administrative code and departmental policies regarding prior injuries, preexisting conditions and degenerative conditions and compare and contrast North Dakota's laws to the other state worker's compensation laws, rules and regulation in the other 49 states. We will also review this matter in the context of what constitutes a compensable injury in North Dakota versus other states.

We reviewed the following in our research:

- Conolly & Associates March 2008 report to the Board of Directors
- 2008 Marsh report
- Past North Dakota WSI Performance Evaluations
- NDCC statutes NDCC 65-01-02 (10)(b)(7)) and NDCC 65-05-15
- 1997 SB 1261 (65-05-15) and testimony
- North Dakota Supreme Court Case Law
- North Dakota Legislative History Summary
- Pre-existing Conditions State Statute & Case Law Research – Amber Buchwitz
- North Dakota WC Review Committee Report, 61st Legislative Assembly
- North Dakota WSI Claim Procedures
- State expert survey of 49 states and one District
- Review of at least 10 WSI denied claims from calendar year 2008 and the first three quarters of calendar year 2009 with denials related to prior injuries, pre-existing condition triggers and/or chronic conditions and aggravations

Background:

The resolution in HCR 3008 states in part, "...the 2008 performance evaluation included conclusions that none of the claims reviewed which involved preexisting conditions or degenerative conditions were inappropriately denied, but that North Dakota law is more conservative than most other jurisdictions as it relates to prior injuries, preexisting or degenerative conditions, triggers and aggravations..."

"Compensable injury", as currently defined by the North Dakota Century Code, 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. This definition meets a very basic injury standard in line with other states' definitions of compensable injury.

North Dakota's threshold of compensability for worker's compensation claims is found in North Dakota Century Code (NDCC) 65-01-02(10). NDCC 65-01-02(10)(a) defines what is incorporated as a compensable North Dakota injury; NDCC 65-01-02(10)(b) defines what is not compensable in the state of North Dakota. The focus of our reporting is on excluded injuries in subsection (10)(b), more specifically, subsections (b) (7) (8) and (9) which state:

- (10)(b)(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.
- (10)(b)(8) A non-employment injury that, although acting upon a prior compensable injury, is an independent intervening cause of injury.
- (10)(b)(9) A latent or asymptomatic degenerative condition, caused in substantial part by employment duties, which is triggered or made active by a subsequent injury.

The Aggravation statute, or NDCC 65-05-15, states that when a compensable injury combines with a non-compensable injury, disease, or other condition, the organization shall award benefits on an aggravation basis.

There are four bases under which the aggravation benefit will be covered and paid currently:

1. In cases of a prior injury, disease, or other condition, known in advance of the work injury, which has caused previous work restriction or interference with physical function the progression of which is substantially accelerated by, or the severity of which is substantially worsened by, a compensable injury, the organization shall pay benefits during the period of acute care in full. The period of acute care is presumed to be sixty days immediately following the compensable injury, absent clear and convincing evidence to the contrary. Following the period of acute care, the organization shall pay benefits on an aggravation basis.
2. If the progression of a prior compensable injury is substantially accelerated by, or the severity of the compensable injury is substantially worsened by a non-compensable injury, disease, or other condition, the organization shall pay benefits on an aggravation basis.
3. The organization shall pay benefits on an aggravation basis as a percentage of the benefits to which the injured worker would otherwise be entitled, equal to the percentage of cause of the resulting condition that is attributable to the compensable injury. Benefits payable on an aggravation basis are presumed to be payable on a fifty percent basis. The

party asserting a percentage other than the presumed fifty percent may rebut the presumption with clear and convincing evidence to the contrary.

4. When an injured worker is entitled to benefits on an aggravation basis, the organization shall still pay costs of vocational rehabilitation, burial expenses under section 65-05-26, travel, other personal reimbursement for seeking and obtaining medical care under section 65-05-28, and dependency allowance on a one hundred percent basis.

A Review of the Evolution of the Current Pre-Existing Condition Statute

- The pre-existing trigger language was initially created in 1989 under SB 2256. Testimony at the time as presented stated the intent was to preclude injuries... "attributable to a pre-existing 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 pre-existing condition by worsening its severity, or accelerating its progression."

- The "trigger" exclusion was first introduced as 1991 SB 2206, which included the following language: NDCC 65-01-02(8)(b)(8) "A latent or asymptomatic degenerative condition, caused in substantial part by employment duties, which is triggered or made active by a non-employment injury."

- 1995 HB 1225 added the language regarding objective medical evidence to the compensable injury definition.

- 1997 HB 1269 deleted wording that went along with "solely because" and added "substantially accelerates its progression or substantially worsens its severity. This is sometimes referred to as 'the trigger' statute. A workplace injury that 'broke the camel's back' is not compensable. However, if the condition got worse much more quickly than it would have otherwise, OR if additional damage was done on top of the degenerative condition making the result much more severe than otherwise would have been, then the injury would be compensable. It will be accepted for either full or partial benefits, depending upon the circumstances. The Bill also adopts language that better matches the language of the aggravation statute in NDCC 65-05-15.

A Review of the Evolution of the Current Aggravation Statute

- This statute has been around since 1931 when HB 209 included the following language…"In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributable to the injury."
- Senate bills in 1939, 1943 and 1953 amend the statute to include a proportional limit and weekly payment limits.
- 1977 SB 2158 amended the statute to specify that pre-existing conditions were not covered under this Act, and are more appropriately covered under this section. It also held that if a physician is unable to estimate the degree of aggravation, but the Bureau is aware that there is a preexisting condition, the degree of aggravation attributable to the work related injury will automatically be 50%. Previously the ND Supreme Court had held that the determination of the degree of aggravation is essentially a medical question be answered by the employee's treating physician. However, in many cases, the physician had been unable to give a reasonable estimate of the degree. When that occurred, the Supreme Court held that the Bureau had to pay on a 100% basis.
- 1981 SB 2127 added language to deal with non-employment injuries that occur after an employee has suffered an employment related injury which aggravates the prior employment injury, and may be more severe that the employment injury.
- 1989 SB 2239 recognized that only a handful of states had an aggravation statute, and that other states temper the harshness of aggravation statutes by reducing the award of permanent disability only. It amended the statute to pay benefits at 100% during the acute phase (no time limit designate) and to continue at the reduced rate on a continued aggravation basis where further treatment and/or periods of disability continue, on the basis that the pre-existing condition either impaired or disabled the claimant and was known in advance of the work injury. There must be medical evidence that the pre-existing condition and the work injury are both substantial contributing causes of the workers medical problem.
- 1997 HB 1261 amended the acute period to 60 days, amended substantial worsening language, provided for 50% payment when claims are accepted on an aggravation basis, and added 100% payment of vocational rehabilitation expenses.

Findings:

A prior North Dakota WSI 2008 performance evaluation of claim compensability decisions found that all of the degenerative disease claims evaluated did contain documentation of the

acceptance/denial rationale and all of those decisions appeared appropriate per state law, administrative code and WSI policies. Adjusters documented their search for prior injuries or pre-existing conditions on every evaluated degenerative claim, and the WSI Medical Director also reviewed nearly 40% of the claims before an initial compensability decision was made. However, while all claims followed the required investigation and documentation process, there was some variability in how the compensability decisions were applied to the evaluated group of degenerative condition claims.

The OSHA Recordkeeping Handbook (OSHA 3245-09R 2005, page 14) provides an industry example of the definition of a significant aggravation of a pre-existing condition. For the purposes of OSHA injury and illness recordkeeping, a significant aggravation of a pre-existing injury or illness is defined in the following manner:

> "A preexisting injury or illness has been significantly aggravated, for purposes of OSHA injury and illness recordkeeping, when an event or exposure in the work environment results in any of the following:
>
> (i) Death, provided that the preexisting injury or illness would likely not have resulted in death but for the occupational event or exposure.
>
> (ii) Loss of consciousness, provided that the preexisting injury or illness would likely not have resulted in loss of consciousness but for the occupational event or exposure.
>
> (iii) One or more days away from work, or days of restricted work, or days of job transfer that otherwise would not have occurred but for the occupational event or exposure.
>
> (iv) Medical treatment in a case where no medical treatment was needed for the injury or illness before the workplace event or exposure, or a change in medical treatment was necessitated by the workplace event or exposure. "

OSHA further defines "significant workplace aggravation of a pre-existing condition as follows: "In paragraph 1904.5(b)(4), the final rule...requires that the amount of aggravation of the injury or illness that work contributes must be "significant," i.e., non-minor, before work-relatedness is established. The pre-existing injury or illness must be one caused entirely by non-occupational factors..." "Paragraph 1904.5(a) states that an injury or illness is considered work related if "an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness." (OSHA 3245-09R, page 20)

Of the 49 states and one District surveyed, the most common practice in other states with regard to prior medical conditions is to accept the claim on its face value. Most states consider employees hired "as is" and any incident at work that aggravates, exacerbates, or triggers an underlying pre-

existing condition (known or unknown) and creates a need for work restriction and/or medical treatment is deemed compensable. In such cases, lost time and medical benefits are paid until the injured employee reaches a pre-injury status. These benefits are paid statutorily at 100%. Medical reports are used to determine when the injured worker achieves pre-injury status, for vocational feasibility determinations and whether there is the existence of any permanent impairment. Apportioned or reduced permanent impairment benefits for pre-existing and subsequent non-work related injuries are the norm nationwide.

There are states that are more restrictive when it comes to exclusions to benefit provision in the combination of prior injuries, pre-existing and degenerative condition and work related injuries. For example, Wisconsin precludes benefits for any injury or condition pre-existing at the time of employment with the employer against whom a claim is made. In Florida, if a work related injury combines with a pre-existing disease or condition to cause or prolong disability or need for treatment, the employer must pay compensation or benefits only to the extent that the work related injury is and remains more than 50 percent responsible for the injury as compared to all other causes combined, and thereafter remains the major contributing cause of the disability or need for treatment. Kansas requires that the work related injury produce increased disability above that found in the prior injury or previous condition. Alaska requires that the work related injury be the substantial cause of the disability, death or need for medical treatment as the threshold to benefits. Both Alaska and Connecticut preclude benefits if there is an aggravation to a pre-existing condition that happened 3 and 6 months, respectively, before the effective date of coverage. However, in most states once the claim is evaluated and determined to be compensable, benefits are provided at the 100% level – an all or nothing proposition - with the exception of permanent disability benefits. We have provided a list of how other state laws and regulations compare to North Dakota with respect to prior injuries, pre-existing conditions, and degenerative conditions in Exhibit 5.1.

Our review of denied claims with prior injuries or pre-existing conditions mirrors prior results from the performance evaluation in 2008. From anecdotal interviews with WSI claims staff, a review of claim file notes and documentation, there appears to be a focus on aggressive claims investigations surrounding degenerative and chronic medical conditions leading to a more aggressive denial decision-making. Our review suggests that some are accepted 100% (Claim #20) others have partial benefits paid (Claim #12), and yet others are denied outright (Claim #17).

It is WSI's claims practice to have supervisory oversight in the process of denying the types of claims that are under review in this section of the evaluation. However, there is no requirement for supervisory oversight when adjusters make the decision to accept a claim with priors or degenerative conditions. In our review of a few accepted claims, we found claims that adjusters had taken a great deal of latitude when determining the significance of prior conditions in their compensability decision. Decisions were made to accept claims with prior injuries, and decisions were made to deny claims under similar circumstances.

Under WSI Claims Procedure 120, general instruction is provided to the WSI claims staff on how to investigate claims presenting with priors and aggravations to pre-existing medical conditions, and to assist with the application of 65-01-02(10)(b)(7) and 65-05-15. Form FL332 (or the series of questions listed therein) is used almost exclusively to obtain medical evidence to make benefit determinations regarding prior injury/pre-existing conditions/aggravation-claims. If the doctor checks box (a) of the FL332 form, the adjuster is directed that the claim can be denied as a trigger. They are then cautioned to consider if the underlying condition would have progressed similarly absent the work injury, however no medical information is requested to assist them in this determination. Then, if box (b) or (c) are checked, the case should be accepted for specific benefits or acceptance at aggravation or 100%, respectively. Please see Exhibit 5.2

The FL 332 form is short and specific in its request for information; so much so that the provider need not spend much time completing the form. However, the issues that surface in these areas of compensability are highly complex and WSI should elicit written responses from providers that are well reasoned and justified. In other words, the rationale obtained from a treating physician by WSI for acceptance or denial of benefits deserves a significantly higher level of involvement than a check the box response. For providers unfamiliar with the law in this area, there should be some definition of terminology used, and instruction with regard to how to apply it appropriately. One specific area that the form does not address at all is the issue of whether the condition is an asymptomatic condition previously unknown to the injured worker and untreated prior to the work incident. According to testimony in advance of the passage of HB 1261, if the preexisting condition is only discovered after the work injury, the claim has to be accepted in full. It is possible that there are cases that have been denied for triggering injuries that may actually be eligible for benefits at the 100% level because the answer to this question is not asked or considered when available.

We note testimony provided by WSI staff in 1997 in advance of the passage of HB 1269, which stated in part, "If the 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% benefits." The Geck and Bergum cases show that the processing of "trigger" denials is very dependent on thorough and supported analysis of the medical evidence because these denials hinge on evidence that is often subject to differing medical opinions. In Geck, the case involved an underlying asymptomatic disease at time of injury. We saw other examples in our review of claims that were initially asymptomatic, where an underlying disease process was identified and where benefits were ultimately denied. WSI might have two medical opinions in the file with at least one medical opinion supporting the cessation of benefits. By statute, this is a reasonable position to take.

Another discussion point surrounds what appear to be conflicts inherent within the claim procedure itself. The claims adjuster is counseled to engage in standard claims investigation techniques: make three- point contact with the injured worker, the employer and the physician, review the claim history, search for previous claims filed for the same or similar body part(s), and obtain copies of medical records. The procedure gives the adjuster license to obtain medical

evidence by advising that if prior problems appear to be significant, the claims adjuster may send a questionnaire to the treating physician to inquire as to whether the employment substantially accelerated the progression or substantially worsened the severity of the pre-existing injury, disease or condition. Further down in Procedure 120, however, the adjuster is counseled, "If the answer is "yes" to any of the questions and the prior injury, disease or condition is not WSI liability, the claim is possibly an aggravation case. If the claims adjuster determines that aggravation is a possibility the claim should be staffed with the claims supervisor and staff attorney". Our review of claim file documentation supports supervisor concurrence with the adjuster's denial more often than not, but there is no documentation regarding whether the claims adjuster/supervisor considered whether or not the underlying condition would have progressed similarly absent the work injury per WSI Procedure 120. The additional step of determining whether the triggering event substantially aggravated or accelerated the underlying condition has not been taken. When claims are filed with prior known or unknown medical conditions, we find that the claims unit lacks consistency in applying its internal procedures, resulting in an inconsistent application of the pre-existing/trigger statute.

Other claims jurisdictions make it a practice to schedule an Independent Medical Evaluation (IME) as a normal part of the investigative claims process to assist the claims adjuster in the process of unraveling contribution and causality issues. The goal of the IME is to provide the claims adjuster with a well reasoned, independent medical/legal opinion that outlines a baseline assessment of the injured worker's medical condition and functional capacity pre-injury, an assessment the day of/after the injury (post-injury), and as of the date of the medical evaluation. Information provided to the IME includes an accurate history of the mechanism of the reported industrial injury, past and present medical records, a job description of the duties the injured worker was performing at/during the time of injury, and the authorization to perform any non-invasive diagnostic testing required for establishing an appropriate diagnosis. The injured worker and the treating physician also provide documentation outlining any change in the injured worker's functional level of activity (including activities of daily living, if appropriate), change in any prior level of physical impairment, and/or a change in treatment frequency or severity attributed to the work incident. Engaging and successful partnering with the North Dakota treating physician community to obtain this type of probative information could result in less adversarial interaction with injured workers, medical practitioners, and reduced litigation. At the very least, it would highlight WSI's strong intent to engage the injured worker and treating physician in the process of determining benefit eligibility.

Yet another discussion point for consideration is how employment related claims associated with cumulative trauma are to be adjudicated in North Dakota. Most jurisdictions cover the effects of long term heavy physical labor, repetitive motion, and heavy equipment use which may not manifest in a single work event under some type of cumulative exposure. NDCC 65-01-02(10)(a) finds injuries compensable which relate to disease(s) caused by a hazard to which an employee is subjected in the course of employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. Occupational hazards

may cause both temporary and permanent injuries and illnesses. Some hazards will create an injury immediately, whereas others may not cause an injury or illness until much later in life. Hazards are generally classified as biological, chemical, ergonomic, physical, psychosocial and safety. Within the ergonomic and physical categories are injuries related to repetitive lifting and bending/stooping movements, pressure extremes, jarring motions, etc. We have reviewed claims presented in these categories that have been denied as non-specific individual traumas or pre-existing conditions with a lack of substantial acceleration documentation (Claim #15, #9, # 18).

With regard to the aggravation awards, WSI averages just over 40 aggravation cases per fiscal year. Anecdotal comments from WSI claim staff indicates that it is very difficult for the claim staff to identify an aggravation case when it is presented. When asked how they apply the concept of substantial acceleration or substantial worsening that appears in both NDCC 65-01-02(10)(b)(7) and NDCC 65-05-15, it does not appear to be sufficiently defined in the legislative language of the statute such that members of the WSI Claims Unit, Treating Physicians, Independent Medical Evaluators and the ND Legislative body can agree to apply the statute consistently to make meaningful medical, factual and legal determinations as to whether the injured worker is entitled to benefits. Based upon WSI Procedure 120, one can assume that if a medical provider answers "yes" to Part b of the questionnaire referenced above that the claim may be picked up on an aggravation basis; more specifically, that a medical provider's affirmative response to Part b results in WSI's 100% acceptance of a claim, usually for a specified period of time. Per statute, that specified period of time will be no less than 60 days from the date of injury. Claim # 21 is one example of how difficult it may be to make a determination as to the type of benefit(s), if any, that should be provided.

Given the common industry practice to award benefits at 100% if the claim is determined to be compensable, a benefit level pricing estimate was solicited to determine how a proposal to eliminate the aggravation category would impact claim costs. It was determined that if the aggravation statute were repealed and WSI paid benefits at the 100% level rather than at 50%, the claim cost would increase by 2.7%. By WSI's calculations, this would result in a $4.8 million dollar increase, resulting in a discounted premium rate level increase of approximately 2.2%.

Recommendations:

Recommendation 5.1: Amend the existing internal WSI Claims Procedure 120 to require claims adjusters to send a questionnaire to the treating physician and/or an IME to inquire as to whether the employment substantially accelerated the progression or substantially worsened the severity of the pre-existing injury, disease or condition. Provide training to all affected WSI Claim and DRO staff.

Priority Level: High

> **WSI Response: Concur.** Claims Procedure 120, Investigation of Priors And Aggravation, will be updated to change the word "may" to "must". The claims procedure will then say "If the prior problems appear to be significant the claims adjuster **must** send FL332 to the treating doctor to determine if the employment substantially accelerated the progression or substantially worsened the severity of the preexisting injury, disease or condition".
>
> WSI provides periodic training on the investigation of prior injuries. The claim's staff and DRO are included in the training. Training will be provided at the time the claim's procedure is updated and finalized.

Recommendation 5.2: At the time a compensability decision is made for a claim with a pre-existing/trigger defense, WSI claims adjusters and supervisors should determine if the underlying condition would have progressed similarly absent the work injury, per WSI Claim Procedure 120.

Priority Level: High

> **WSI Response: Concur.** When pre-existing conditions are present, claims are compensable when the industrial incident substantially worsened or substantially progressed the underlying condition. As part of that review, the organization must determine whether the condition would have progressed similarly absent the industrial incident.

Sedgwick CMS Reply: WSI responds to this recommendation in a fashion suggesting staff already does what is intended by the recommendation. We disagree. We made this recommendation because of our finding as noted previously in this Element and repeated here: "Our review of claim file documentation supports supervisor concurrence with the adjuster's denial more often than not, but there is no documentation regarding whether the claims adjuster/supervisor considered whether or not the underlying condition would have progressed similarly absent the work injury per WSI Procedure 120." We simply would like to see documentation that reflects that the procedure was followed. Absent that documentation, the decision rationale is lacking.

Recommendation 5.3: In case circumstances where there is a prior medical condition or pre-existing work restriction, WSI should obtain this information to determine if there is a substantial objective baseline from which to proceed, such as input from treating physicians familiar with the patient's medical condition(s). This would allow WSI to establish an objective baseline and an accurate fact basis from which to proceed. The injured worker and the treating physician should be asked to provide documentation outlining any change in the injured worker's functional level of activity (including activities of daily living, if appropriate), change in any prior level of physical impairment, and/or a change in treatment frequency or severity attributed to the work incident.

Priority Level: Medium

> **WSI Response: Concur.** To the extent information is available upon which an "objective baseline" is able to be established, WSI considers these findings in determining whether the industrial exposure substantially worsened or substantially progressed the underlying condition. When treating physician input is available, the same will be sought and reviewed by the organization.

Recommendation 5.4: Utilize the IME process to resolve disputes arising out of claim denials for pre-existing conditions, prior conditions and degenerative conditions.

Priority Level: Medium

> **WSI Response: Concur.** Currently WSI employs the use of IMEs in order to resolve medical disputes, where appropriate. WSI will continue to use these experts in the areas which have a significant need.

Sedgwick CMS Reply: As is true of our perception of WSI's response to Recommendation 1.3, where we point out the advantages of IMEs over medical directors in making compensability determinations, we believe that WSI does not concur with this recommendation. We reiterate here that independent medical evaluators have distinct advantages over in house medical directors in that they examine the patient and take a history from the patient, as well.

Recommendation 5.5: We recommend that WSI prepare legislation for consideration by the legislature which repeals the aggravation statute for injuries on or after a date in 2011 to be determined by the legislature.

Priority Level: High

> **WSI Response: Concur.** WSI will prepare legislation for the interim Legislative Workers' Compensation Review Committee's consideration.

① SB 2297
3-20-2013

2013 Senate Bill No. 2297
Testimony before the House Industry, Business, and Labor Committee
Presented by: Anne Jorgenson Green, Staff Counsel
Workforce Safety & Insurance
March 20, 2013

Mr. Chairman, Members of the Committee:

My name is Anne Green, Staff Counsel with Workforce Safety and Insurance, here to provide testimony on Senate Bill 2297. WSI's Board of Directors recommends a Do Not Pass on SB 2297.

Senate Bill 2297 proposes to require Legislative Council to consider studying preexisting conditions under North Dakota workers compensation law.

During the 2009 Legislative Session, House Concurrent Resolution No. 3008 required Legislative Council to study workers compensation laws in North Dakota and other states with respect to prior injuries, preexisting conditions and degenerative conditions. In August of 2009, the Workers Compensation Review Committee, pursuant to NDCC 65-02-30, selected this issue, along with three others, as topics for WSI's biennial performance evaluation. The State Auditor's office selected the remaining elements for review. In 2010, Sedgwick CMS was selected by the State Auditor's office to conduct WSI's biennial performance evaluation.

In its analysis of other states' workers compensation law, Sedgwick found a number of states with laws that were more restrictive in excluding benefits to injured workers than North Dakota. Conversely, Sedgwick also found that a number of jurisdictions paid claims at 100% once they were determined compensable. Sedgwick concluded that WSI's definition of compensable injury "meets a very basic injury standard in line with other states' definitions of compensable injury". 2010 Sedgwick Performance Evaluation at 88.

The performance evaluation concluded that WSI staff devotes considerable time to compensability determinations regarding preexisting and degenerative conditions, making specific suggestions for improvement. They noted excellent documentation of decision-making and appropriate application of the law. Sedgwick at 92.

North Dakota workers compensation law regarding preexisting conditions was studied

as recently as 2010. That study acknowledged the complexity of this area of the law while still making recommendations for improvement, all with which WSI concurred. WSI requests a do not pass on SB 2297.

This concludes my testimony. I am happy to answer any questions that you may have.

(5)

2013 Senate Bill No. 2297
Testimony before the Senate Industry, Business, and Labor Committee
Presented by: Anne Jorgenson Green, Staff Counsel
Workforce Safety & Insurance
January 29, 2013

Mr. Chairman, Members of the Committee:

My name is Anne Green, Staff Counsel with Workforce Safety and Insurance, here to provide testimony on Senate Bill 2297. WSI's Board of Directors recommends a Do Not Pass on SB 2297.

Senate Bill 2297 proposes to require Legislative Council to consider studying preexisting conditions under North Dakota workers compensation law.

During the 2009 Legislative Session, House Concurrent Resolution No. 3008 required Legislative Council to study workers compensation laws in North Dakota and other states with respect to prior injuries, pre-existing conditions and degenerative conditions. In August of 2009, the Workers Compensation Review Committee, pursuant to 65-02-30, selected this issue, along with three others, as topics for WSI's bienniel performance evaluation. The State Auditor's office selected the remaining elements for review. In 2010, Sedgwick CMS was selected by the State Auditor's office to conduct WSI's biennial performance evaluation.

In its analysis of other states' workers compensation law, Sedgwick found a number of states with laws that were more restrictive in excluding benefits to injured workers than North Dakota. Conversely, Sedgwick also found that a number of jurisdictions paid claims at 100% once they were determined compensable. North Dakota law permits WSI to "aggravate" a claim or pay the percentage which the objective medical evidence supports as WSI's liability. Sedgwick concluded that WSI's definition of compensable injury "meets a very basic injury standard in line with other states' definitions of compensable injury." 2010 Sedgwick Performance Evaluation at 88.

The performance evaluation concluded that WSI staff devotes considerable time to compensability determinations regarding pre-existing and degenerative conditions, making specific suggestions for improvement. They noted excellent documentation of decision-making and appropriate application of the law. Sedgwick at 92.

North Dakota workers compensation law regarding pre-existing conditions was studied as recently as 2010. That study acknowledged the complexity of this area of the law while still making recommendations for improvement, all of which WSI concurred with. WSI requests a do not pass on SB 2297.

This concludes my testimony. I am happy to answer any questions that you may have.