MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1119

2005 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1119

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1119

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date Monday, January 17, 2005

Tape Number	Side A	Side B	Meter #
1	X		0-end
1		X	0-end

Committee Clerk Signature Rose W. Thudeath

Minutes:

Chairman Keiser called the Committee to order. He asked **Mr. Sandy Blunt, Executive DirectorCEO, Workforce Safety & Insurance,** to give the Committee an overview of the six bills submitted by the Agency in support of members of the Legislature. **Dir. Blunt** began with vision and mission statements of the Agency. The Agency's vision is to be an independently governed and recognized leader in providing superior workers' compensation service and products to employers, workers, and providers. The Agency's mission: "Our mission is our passion; our passion is North Dakota's work force. To us it's personal."

Dir. Blunt explained that the $1.1 billion reserve fund is set aside in order to pay claims. These funds are separate from those issues that deal with premiums. He referred the Committee to a premiums chart A (See Handout #1). The white line represents the charged premium. The yellow line represents the actual expenses in the system. At one time the fund got in trouble because the Agency was charging on the white line; unfortunately, what was spent on wages and medical

benefits was significantly higher. As a result the fund fell into a negative position. Consequently, rates were increased, those in the black zone, which were higher than the expenses. Employers were being charged in order to bring the fund back into balance. Currently, the Agency is charging $97 million in premiums to the employers in North Dakota. The Agency expects to spend $121-122 million. The green zone represents reserve funds used to supplement the fund. The yellow line is on an upward trend. Three factors which influence this trend are the costs of prescription drugs and medical treatment and wages.

Dir. Blunt referred to the Filed Claims Trend, Chart B (See Handout #1). He pointed out that the Agency's claim history is going down while the fund is going up. In referring to Chart C, p. 2 (Handout #) and the pink line, pharmacy costs, he said these costs could be dealt with on a cost basis or a consumption basis. The Agency has hired a pharmacy benefits manager to help control the costs. With regard to consumption the Agency has hired a doctor of pharmacy who helps with these controls. The yellow line represents medical costs which are increasing. The Agency is adopting national guidelines for treatment protocols. The blue line represents wages which are increasing with cost of living.

Dir. Blunt referred to Chart D which shows that 1% of the Agency's claims consume 50% of the cost. To counter these trends, the Agency proposes capping a temporary total wages, 104 weeks for two years, and to continue to pay wages for five more years as that injured worker moves back into the work force.

In summary **Dir. Blunt** restated all insurance companies follow the same principle: whatever we spend next is how much we have to collect. The Agency must be forward thinking, careful about trying to change too quickly, and to be mindful of not repeating past mistakes.

(Meter #9.5)

Rep. Ekstrom asked for an historical overview of costs, like salaries from 1997 on through, a percentage against premiums. **Dir. Blunt** said he could provide the Committee with that information.

Rep. Amerman questioned the accuracy of the pharmacy costs trend and whether or not it is overstated because of adding outpatient hospital costs, such as an I.V. **Dir. Blunt** said the fee schedule is based on DRG's. In a hospital case, a flat fee is charge. The Agency receives batch billing and the cost of drugs is included. That information is broken out to determine cost. The auditor pointed out that if this were done with previous years' information, the curve would be different. The Agency is looking at some new software to more efficiently track medical costs.

Rep. Kasper referred to Chart D which reflect 1998 and 1999 figures and asked if more current information were available. **Dir. Blunt** said he could provide that information.

Chairman Keiser opened the Hearing on HB 1119.

(Meter #15.1)

Rep. Mark Dosch stated his support of HB 1119 regarding drug testing of injured workers.

Senator Kilzer as a physician, stated his support of HB 1119. He stated three examples where testing is necessary to determine correct medication levels: insulin levels for diabetics, a blood thinner, such as coumadin, to prevent clotting, and psychotrophic drugs or mental health medication. This testing is necessary for public safety. Another example has to with pain medications which an injured worker might be taking. Testing makes sense with regard to medical practices and good providence by a third party payer or Workers Safety Insurance.

Rep. Thorpe asked whether or not the regular physician does the testing. **Sen. Kilzer** confirmed.

Ms. Anne Jorgenson Green, Staff Counsel for Workforce Safety and Insurance, read her testimony into the record. (See Handout #2)

(Meter #24.9)

Rep. Froseth noted Director Blunt said these bills pertained to the future and that none will go back to previous cases. He asked if that pertained to this bill also. **Ms. Green** said that HB 1119 allows testing of any injured worker regardless of the date of injury.

Rep. Kasper asked how many states test for drugs currently. **Ms. Green** said there were a number of jurisdictions that allow testing in pre or post injury, but none with regard to the way HB 1119 is crafted.

Rep. Amerman referred to Line 22, p. 4 of HB 1119 and commented that after the law is in affect, the Agency writes the rules. He wondered about criteria, timing, and the legalities. Also, he voiced concern as to whether this authority will be punitive or rehabilitative. He suggested that maybe the rules should be stated before the law is passed. **Ms. Green** stated that any testing would be reviewed at the highest levels of the organization. Clear criteria will be developed through the Administrative Rules process. These rules are written subject to legislative review. With regard to timing, this a logistical issue that has to be dealt with as time goes on. Also, with regard to the way a sample is taken and the chain of custody, these procedures will follow rules from the U.S. Dept. of Human Services, National Institute of Health.

Rep. Amerman restated that he wished they had a more comprehensive set of rules to consider before voting to allow drug testing.

(Meter #33.5)

Rep. Ekstrom asked about the privacy rights of the individual tested. **Ms. Green** that a distinction must be drawn between criminal penalties, which would refer to a DUI, and the permissive language of this statute. The point of this legislation is to zero in on an addition problem and provide that injured worker with the tools, treatment, and/or the wake-up call, to affirmatively participate in that injured worker's return to work.

Rep. Ekstrom suggested that the presence or absence of drugs in the system will change how the claim is handled. **Ms. Green** said the issue is responsibility for one's own recovery and active participation in becoming a productive member of society. One of those elements is the use or abuse of prescription substances or use and abuse of illegal substances and that hampers WSI's ability to send that person back to work on a trial basis. That becomes an issue in the adjudication of a claim and to do what Title 65 has entrusted the Agency to do.

Rep. Johnson asked if the worker claimed the testing was in error, whether or not there is any recourse for retesting. **Ms. Green** said that would be to the Agency's benefit to allow the worker to test again to justify whether or not this is a one-time only situation. **Chairman Keiser** asked for clarification and if this only affects disability. **Ms. Green** confirmed. He asked if it didn't also affect rehab. **Ms. Green** confirmed that it will affect rehabilitation or vocational education benefits.

(Meter #45)

Rep. Kasper asked about recovery times which are affected by addiction. **Ms. Green** stated an example regarding an injured individual, whose physician has documented chronic marijuana use, which impacts the individual's ability to retrain.

Rep. Forseth asked about an injury from an accident as a result of drug use and whether or not there are changes in the way the claimant will be handled from present legislation. **Ms. Green** said that example comes under a different statutory scheme that will not be affected by this legislation.

Rep. Boe referred to the permissiveness of the language and whether a claimant would lose all benefits or just partial. **Ms. Green** said the legislation crafted with a two-tiered approach. After the evidence that a drug test should take place is collected, a drug test issued, and returned positive or negative, the first consequence would be a loss of disability benefits for 30 days. If after a second instance of non-compliance, there would be a permanent loss of those disability benefits.

Chairman Keiser restated for clarification that under the current law if a claimant is under the influence of illegal drugs or alcohol, the coverage is eliminated. This statute would change that. It also expands the definition from illegal drugs, to prescribed medications. All this can be tested and influences decisions. This is a slide expansion. **Ms. Green** restated that in Title 65 whereby a worker injured at the workplace who is tested after that injury and there is the presence of alcohol and drugs, there is a rebuttable presumption that the injury was caused because of being under the influence. That's that initial determination of compensibility. House Bill 1119 is dealing with something further down the road: that ongoing adjudication of benefits. The claim has already been deemed compensible.

Rep. Amerman asked if there were an instance of overmedication, maybe fraud, what recourse would the claimant have.

(end of Tape No. 1, Side A)

[There is a short gap in the taping on Side B]

Ms. Green confirmed that would be a fraud scenario. If there were an inordinate amount of prescribed substances coming out of certain providers, and if those substances are paid for by Workforce Safety, that would give WSI the ability to examine that particular provider under the Fraud Statute. That issue was brought out in the Octagon Study and is an area that is being investigated and expanded. In terms of the claimant's ability, if there were a pattern of over prescription with that provider, it would be investigated.

Rep. Thorpe asked how this would affect someone who was house bound by an injury and **Ms. Green** said that someone could be sent to the residence. **Rep. Thorpe** asked who decides which provider to contact and **Ms. Green** if the injured worker has an established relationship with a particular clinic, it is likely that facility will be use. WSI is committed to using the best facility available.

Rep. Amerman remains unconvinced that this legislation is a benefit to the injured worker rather than a hindrance. He cited an example of subjecting an injured worker to multiple tests. **Ms. Green** referred to the context she used in her example of 30 days, 45 days, or in excess of that was a situation whereby WSI is creating a body of facts where the Agency identify the problem not to test to find a potential problem. In the scenario given the multiple tests were intended to exonerate the injured worker.

Chairman Kasper referred to the scenario of the injured worker using marijuana. Under this bill if the injured worker were found using marijuana, benefits would be suspended for 30 days. If marijuana was found a second time, the bill states benefits would be discontinued. He asked if the claimant has recourse to an appeal process, if he mends his ways, and whether or not WSI

would allow for that or not. **Ms. Green** said there are several options. The injured worker can appeal the process and there's also the ability of WSI, under continuing jurisdictional statute, to take a look at that claim and negative blood tests. "The door is not completely closed."

Rep. Amerman asked how much clout the employer has with the Agency with regard to requesting drug testing. **Ms. Green** said she could not answer that question. If it were one piece of information among many, that would be different than one piece of information.

Rep. Ruby referred to Re. Kasper's scenario and the final option and whether or not the appeal has to be done in 30 days. **Ms. Green** confirmed. **Rep. Ruby** went on to note that 90 days or six months down the road, the worker wouldn't have recourse at that point. **Ms. Green** stated that because claims are fluid and because the facts the Agency deals with have a thousand shades of gray, WSI has statutory authority and continuing jurisdiction to evaluate any claim at any time at any point in that claim's ongoing history.

Mr. Blunt restated the major points **Ms. Green** covered in her testimony and concluded that goal of the agency is to help the injured worker.

Rep. Kasper referred once again to Rep. Ruby's clarification on the second testing that resulted in the cut off of benefits. There is a 30-day right of appeal. He wanted confirmation that the Agency will work with anyone who wishes to reform whether or not it's beyond the 30-day appeal and that there is an door for that kind of situation. **Mr. Blunt** said it depends. If the worker has missed the 30 day appeal window, that will go to another hearing.

(Meter #16.3)

Rep. Amerman asked for confirmation that no other state has this. **Mr. Blunt** said the rules and the laws of each state are different; the Agency has not seen any the same, but that does not mean they don't exist. There are so many varied positions of states that are not public.

Rep. Amerman voiced concern that the law may allow for abuse by WSI. **Mr. Blunt** said there is a potential for abuse if the Agency fails to establish the appropriate administrative rules.

Rep. Thorpe noted that the Agency is asking for a lot of authority and whether or not an amendment might be drawn up to put this authority under the State Insurance Commissioner.

Mr. Blunt said that matter would be up to the Board; they would vote as to whether to support or reject any kind of Amendment.

Vice-Chairman noting no further discussion in favor, asked for testimony in opposition.

(Meter #21)

Mr. Dave Kemnitz, President of the N.D. AFL/CIO, stated that HB 1119 present a powerful a new tool to cut off benefits. He said the language of the statute doesn't provide for good cause. Also, there is no provision for the injured worker to reinstate. He said the language of the statute is more than permissive; it's aggressive and onerous. The statute doesn't provide for rehabilitation for claimants who have addiction problems.

Rep. Kasper asked **Mr. Kemnitz** about good cause. **Mr. Kemnitz** said there is good cause for testing, but there is not good cause for the cessation of benefits. **Rep. Kasper** referred to p. 3 line 21 of the bill of HB 1119, which refers to the first positive drug test, "the organization may discontinue all disability benefits for a period of thirty days..." It states "may" not "shall." He referred to **Ms. Green's** testimony that it's not the Agency's intent to cut off benefits, but to

intervene and try to rehabilitate. He questioned **Mr. Kasper's** concern in that area. **Mr. Kemnitz** gives the Agency the discretion to cut off benefits without recourse.

Chairman Keiser asked that **Mr. Kasper** put his testimony and responses in writing for the Committee.

Chairman Keiser pointed out that there are two sections that are permissive: that the Bureau may suspend and that they may develop the rules. (Meter #41.3) He suggested before the Bureau may suspend, they shall develop the rules. **Mr. Kasper** confirmed.

Mr. Leo ____, an injured worker, testified against HB 1119. He cited an example of having to have WSI approve a pharmacy request, subsequent delays, and vulnerability because he was without medicine over a weekend. If the Bureau did drug testing, he would have to spend another $2,000 to defend himself against a Bureau delay. He went on to say that he feels this legislation will be used against injured workers.

(End of Tape 1, Side B)

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1119

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1-26-05

Tape Number	Side A	Side B	Meter #
3		xx	10.8--35.0

Committee Clerk Signature Pam Dever.

Minutes:**Chair Keiser:** Take up HB 1119. Let's get the amendments explained. Rep. Amerman, can you explain your amendment?

Rep. Amerman: It's a hog house. This bill gives WSI drug testing ability. On page 4, #8 it says "the organization may adopt rules consistent with this section to determine the criteria for substance testing." I submit to you that the cart is before the horse. I believe they should have come to the committee with a comprehensive drug testing plan with criteria laid out. They want us to pass this, and then they will go back and write how they will drug test. This is backwards.

Rep. Dosch: If you look at some of the other amendments, I believe it addresses most of your concerns.

Rep. Keiser: Look at this little amendment. Look at page 3, look at "may" and "may". I think some things need to be required before they could start it. What does your amendment do?

Rep. Froseth: On page, 4 line 23 and 24, "they shall establish the rules prior to implementation". Then on page 4, line 25, Section 3, this postpones until "after the administrative rules have been

established". Top of page 1, line 3, provides an effective date. Page 3, line 31, is a correction in language.

Chair Keiser: I have had a few people question the section of this bill that deals with legal drugs. Any discussion. WSI is concerned with oxycontin and that the injured worker should be taking it to rehab and instead they sell the drug. Then there is the worker that gets sick or can't tolerate the dose and changes it and is later denied benefits because he changed or quite the meds.

Rep. Dosch: You do that under the guidance of a doctor. If the meds are too much or too little, you go back to the doctor and tell him to fix it.

Chair Keiser: That's the question. Does the language say that the doctor can vary something.

Rep. Ekstrom: I'm still not fond of this bill. I like Amerman's amendment. I have visited with a doctor that found one of his patients was to be taking oxycontin and was instead selling it. He was very disturbed by this. I think WSI needs to clamp down on doctors, too, with those kinds of drugs out there. There responsibility.

Chair Keiser: Our law is clear. We have zero tolerance for drugs or alcohol if the injury occurs and you are under the influence.

Rep. Amerman: I appreciate trying to save this bill, but I don't know what "reasonable basis" is. Who determines this. I don't know if the Froseth amendment will do what we want it too. I think we should wait two more years. I think my amendment has a better plan.

Rep. Froseth: I visited with WSI because I had reservations about this bill being a witch hunt. Their intentions are to get the worker back to work healthy. I'm convinced that this is what the bill's intentions are.

Rep. Boe: I did not like this bill in the beginning but have changed my mind the more information I got.

Rep. Dietrich: I appreciate the changes, but I agree with Rep. Amerman. This is the cart before the horse.

Rep. Dosch: We need to stay focused on legislative intent. We need to go after the abusers.

Rep. Kasper: If WSI sees a real problem, then we need to address this.

Rep. Ruby: I move we pass the Froseth Amendment. Rep. N. Johnson: I second.

Vote on Amendment: 13 - Yes, 1 - No, 0 - Ab. Passed

Rep. Amerman: I move a Do Pass on my amendment .0101. Rep. Dietrich: I second.

Vote on Amerman amendment: 4 - Yes, 10 - No, Failed

Chair Keiser: We have HB 1119 as previously amended. What are the wishes of the committee?

Rep. Froseth: I move a DO PASS as AMENDED. Rep. Ruby: I second.

VOTE: 10 - Yes, 4 - No, 0 - AB, PASSED Rep. Froseth will carry the bill.

Rep. Amerman: I request a divided report.

FISCAL NOTE

Requested by Legislative Council
12/22/2004

Bill/Resolution No.: HB 1119

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

WORKFORCE SAFETY & INSURANCE
2005 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL DESCRIPTION: Drug Testing

BILL NO: HB 1119

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

The proposed legislation provides WSI the opportunity to test injured workers where drug misuse or abuse is suspected. Workforce Safety and Insurance's ability to test an injured worker for the presence of an illegal substance or the absence of a prescribed substance is necessary for the organization to effectively medically manage claims and to facilitate an injured workers rehabilitation and return to work. When WSI has information that a substance is being abused, the ability to determine the accuracy of those suspicions is critical to affirmatively getting the injured worker the services they need to move their medical and vocational status forward.

FISCAL IMPACT: No significant quantifiable impact is anticipated. The drug testing provision may serve to expedite recovery and earlier returns to work in certain cases, resulting in some savings for those individual cases. To the extent savings occur, it will be reflected in future premium levels.

DATE: January 3, 2005

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, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	John Halvorson	**Agency:**	WSI
Phone Number:	328-3760	**Date Prepared:**	01/11/2005

January 17, 2005

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1119

Page 1, line 2, remove "and"

Page 1, line 3, after application insert ", and to provide an effective date"

Page 4, line 25, insert:,

"**SECTION 3. EFFECTIVE DATE.** This Act is effective thirty days after the effective date of administrative rules adopted to establish criteria for substance abuse testing."

Renumber accordingly

Froseth

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1119

Page 1, line 2 remove "and"

Page 1, line 3, after application insert ", and to provide an effective date"

Page 3, after line 18, insert:

"c. The organization must have a reasonable basis to require an employee to submit to a test to determine the presence or absence of substances in the employee's system.

Page 3, line 31, replace "all" with "disability and vocational rehabilitation"

Page 4, line 25, insert:,

"**SECTION 3. EFFECTIVE DATE**. This Act is effective thirty days after the effective date of administrative rules adopted to establish criteria for substance abuse testing."

Renumber accordingly

Date: 1-26-05

Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1119

House **INDUSTRY, BUSINESS AND LABOR** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Adopt Amend as presented by Froseth

Motion Made By Rep Ruby Seconded By Rep. Johnson

Representatives	Yes	No	Representatives	Yes	No
G. Keiser-Chairman	X		Rep. B. Amerman	X	
N. Johnson-Vice Chairman	X		Rep. T. Boe	X	
Rep. D. Clark	X		Rep. M. Ekstrom	X	
Rep. D. Dietrich	X		Rep. E. Thorpe		X
Rep. M. Dosch	X				
Rep. G. Froseth	X				
Rep. J. Kasper	X				
Rep. D. Nottestad	X				
Rep. D. Ruby	X				
Rep. D. Vigesaa	X				

Total (Yes) - 13 No 1

Absent

Floor Assignment Froseth

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

58127.0101
Title.

Prepared by the Legislative Council staff for
Representative Amerman
January 24, 2005

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1119

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of the feasibility and desirability of a comprehensive drug-testing program by workforce safety and insurance.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE COUNCIL STUDY. The legislative council shall consider studying during the 2005-06 interim the feasibility and desirability of a comprehensive drug-testing program by workforce safety and insurance, including the issues of who would be drug-tested, who would determine when a drug test is needed, where the drug test would be performed, the manner in which the drug test is conducted, the rehabilitation process of the claimant, disciplinary action against the claimant, civil liability, and confidentiality. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly

58127.0103
Title.0300

Adopted by the Industry, Business and Labor Committee - Minority
January 26, 2005

House Amendments to HB 1119 - Industry, Business and Labor Committee 02/02/2005

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of the feasibility and desirability of a comprehensive drug-testing program by workforce safety and insurance.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE COUNCIL STUDY. The legislative council shall consider studying during the 2005-06 interim the feasibility and desirability of a comprehensive drug-testing program by workforce safety and insurance, including the issues of who would be drug-tested, who would determine when a drug test is needed, where the drug test would be performed, the manner in which the drug test is conducted, the rehabilitation process of the claimant, disciplinary action against the claimant, civil liability, and confidentiality. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly

Date: 1-26-05

Roll Call Vote #: 2

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1119

House **INDUSTRY, BUSINESS AND LABOR** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 58127.0103 , 0300

Action Taken Do Pass Amerman Amends

Motion Made By Rep Amerman Seconded By Rep Dietrich

Representatives	Yes	No	Representatives	Yes	No
G. Keiser-Chairman		X	Rep. B. Amerman	X	
N. Johnson-Vice Chairman		Y	Rep. T. Boe		X
Rep. D. Clark		Y	Rep. M. Ekstrom	X	
Rep. D. Dietrich	X		Rep. E. Thorpe	X	
Rep. M. Dosch		Y			
Rep. G. Froseth		Y			
Rep. J. Kasper		X			
Rep. D. Nottestad		Y			
Rep. D. Ruby		Y			
Rep. D. Vigesaa		Y			

Total (Yes) 4 No 10

Absent -0-

Floor Assignment Rep. Amerman

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

REPORT OF STANDING COMMITTEE (MINORITY)

HB 1119: Industry, Business and Labor Committee (Rep. G. Keiser, Chairman) A **MINORITY** of your committee (Reps. Amerman, Dietrich, Ekstrom, Thorpe) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS.**

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of the feasibility and desirability of a comprehensive drug-testing program by workforce safety and insurance.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE COUNCIL STUDY. The legislative council shall consider studying during the 2005-06 interim the feasibility and desirability of a comprehensive drug-testing program by workforce safety and insurance, including the issues of who would be drug-tested, who would determine when a drug test is needed, where the drug test would be performed, the manner in which the drug test is conducted, the rehabilitation process of the claimant, disciplinary action against the claimant, civil liability, and confidentiality. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly."

Renumber accordingly

The reports of the majority and the minority were placed on the Seventh order of business on the calendar for the succeeding legislative day.

Adopted by the Industry, Business and Labor Committee - Majority
January 26, 2005

House Amendments to HB 1119 - Industry, Business and Labor Committee 02/02/2005

Page 1, line 2, remove the second "and"

Page 1, line 3, after "application" insert "; and to provide an effective date"

House Amendments to HB 1119 - Industry, Business and Labor Committee 02/02/2005

Page 3, after line 18, insert:

"c. The organization must have a reasonable basis to require an employee to submit to a test to determine the presence or absence of substances in the employee's system."

Page 3, line 31, replace "all" with "disability and vocational rehabilitation"

House Amendments to HB 1119 - Industry, Business and Labor Committee 02/02/2005

Page 4, after line 25, insert:

"**SECTION 3. EFFECTIVE DATE.** This Act is effective thirty days after the effective date of administrative rules adopted by workforce safety and insurance to establish criteria for substance abuse testing. Workforce safety and insurance shall certify to the legislative council when this Act has become effective as provided in this section."

Renumber accordingly

Date: 1-26-05

Roll Call Vote #: 3

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1119

House **INDUSTRY, BUSINESS AND LABOR** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 58127.0102 .0102 .0200

Action Taken Do Pass as Amended (Froseth)

Motion Made By Rep. Froseth Seconded By Rep. Ruby

Representatives	Yes	No	Representatives	Yes	No
G. Keiser-Chairman	X		Rep. B. Amerman		X
N. Johnson-Vice Chairman	X		Rep. T. Boe	X	
Rep. D. Clark	X		Rep. M. Ekstrom		X
Rep. D. Dietrich		X	Rep. E. Thorpe		X
Rep. M. Dosch	X				
Rep. G. Froseth	X				
Rep. J. Kasper	X				
Rep. D. Nottestad	X				
Rep. D. Ruby	X				
Rep. D. Vigesaa	X				

Total (Yes) 10 No 4

Absent -0-

Floor Assignment Rep. Froseth

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

Divided report - minority
No Dietrich
Amerman
Ekstrom
Thorpe

REPORT OF STANDING COMMITTEE (MAJORITY)

HB 1119: Industry, Business and Labor Committee (Rep. G. Keiser, Chairman) A **MAJORITY** of your committee (Reps. Keiser, N. Johnson, Clark, Dosch, Froseth, Kasper, Nottestad, Ruby, Vigesaa, Boe) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS.**

Page 1, line 2, remove the second "and"

Page 1, line 3, after "application" insert "; and to provide an effective date"

Page 3, after line 18, insert:

"c. The organization must have a reasonable basis to require an employee to submit to a test to determine the presence or absence of substances in the employee's system."

Page 3, line 31, replace "all" with "disability and vocational rehabilitation"

Page 4, after line 25, insert:

"**SECTION 3. EFFECTIVE DATE.** This Act is effective thirty days after the effective date of administrative rules adopted by workforce safety and insurance to establish criteria for substance abuse testing. Workforce safety and insurance shall certify to the legislative council when this Act has become effective as provided in this section."

Renumber accordingly

2005 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1119

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1119

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date February 28, 2005

Tape Number	Side A	Side B	Meter #
1		X	72-END
2	X		1-560

Committee Clerk Signature Jen Heitz

Minutes: **Chairman Mutch opened the hearing on HB 1119, relating to drug testing of injured workers for workforce safety and insurance purposes. All Senators were present.**

Representative Mark Dosch introduced the bill. There is a problem out there with individuals on drugs that are causing problems, selling drugs like oxycontin to high school kids. If an injured worker is following his doctor's orders, they will have nothing to worry about. As long as a person is not taking illegal drugs, this bill will not have an effect on people.

Senator Heitkamp- Why are you taking away the benefits of workers?

Representative Dosch- As you will hear in the upcoming testimony, things will not change if people are following the rules.

Senator Heitkamp- Do you believe treatment could solve the problems?

Representative Dosch- Treatment could definitely help. We need to identify the individuals and give them a choice.

Senator Heitkamp- Why aren't you doing anything with the doctors, being that some of these factors are things they can control?

RepresentativeDosch- I encourage you to ask that question to the WSI representatives here today.

Anne Jorgenson-Green, Workforce Safety Insurance (WSI) staff counsel appeared in support of the bill. See written testimony.

Senator Klein- If this bill goes into effect, you will go through the rules process and have hearings again?

Anne- Correct. If the bill is passed, it will not have an effective date until after WSI has gone back to establishing administrative rules. Once that is accomplished, the bill would become law.

Senator Fairfield- How are your viewing the administrative rules?

Anne- The administrative rules are there to include in the legislation all of the detail and items by which the process will happen.

Senator Fairfield- The administrative rules are fairly limited in how they can address issues. Does that gives us a false sense of security?

Anne- No, the statute as amended is a solid piece of legislation. This is not a random act by the agency. We look at what is in the best interest of getting the injured person back to work.

Senator Fairfield- The items you have put forth on what the reasonable basis might be, seem to be about illegal use. How do these concern absence of a prescribed medication?

Anne- Typically if someone is not taking their prescription drugs, it ends up going to someone else. There is a contract that exists between a doctor and injured worker about taking a drug test. A different course of treatment would need to be addressed.

Senator Heitkamp- The question is how are we going to protect drug testing results from getting to the employer? The employer would have access to the information.

Anne- Under current law, and employer has access to an injured worker's file.

Senator Heitkamp- Why are we focusing on losing benefits, is the bureau going to pay for treatment for alcohol and drug treatment to legally prescribed medication?

Anne- The bureau currently pays for drug treatment. The best course of medical treatment is to often send people to drug rehabilitation. This bill is for situations where drug treatment has failed, and things are left at a standstill. The goal is to get people back to work.

Chairman Mutch- My business has to do drug testing of our employees, it is required by law. Does this bill make the law inclusive to every type of business out there?

Anne- The testing we are referring to is after a worker has been injured. There is a set of facts that suggests the injured worker is not taking the prescribed substances or using illegal drugs.

Senator Fairfield- The issue on one hand is testing for illegal drugs, the other issue is testing for the absence of a prescribed medication. Is that breaking new ground? The penalty comes with a negative test.

Anne- My research shows that other jurisdictions do not have laws similar to this.

Senator Fairfield- I understand that the injured worker does not have a choice in their physician, is that correct?

Anne- No. As a general matter, WSI is very flexible in terms of treatment for an injured worker.

Chris Runge, representing the ND Public Employees Association appeared in opposition to the bill. See written testimony.

Senator Heitkamp- If we go ahead with this legislation, it is true we would be the only state in the union to do such a thing?

Chris- Yes, that is correct.

Senator Krebsbach- Does the system really need to support an injured worker who is not following guidelines from a doctor?

Chris- I think a different approach needs to be taken when there's a case of severe pain. These would be tough cases for WSI to handle. Setting up a system to test for legal drugs and illegal drugs sets up an adversarial relationship between the injured worker and the physician. This type of system is not in place in any other state in the country.

Chairman Mutch- If people are following the rules, then what is there to be afraid of when taking the test?

Chris- It is my constitutional right to have those personal freedoms.

Senator Heitkamp- Was there any amendments offered in the House to have a complete drug testing plan for employers and employees, and anyone involved in workers comp?

Chris- No. This is for anybody that is an injured worker.

Marilyn Schoenberg, appeared in opposition to the bill. See written testimony.

Chairman Mutch- So, are you a partially or permanently injured worker?

Marilyn- I went back to college and renewed my teaching certificate and have been teaching since 2000. There is nothing wrong with me anymore, despite what the psychiatrist says.

Chairman Mutch- So, this bill one way or the other, would not have any effect on your benefits?

Marilyn- No.

Jeff Miller appeared before the committee in opposition to the bill. He explained his situation when he was injured while working for Wolverine Drilling. He was placed on several different painkillers for his condition. He is concerned how this testing will be regulated, and if he will be forced to take medication that he might not be comfortable with, in order to receive his workmen's comp.

LeRoy Volk appeared in opposition to the bill, see written testimony.

Deb Bail, an injured nurse from Jamestown appeared in opposition to the bill. She explained her condition to the committee. Her main concern is who makes the decision is who makes the decision to require testing and who interprets the results. She was sent to a psychologist in St. Paul in April 2000, and disagreed with the process that was used for her evaluation. She wonders what the cost will be for each individual drug test that would take place.

Cheryl Bergian representing the ND Human Rights Coalition appeared in opposition to the bill.

Dave Kemnitz representing the AFL-CIO, appeared in opposition to the bill. In Ohio, they have post-injury testing in place, where they have three pages of criteria.

Cevold Vetter appeared in opposition to the bill.

Chairman Mutch closed the hearing on HB 1119. No action was taken.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1119

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 3-23-05

Tape Number	Side A	Side B	Meter #
1	xxx		-801

Committee Clerk Signature Lisa VanBerkom

Minutes: **Chairman Mutch allowed committee discussion on HB 1119. All Senators were present. HB 1119 relates to drug testing of injured workers for workforce safety and insurance purposes.**

Senator Klein: In what we have been listening to, is that this is a tool that WSI is looking for to help these injured workers who may have gotten on a drug issue or aren't taking their drugs properly. I question why they would want to go through the administrative rules process, because that is another opportunity to have hearings and get everyone worked up. This is going to be a very complicated issue again, but this will not go into effect until the rules committee determines the rules. That is another year process, and if the committee would reject that, it would be gone.

Senator Nething: Keep in mind that the administrative rules committee, the only thing they approve is whether or not it relates to the legislative intent in the law. They can't decide whether they like it or not.

Senator Klein: They can suspend and force the groups to continue to work at it.

Senator Espegard: I have some problems with this bill. It is reaching a little far into some territory that I'm nervous about.

Chairman Mutch: How much work is that going to make for the Bureau?

Senator Klein: The case worker, and the doctor will make that decision. If you are not getting any better from your prescription, and how it is working and if they are taking their meds as they should.

Senator Espegard: We asked yesterday, where else in the country this is being done and according to the administrator it is not being done anywhere.

Senator Nething: I think what Senator Klein just said is true, but the problem comes when the club that is giving to the director, he's the one that signs off an makes the decision and he's the one that makes the decision. I think it's a bill who's time hasn't come.

Maybe another day, but not now.

Senator Heitkamp moved a DO NOT PASS. Senator Espegard seconded.

Roll Call Vote: 4 yes. 3 no. 0 absent.

Carrier: Senator Heitkamp

Date: 3-23-05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1119

Senate **Industry, Business, and Labor** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Not Pass

Motion Made By HeitKamp Seconded By Espegard

Senators	Yes	No	Senators	Yes	No
Chairman Mutch		X	**Senator Fairfield**	X	
Senator Klein		X	**Senator Heitkamp**	X	
Senator Krebsbach		X			
Senator Espegard	X				
Senator Nething	X				

Total (Yes) 4 No 3

Absent

Floor Assignment HeitKamp

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

REPORT OF STANDING COMMITTEE

HB 1119, as engrossed: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **DO NOT PASS** (4 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1119 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

HB 1119

WORKFORCE SAFETY & INSURANCE
2005 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

***BILL DESCRIPTION*: Drug Testing w/ Amendment**

***BILL NO:* HB 1119**

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

The proposed legislation provides WSI the opportunity to test injured workers where drug misuse or abuse is suspected. Workforce Safety and Insurance's ability to test an injured worker for the presence of an illegal substance or the absence of a prescribed substance is necessary for the organization to effectively medically manage claims and to facilitate an injured workers rehabilitation and return to work. When WSI has information that a substance is being abused, the ability to determine the accuracy of those suspicions is critical to affirmatively getting the injured worker the services they need to move their medical and vocational status forward.

The amendment makes rule setting mandatory rather than permissive.

***FISCAL IMPACT*:** No significant quantifiable impact is anticipated. The drug testing provision may serve to expedite recovery and earlier returns to work in certain cases, resulting in some savings for those individual cases. To the extent savings occur, it will be reflected in future premium levels.

The proposed amendment has no impact on the bill as originally introduced.

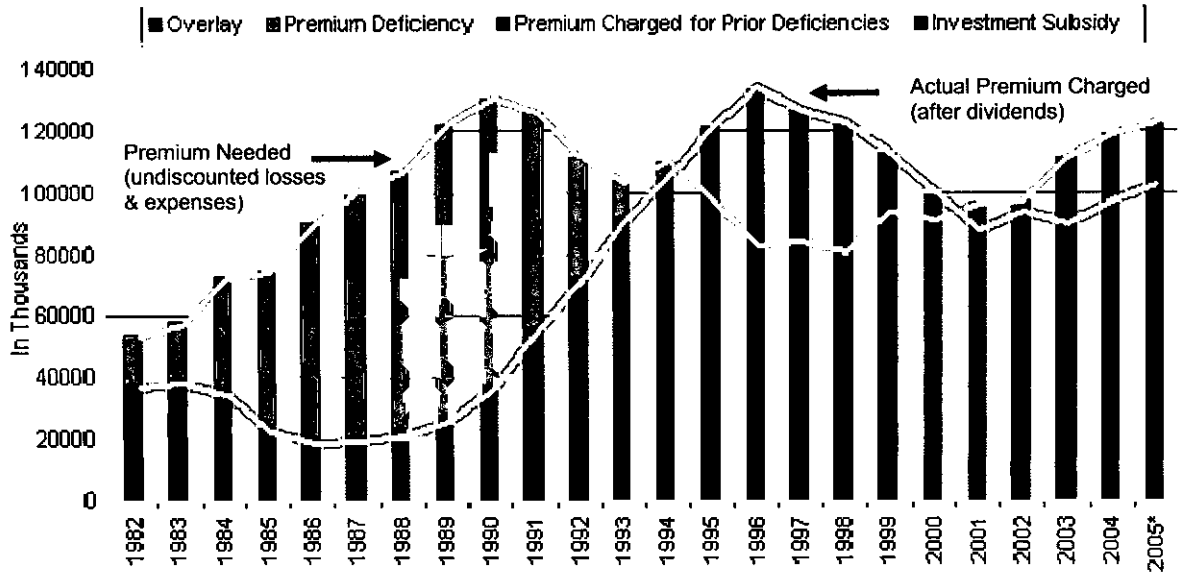
***DATE*: January 17, 2005**

Re: HB 1119

I., B., & L. 1/17/05

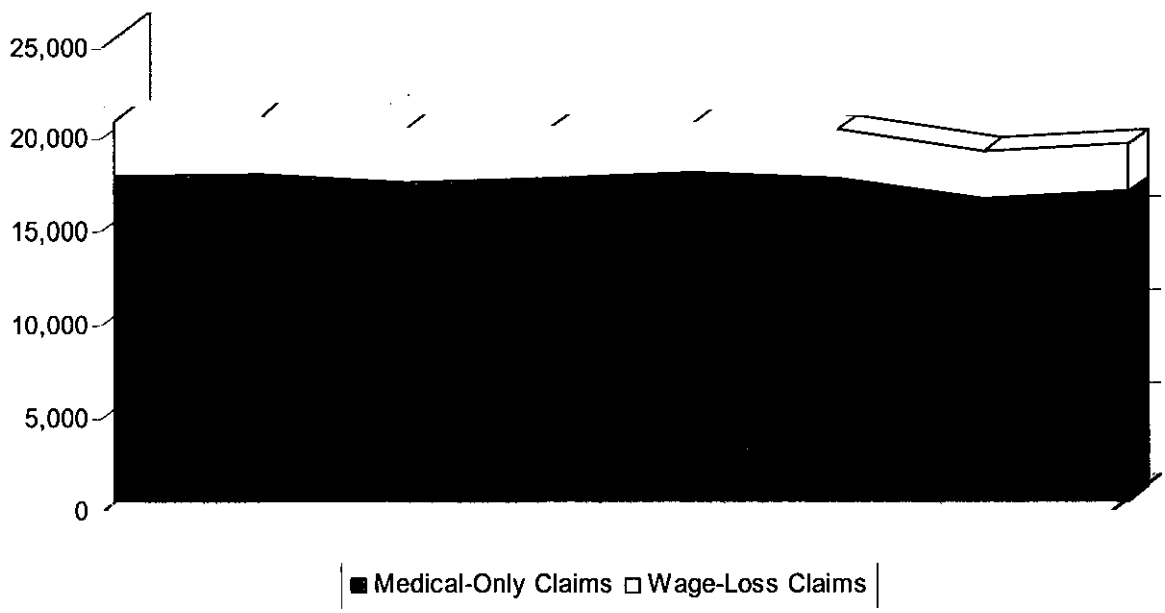
Testimony before the House IB&L Committee
Sandy Blunt, Executive Director/CEO, Workforce Safety & Insurance

#1



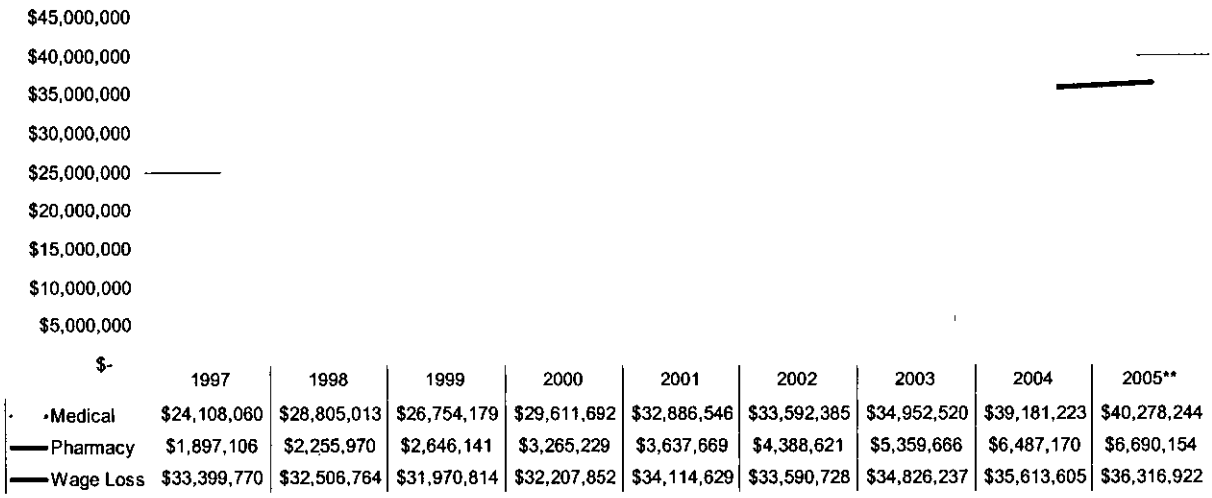
OPENING CHART A

Filed Claims Trend 1997-2004



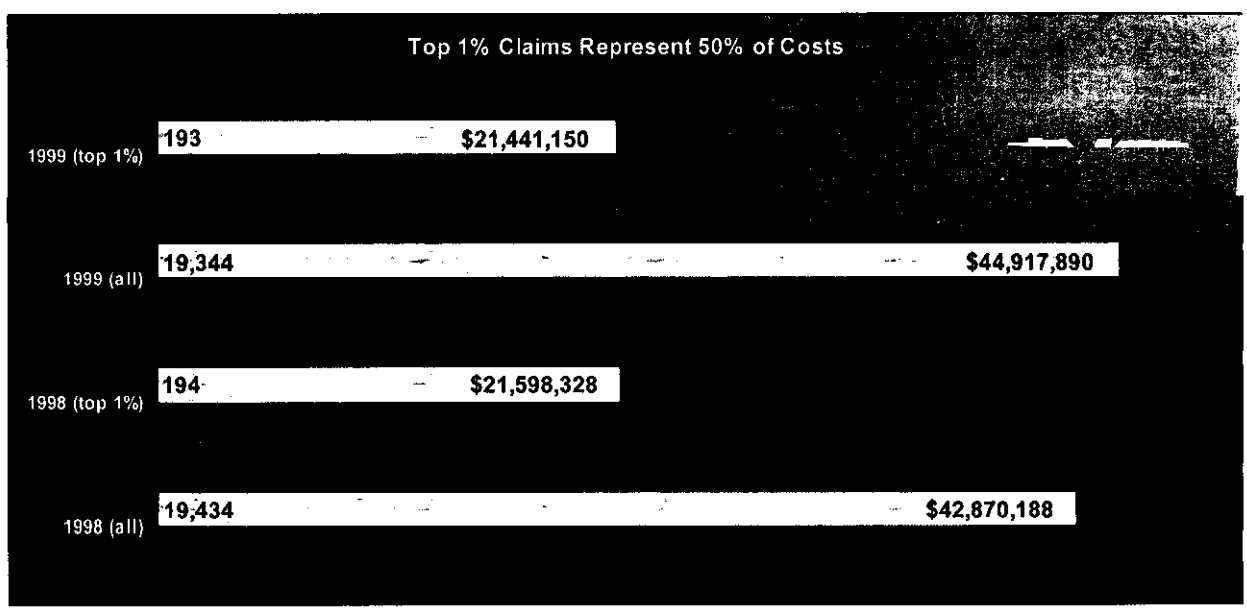
OPENING CHART B

Major Cost Trends



	1997	1998	1999	2000	2001	2002	2003	2004	2005**
Medical	$24,108,060	$28,805,013	$26,754,179	$29,611,692	$32,886,546	$33,592,385	$34,952,520	$39,181,223	$40,278,244
Pharmacy	$1,897,106	$2,255,970	$2,646,141	$3,265,229	$3,637,669	$4,388,621	$5,359,666	$6,487,170	$6,690,154
Wage Loss	$33,399,770	$32,506,764	$31,970,814	$32,207,852	$34,114,629	$33,590,728	$34,826,237	$35,613,605	$36,316,922

OPENING CHART C



* From Page 123 of September 22, 2004, WSI Performance Audit

OPENING CHART D

WSI's Vision -- To be an independently governed and recognized leader in providing superior workers' compensation products and services to employers, workers, and providers.

WSI's Core Values -- Excellence, Integrity, Service, Passion, Honesty, Trust, Compassion, Justice, Commitment and Financial Stability.

WSI's Mission -- Our mission is our passion. Our passion is North Dakota's workforce. To us, it's personal.

#2
IBL
1/17/05
Re: HB1119

2005 House Bill No. 1119
Testimony before the House Industry, Business, and Labor Committee
Presented by: Anne Jorgenson Green, Staff Counsel
Workforce Safety and Insurance
January 17, 2005

Mr. Chairman, Members of the Committee:

Good Morning. My name is Anne Jorgenson Green and I am staff counsel for Workforce Safety and Insurance (WSI). I am here today to testify in support of House Bill 1119. Claims with substance abuse issues are costly, difficult to manage, hard to return to work, and –most importantly—personally damaging to the individual. The purpose of this legislation is to provide WSI with a clear tool to help injured workers. It clarifies WSI's ability to test an injured worker for the absence of a prescribed medication or the presence of an illegal substance. The Workforce Safety and Insurance Board of Directors supports this bill.

WSI believes the authority exists to test for drugs, but requires clarification. Under current law, WSI may require an injured worker to submit to an examination for the purposes of diagnosis, prognosis, treatment or capabilities. That includes an independent medical exam, a functional capacities exam, or other tests to provide an injured worker the best possible course of treatment.

Under HB 1119, WSI proposes a specific inclusion clarifying that a health care facility shall conduct a test for drugs at the request of the organization. Additionally, the bill also proposes potential wage loss consequences for a test demonstrating the absence of a prescribed medication or the presence of an illegal substance. The statutory language is permissive, not mandatory. A first failed drug test "may" result in the loss of wages for 30 days. A second failed drug test "may" result in the permanent loss of wages.

The law as written provides for the suspension of wages as a discretionary tool that should only be utilized as a last resort after all efforts of interdiction and drug treatment have failed. It should be clearly noted that this law only contemplates the loss of wages --the injured worker will continue to receive all of the medical benefits regardless of the outcome of the test.

Information coming into the possession of WSI's claim managers by way of medical notes, conversations with healthcare workers, or from the injured worker must be handled in a way which provides the best medical services available. To effectively manage the claim and return injured workers to gainful employment requires the ability to accurately identify potential obstacles to the process. The ability to test and identify such an issue ensures injured workers will receive the most appropriate and timely care available.

Understandably, whenever an organization mentions drug testing, there are concerns by many that privacy rights will be compromised and penalties will be issued without cause. If HB 1119 is passed, WSI commits that we will immediately begin working with our stakeholders to design and implement administrative rules that will assure testing is only conducted as the result of clear conditions of suspicion and at a best-in-class facility.

If WSI is truly dedicated to helping and not harming these injured workers, then we must do it by partnering with the highest-level, neutral professionals in the industry. WSI intends to use the gold standard of guidelines and testing as established by organizations such as The United States Department of Health and Human Services and its National Institute of Drug Abuse NIDA (NIDA).

NIDA was established by Congress in 1974 to mount a scientific response to the increase in drug abuse that occurred in the U.S. during the late 1960s and early 1970s. Since its founding, NIDA has grown to become the world's preeminent generator and repository of scientific knowledge about drug abuse and addiction. Additionally, NIDA supports more than 85 percent of all biomedical and behavioral drug abuse research conducted in the world.

WSI requests your favorable consideration of House Bill 1119. If there are any questions, I would be happy to answer them at this time. Thank you.

2005 Workforce Safety & Insurance Legislative Quick Guide

HB 1119

WSI Drug Testing

Sponsor: Rep. Mark Dosch, Co-Sponsor: Sen. Ralph Kilzer

Drug Testing of Employees

- Provides WSI the opportunity to test injured workers where drug misuse or abuse is suspected.
- Allows WSI to suspend or discontinue benefits for refusal to submit to testing or for adverse test results.
- Applies to those classes of drugs most prone to abuse or misuse.

WHY – WSI needs a way to effectively address suspected abuse or misuse of addictive drugs. It becomes even more difficult to rehabilitate an injured worker or effectively manage claims where drug abuse or misuse is involved.

FISCAL NOTE:

No significant quantifiable impact is anticipated. The drug testing provision may serve to expedite recovery and earlier returns to work in certain cases, resulting in some savings for those individual cases. To the extent savings occur, it will be reflected in future premium levels.

DOC:24720811

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

Workforce Safety & Insurance
WSI
Putting safety to work

Fargo Service Center
2601 12th Avenue SW
Fargo ND 58103-2354

www.WorkforceSafety.com
Sandy Blunt, Executive Director/CEO

NEW WAY

February 4, 2005

Bone Spine Sports Clinic
225 N 7th St
PO Box 5505
Bismarck ND 58506-5505

Injured Worker:	Leroy Volk	Birth Date:	
Claim No.:		Injury Date:	
Body Part:	Lower Cervical Spine, Thoracic Spine, Left Shoulder		

Dear Medical Provider:

Workforce Safety & Insurance's Utilization Review Department has received a request for the following treatment or procedure for the injured worker listed above. **Please note that this letter is not a guarantee of payment.** The Utilization Review Department makes recommendations based on medical necessity only. The claims analyst will determine if the treatment or procedure is the result of a compensable work injury and is a covered treatment or procedure.

Provider: Tana Ciavarella, PA-C
Facility: Bone Spine Sports Clinic
Diagnosis: Neck and upper back pain
Request Date: 02/03/2005 **Recommendation Date:** 02/03/2005

Requested Service: Physical therapy eight visits for exercises and two modalities 02-07-05 to 03-07-05

Recommended Service: Same as requested

Rationale/Summary: This patient has an initial injury date of 07-10-00. Medical and physical therapy notes reviewed. Physical therapy has been found to be medically necessary.

The Utilization Review Department makes recommendations based on medical necessity. **Final liability and payment decisions are the responsibility of the claims analyst handling this claim.**

If you have additional medical information and desire an appeal, please submit your request in writing to the UR Department at the address above within 30 days to begin that process. You may also fax your written request to 701-328-5965 or 1-888-777-5872. If you do not request appeal from the UR Department within that time period, this decision becomes final subject only to the reopening of the claim under section 65-05-04 of the North Dakota Century Code.

Thank you. Please refer to the claim number listed above when contacting Workforce Safety & Insurance (WSI).

Utilization Review Department

cc: Dietz & Little, Leroy Volk, Medcenter One Inc

CC NOTATION: This carbon copy (cc) is for your information only; no action is required on your part. Injured workers: Please note the WSI's medical service rules and fees were applied when processing the medical bills. By law, you should not be billed or held responsible for the balance of denied charges relating to a compensable injury. If you do receive bills from a medical provider, please contact our office immediately. You are not required to submit payment for these bills.

FL420

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

Workforce Safety & Insurance
WSI
Putting safety to work
www.WorkforceSafety.com

DOC: 22254030

Fargo Service Center
2601 12th Avenue SW
Fargo ND 58103-2354

OLD WAY

February 26, 2004

Spine Orthopedic and Pain Center PC
121 W Century Ave
Bismarck ND 58503

Injured Worker:
Claim No.:
Body Part: Lumbar Spine
Birth Date:
Injury Date:

Dear Medical Provider:

Workforce Safety & Insurance's Utilization Review Department has received a request for the following treatment or procedure for the injured worker listed above:

Provider: Dr. Michael Martire
Facility: Spine, Orthopedic, & Pain Center
Diagnosis: Low back pain
Request Date: 02-24-2004 **Recommendation Date:** 02-25-2004

Requested Service: Physical therapy eight visits for exercises and two modalities 02-26-04 to 03-26-04

Recommended Service: same as requested

Rationale/Summary: This patient is a 48 year old female who injured her low back on 09-03-90. She is experiencing a flare-up of low back pain with decreased ROM, mobility, and function. Physical therapy eight visits for exercises and two modalities 02-26-04 to 03-26-04 has been found to be medically necessary.

The Utilization Review Department makes recommendations based on medical necessity. Final liability and payment decisions are the responsibility of the claims analyst handling this claim.

If you have additional medical information and desire an appeal, please submit your request in writing to the UR Department at the address above within 30 days to begin that process. You may also fax your written request to 701-328-5965 or 1-888-777-5872. If you do not request appeal from the UR Department within that time period, this decision becomes final subject only to the reopening of the claim under section 65-05-04 of the North Dakota Century Code.

Thank you. Please refer to the claim number listed above when contacting Workforce Safety & Insurance (WSI).

Utilization Review Department

cc:

CC NOTATION: This carbon copy (cc) is for your information only; no action is required on your part. Injured workers: Please note the WSI's medical service rules and fees were applied when processing the medical bills. By law, you should not be billed or held responsible for the balance of denied charges relating to a compensable injury. If you do receive bills from a medical provider, please contact our office immediately. You are not required to submit payment for these bills.

FL420

2005 Engrossed House Bill No. 1119
Testimony before the Senate Industry, Business, and Labor Committee
Presented by: Anne Jorgenson Green, Staff Counsel
Workforce Safety and Insurance
February 28, 2005

Mr. Chairman, Members of the Committee:

Good Morning. My name is Anne Jorgenson Green and I am staff counsel for Workforce Safety and Insurance (WSI). I am here today to testify in support of Engrossed House Bill 1119 (HB 1119). Claims with substance abuse issues are costly, difficult to manage, hard to return to work, and –most importantly—personally damaging to the individual. The purpose of this legislation is to provide WSI with a clear tool to help injured workers. It clarifies WSI's ability, in a limited number of cases and only when there is a "reasonable basis," to test an injured worker for the absence of a prescribed medication or the presence of an illegal substance. The Workforce Safety and Insurance Board of Directors supports this bill.

WSI believes the authority exists to test for drugs, but requires clarification. Under current law, WSI may require an injured worker to submit to an examination for the purposes of diagnosis, prognosis, treatment or capabilities. That includes an independent medical exam, a functional capacities exam, or other tests to provide an injured worker the best possible course of treatment.

Under HB 1119, WSI proposes a specific inclusion clarifying that a health care facility shall conduct a test for drugs at the request of the organization. Additionally, the bill also proposes potential wage loss consequences for a test demonstrating the absence of a prescribed medication or the presence of an illegal substance. The statutory language is permissive, not mandatory. A first failed drug test "may" result in the loss of wages for 30 days. A second failed drug test "may" result in the permanent loss of wages.

The law as written provides for the suspension of wages as a discretionary tool that should only be utilized as a last resort after all efforts of interdiction and drug treatment have failed. It should be clearly noted that this law only contemplates the loss of wages --the injured worker will continue to receive their medical benefits regardless of the outcome of the test.

Information coming into the possession of WSI's claim managers by way of medical notes, conversations with healthcare workers, or from the injured worker must be handled in a way which provides the best medical services available. To effectively manage the claim and return injured workers to gainful employment requires the ability to accurately identify potential obstacles to the process. The ability to test and identify such an issue ensures injured workers will receive the most appropriate and timely care available.

If WSI is truly dedicated to helping and not harming these injured workers, then we must do it by partnering with the highest-level, neutral professionals in the industry. WSI intends to use the gold standard of guidelines and testing as established by organizations such as The United States Department of Health and Human Services (HHS) and its National Institute of Drug Abuse (NIDA). NIDA was established by Congress in 1974 to mount a scientific response to the increase in drug abuse that occurred in the U.S. during the late 1960s and early 1970s. Since its founding, NIDA has grown to become the world's preeminent generator and repository of scientific knowledge about drug abuse and addiction. Additionally, NIDA supports more than 85 percent of all biomedical and behavioral drug abuse research conducted in the world.

Understandably, whenever an organization mentions drug testing, there are concerns by many that privacy rights will be compromised and penalties will be issued without cause. Given these concerns, WSI proposed two amendments before the house which are now reflected in the bill. First, WSI added language to the bill that there must be a "reasonable basis" to test an injured worker. The tests contemplated under this bill are not intended to be and will not be performed in a random manner.

There must be a reasonable basis for the test and the claims manager must have facts which provide the foundation that an injured worker may be abusing illegal or prescribed substances. As noted by HHS, testing does not require certainty; however, mere "hunches" by themselves are not sufficient cause for testing. Reasonable basis testing may be based upon, among other things:

1. Observable phenomena, such as direct observation of drug use or possession and/or the physical symptoms of being under the influence of a drug;
2. A pattern of abnormal conduct or erratic behavior;
3. Arrest or conviction for a drug-related offense, or the identification of an individual as the focus of a criminal investigation into illegal drug possession, use, or trafficking;
4. Information provided either by reliable and credible sources or independently corroborated.

The second change in HB 1119 was the clarification of its effective date. Administrative Rules are contemplated in the bill for the purpose of creating policy and procedure for the implementation and management of the law. HB 1119 will not become effective until the Administrative Rules have been reviewed and approved by the Legislative Rules Committee. By the use of a delayed effective date, the process by which WSI will adjudicate these cases can be reviewed and approved by a committee of the legislative assembly.

WSI requests your favorable consideration of Engrossed HB 1119. If there are any questions, I would be happy to answer them at this time. Thank you.

NDPEA NORTH DAKOTA PUBLIC EMPLOYEES ASSOCIATION

AMERICAN FEDERATION OF TEACHERS LOCAL 4660 AFL-CIO

333 EAST BROADWAY AVE, SUITE 1220
BISMARCK, NORTH DAKOTA 58501-3396

701-223-1964
1-800-472-2698

EMAIL: comments@ndpea.org
WEBSITE: www.ndpea.org

TESTIMONY IN OPPOSITION TO HB 1119
Before the Senate Industry, Business and Labor Committee
February 28, 2005
North Dakota Public Employees Association AFT 4660
And
The North Dakota AFL-CIO

Chairman Mutch and members of the Senate Industry, Business and Labor Committee, my name is Chris Runge and I am the Executive Director of the North Dakota Public Employees Association, AFT 4660 and the Secretary Treasurer of the North Dakota AFL-CIO. On behalf of the labor movement here in North Dakota, I am here to testify in opposition to HB 1119.

For the first time in this country, a government agency will force an injured worker to be subject to drug testing for presence of an illegal substance and for the presence of a prescribed substance. Drug testing is already allowed to determine whether the injury was caused by drug or alcohol usage, but this bill goes much, much further. This bill allows an injured worker who has already been found eligible for benefits to be searched for illegal and legal drug usage. We have been unable to find any other state that has gone this far in invading the privacy of an injured worker.

I understand what the WSI claims is their reasoning for this bill: "to be able to effectively medically manage claims and to facilitate an injured worker's rehabilitation and return to work." They claim that "when WSI has information that a substance is being abused, the ability to determine the accuracy of those suspicions is critical to affirmatively getting the injured worker the services they need to

move their medical and vocational status forward." However, the only tool that the WSI has in its arsenal to achieve this goal is to deny benefits to the injured worker. This certainly isn't going to get the injured worker "the services" they need.

Pain management is important in claims management and it is important that doctors prescribe these medications in a responsible manner. The American Association of State Compensation Insurance Funds in its recent newsletter discusses pain management and the use of opiods in treating chronic pain. The newsletter states, "...the importance in understanding the effectiveness of pain management is recognizing strategies physicians should demonstrate with respect to patient management." It further states, "Because pain is a subjective experience, there is a great degree of subjectivity in prescribing opioids. Physicians should adhere to some reasoned methodology to determine correct dosing." It goes on to state that the negative side effects from the use of these drugs is the "potential for drug dependence and addiction."

Finally, the article recommends that there be established expectations of physicians that prescribe opioids and that if this is done, it will enhance "claim management guidelines and increase the odds of identifying fraudulent behavior and placing the injured worker at MMI." This bill does not begin to address physician expectations and how establishing these expectations could be used to accomplish what the WSI is seeking to do without subjecting the injured worker to losing benefits.

Recognizing drug abuse and treating drug abuse is not just a problem in the workplace, it is a problem in the general public as well as we all know. Those of us who have worked in the social work field know the inherent complex issues moving someone towards treatment. This bill will unilaterally allow the WSI to require a test for the use of illegal substance as well as legal substances.

The problem with this bill is that it will put the WSI in an adversarial position with the injured worker, a position that is in direct conflict with the purpose of the workers compensation system. An

injured worker has no choice but to use the WSI system for a work-related injury. The main purpose of the system was to prevent the adversarial nature of the civil court system, so the injured workers could get better without having to worry about going to court. It is a system of mutuality. The North Dakota Supreme Court has already cautioned the WSI against its adversarial position with injured worker. There is no doubt that this bill will increase litigation and will indeed put the injured worker in an adversarial position with WSI.

Now an injured worker, based on the suspicion or a "reasonable basis" of WSI will now have to face the indignity of a drug test to see if they are using illegal drugs or to see if they are following their doctor's instructions and using a prescribed medication. This is a severe invasion of the injured worker's right to privacy and against the injured workers constitutionally protected right against self-incrimination. Since when does an injured worker give up the right to privacy and the right against self-incrimination simply because of an injury on the job? Does the injured worker now have to give up his constitutional rights in order to get a benefit he is entitled to, been found eligible for, and has been receiving?

Quite frankly, an injured worker now has no idea what potentially awaits them when they get injured on the job if this bill becomes law. An injured worker has no idea that they may now be subject to a drug test to check if they are taking a prescribed medications. The need for this type of intrusion into the privacy of an injured worker and citizen of North Dakota must be substantial. It is not good enough that a state agency wants to make sure that they can effectively manage a medical claim. Are we going to allow any insurance company to do the same when someone has been in a car accident and the insurance company wants to make sure that the injured party is following doctor's orders? Is this the road we are now going down?

N.D.C.C. 65-05-28 already mandates that the injured employee follow the directives of the doctor or health care provider and to comply with all reasonable requests. While WSI claims that it may use this

statute on approximately 12 cases per year, the scope of the language is broad enough that it could be used for more than 12 cases and could be subject to abuse by WSI.

This bill is overkill and places the WSI in an adversarial position with an injured worker. We strongly believe that enhancing physician expectations for the use of pain medication and pain treatment will go further to get the injured worker back to work then this bill will do. N.D.C.C. 65-05-28 already provides WSI the ability to set up these physician expectations and we believe that this is the proper direction for WSI and will avoid the adversarial nature of mandatory drug testing. Improving physician expectations will enhance the doctor-patient relationship and continue the trusting relationship between those two parties without it becoming adversarial.

Again, the need for drug testing must be substantial in order to overcome a citizen's right to privacy and to override a citizen's 5th Amendment right against self-incrimination. The ND AFL-CIO and NDPEA are opposed to this bill and ask that you give this bill a DO NOT PASS. Thank you for your time and I am available to answer any questions that you have.

Chris Runge

[Cite as *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717.]

THE STATE EX REL. OHIO AFL-CIO ET AL. *v.* OHIO BUREAU OF WORKERS' COMPENSATION ET AL.

[Cite as *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717.]

Workers' compensation — Warrantless drug and alcohol testing of injured workers — 2000 Am.Sub.H.B. No. 122 violates the protections against unreasonable searches contained in the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution.

(No. 2001-0642 — Submitted January 30, 2002 — Decided December 18, 2002.)

IN MANDAMUS.

SYLLABUS OF THE COURT

2000 Am.Sub.H.B. No. 122, which permits the warrantless drug and alcohol testing of injured workers without any individualized suspicion of drug or alcohol use, violates the protections against unreasonable searches contained in the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution.

PFEIFER, J.

{¶1} The issue in this case is whether 2000 Am.Sub.H.B. No. 122 ("H.B. 122"), which permits the warrantless drug and alcohol testing of injured workers, is constitutional. We find that H.B. 122 violates the protections against unreasonable searches contained in the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution.

Factual Background

{¶2} The relators in this matter are the Ohio AFL-CIO, its president, William A. Burga, and the United Auto Aerospace & Agricultural Implement Workers of America, Regions 2 and 2-B ("UAW"). The respondents are the Ohio Bureau of Workers' Compensation, James Conrad, Administrator ("BWC"), and the Industrial Commission of Ohio ("the commission").

{¶3} Relators filed an original action in mandamus in this court on April 3, 2001, seeking to prevent the BWC and the commission from enforcing amendments to R.C. 4123.54 that the General Assembly enacted in H.B. 122. Those provisions were to become effective on April 10, 2001.

{¶4} R.C. 4123.54(A)(2) excludes from workers' compensation benefits anyone whose injury was "[c]aused by the employee being intoxicated or under the influence of a controlled substance * * * where the intoxication or being under the influence of a controlled substance * * * was the proximate cause of the injury." H.B. 122 did not change this section. H.B. 122 did add Section (B), setting forth how an employer may prove that its employee was intoxicated or under the influence of a controlled substance.

{¶5} Through H.B. 122, R.C. 4123.54(B) now provides that where chemical testing reveals certain prohibited levels of alcohol or controlled substances in the body of an injured employee, a rebuttable presumption arises that the employee's injury was proximately caused by the influence of alcohol or a controlled substance. By incorporating R.C. 4511.19(A)(2) to (7), R.C. 4123.54(B) allows for blood, breath, or urine testing of employees.

{¶6} Moreover, and most significant for relators, under H.B. 122, when an injured employee refuses to submit to an employer-requested chemical test, that employee is rebuttably presumed to have been intoxicated or under the influence of a controlled substance at the time of the workplace injury, and that condition is rebuttably presumed to have been the injury's proximate cause. R.C. 4123.54(B)(5). The statute states that "the employee's refusal to submit" to any

chemical test "may affect the employee's eligibility for compensation and benefits."

{¶7} Thus, under H.B. 122, every Ohio worker injured on the job must submit to an employer-requested chemical test, regardless of whether the employer has any reason to believe that the injury was caused by the employee's intoxication or use of controlled substances. Failure to submit to a breath, blood, or urine test creates a rebuttable presumption against the employee that use of drugs or alcohol caused the injury.

{¶8} Relators allege that the combined 950,000 members of the AFL-CIO and UAW are potential subjects of the testing requirements contained in H.B. 122, requirements that relators allege are unconstitutional. Their complaint does not allege any specific instance of a constitutional violation that has actually occurred.

{¶9} Respondents moved to dismiss the mandamus action, and this court denied that motion on July 25, 2001. 92 Ohio St.3d 1447, 751 N.E.2d 484. This court, sua sponte, granted an alternative writ, setting a schedule for briefing and the presentation of evidence. 92 Ohio St.3d 1455, 752 N.E.2d 287.

Law and Analysis

{¶10} The first issue before us is whether the relators have standing to bring this mandamus action. Respondents argue that relators merely assert a potential harm to some of their members, which is insufficient to confer standing. But conferring standing in this case would set no precedent in that regard—this court has previously ruled upon the constitutionality of the workers' compensation system in *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 631 N.E.2d 582, upon actions in mandamus, prohibition, and quo warranto brought by, among other parties, relators AFL-CIO and UAW.

{¶11} Moreover, "[t]his court has long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they

may be resolved in a form of action that involves no rights or obligations peculiar to named parties." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 471, 715 N.E.2d 1062. In *Sheward*, this court held that "[w]here the object of an action in mandamus and/or prohibition is to procure the enforcement or protection of a public right, the relator need not show any legal or special individual interest in the result, it being sufficient that the relator is an Ohio citizen and, as such, interested in the execution of the laws of this state." Id. at paragraph one of the syllabus.

{¶12} The granting of writs of mandamus and prohibition to determine the constitutionality of statutes will "remain extraordinary" and "limited to exceptional circumstances that demand early resolution." Id., 86 Ohio St.3d at 515, 715 N.E.2d 1062 (Pfeifer, J., concurring). We find this case to be one of those rare cases. As the statutory scheme at issue in *Sheward* affected every tort claim filed in Ohio, H.B. 122 affects every injured worker who seeks to participate in the workers' compensation system. It affects virtually everyone who works in Ohio. The right at stake, to be free from unreasonable searches, is so fundamental as to be contained in our Bill of Rights. H.B. 122 has sweeping applicability and affects a core right. Since H.B. 122 therefore implicates a public right, we find that relators meet the standing requirements of *Sheward*.

{¶13} The threshold constitutional question is whether the searches allowed by H.B. 122 involve state action. "Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government." *Skinner v. Ry. Labor Executives' Assn.* (1989), 489 U.S. 602, 614, 109 S.Ct. 1402, 103 L.Ed.2d 639. While H.B. 122 applies to the state of Ohio itself as an employer, it also affects employees working for private employers. Does the testing conducted by

private employers pursuant to H.B. 122 constitute state action? We hold that it does.

{¶14} The United States Supreme Court has held that attributing actions by private entities to the state "is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Academy v. Tennessee Secondary School Athletic Assn.* (2001), 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807. However, the court has identified several relevant factors. Id. at 296, 121 S.Ct. 924, 148 L.Ed.2d 807. The situations where the court has found that a challenged activity may be "state action" include those in which the private activity results from the state's exercise of coercive power, when the state provides significant encouragement for the activity, either overt or covert, or when a private actor operates as a willful participant in joint activity with the state or its agents. Id.

{¶15} In short, "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may fairly be treated as that of the State itself.' " Id. at 295, 121 S.Ct. 924, 148 L.Ed.2d 807, quoting *Jackson v. Metro. Edison Co.* (1974), 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477.

{¶16} The entanglement of private employers and the state in the administration of Ohio's workers' compensation system dates back to the system's creation and is rooted in the Ohio Constitution and statutory law. Section 35, Article II of the Ohio Constitution allows for the establishment of a workers' compensation system to be "administered by the state." Section 35, Article II states that the compensation awarded thereunder "shall be in lieu of all other rights to compensation, or damages, for * * * death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law * * * shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease."

{¶17} By statute, the state has made employer participation in the workers' compensation system mandatory, with limited exceptions. R.C. 4123.01(B)(2); R.C. 4123.35. Noncomplying employers are subject to suit brought by the state. R.C. 4123.75. The administrative process for the adjudication of employees' claims is state-created. Section 35, Article II, Ohio Constitution; R.C. 4121.02 (creating the Industrial Commission); R.C. 4121.121 (creating the Bureau of Workers' Compensation).

{¶18} Before this backdrop of state control comes H.B 122. While employers can set forth their own drug testing procedure for purposes of exposing employee misconduct, they cannot themselves use test results to affect an employee's entitlement to workers' compensation. The final word on eligibility for workers' compensation belongs to the state. It is R.C. 4123.54 that denies compensation for injuries "[c]aused by the employee being intoxicated or under the influence of a controlled substance." Only that legislative action makes intoxication or drug use relevant in determining workers' compensation eligibility. H.B. 122 modified R.C. 4123.54 to create a procedure to prove intoxication or drug use as a proximate cause of an injury. In H.B. 122, the General Assembly dictated when the test is to be performed, the substances to be tested for, the prohibited levels of those substances, and the consequences if the employee tests positive. Most important for this case, the statute sets forth the consequences for the employees' refusal to take an employer-requested test. Without this legislation, an employer could not withhold an employee's workers' compensation for failure to take a drug test. The rebuttable presumption created by the state is the hammer that forces an employee to take an employer-directed drug test. It is a complete entanglement of private and state action.

{¶19} We therefore find that the state of Ohio's significant promotion of drug testing through its exercise of coercive power creates the close nexus between the state and the challenged action required to constitute state action.

{¶20} Thus, we face the issue of whether H.B. 122 is constitutional. The Fourth Amendment to the Constitution of the United States reads:

{¶21} "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

{¶22} Section 14, Article I of the Ohio Constitution is virtually identical to the Fourth Amendment. Therefore, we look to United States Supreme Court precedent to determine the constitutionality of H.B. 122 under the federal Constitution and the Ohio Constitution.

{¶23} The United States Supreme Court, in a line of cases beginning with *Skinner*, has addressed the issue of suspicionless drug testing in the workplace and at schools. In each case, the court has held that the collection and subsequent analysis of biological samples obtained through blood, breath, or urine testing "must be deemed Fourth Amendment searches." *Skinner*, 489 U.S. at 618, 109 S.Ct. 1402, 103 L.Ed.2d 639. See discussion of *Skinner* cases, infra. Thus, the testing allowed by H.B. 122 does constitute a search for Fourth Amendment analysis purposes.

{¶24} The next step is to determine whether a given search is reasonable. In general, the reasonableness of a particular search or practice " 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402, 103 L.Ed.2d 639, quoting *Delaware v. Prouse* (1979), 440 U.S. 648, 654, 99 S.Ct. 1391, 59 L.Ed.2d 660. What we commonly think of as a necessary element of a reasonable search, a warrant based upon probable cause, is not a prerequisite to every search. The Supreme Court has held that "[a] search unsupported by probable cause can be constitutional * * * 'when special needs,

beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " *Vernonia School Dist. 47J v. Acton* (1995), 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564, quoting *Griffin v. Wisconsin* (1987), 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709.

{¶25} Thus, as long as the government interest behind the drug testing is not merely to fight crime, i.e., when the results of testing are not used to procure criminal convictions, governmental special needs can be enough to obviate the general requirement of probable cause or individualized suspicion of wrongdoing:

{¶26} "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624, 109 S.Ct. 1402, 103 L.Ed.2d 639.

{¶27} The "special needs" analysis includes a consideration of the practicalities of achieving the government's objectives through the ordinary means of securing a warrant based on probable cause. If securing a warrant is impracticable, then the government's special needs are weighed against the individual's privacy interest:

{¶28} "Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Chandler v. Miller* (1997), 520 U.S. 305, 318, 117 S.Ct. 1295, 137 L.Ed.2d 513.

{¶29} The balance between governmental special needs and individuals' expectation of privacy has been the focus in a line of Supreme Court cases addressing suspicionless searches. *Skinner* was the first of these cases to set forth the "special needs" analysis. In *Skinner*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639, the Federal Railroad Administration promulgated safety regulations

that required railroads to perform blood and urine tests of employees who are involved in certain train accidents, and authorized railroads to administer breath and urine tests to employees who violate certain safety rules. The court found that the procedures were constitutional due, in part, to "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety." Id., 489 U.S. at 620, 109 S.Ct. 1402, 103 L.Ed.2d 639. Accidents involving railroads are potentially catastrophic, and the goal of preventing such accidents "may justify departures from the usual warrant and probable-cause requirements." Id. Evidence also suggested that substance abuse had contributed to railroad accidents in the past. Id. at 607-608, 109 S.Ct. 1402, 103 L.Ed.2d 639. Suspicionless searches were held to be appropriate because railroad supervisors were not trained in enforcing the law and the intricacies of Fourth Amendment jurisprudence. Id. at 623-624, 109 S.Ct. 1402, 103 L.Ed.2d 639. Automatic testing would be the only practicable way to achieve the ends of the state.

{¶30} The court weighed these special needs of the government against the expectation of privacy of railroad workers. The court noted that the industry was already pervasively regulated for safety reasons. The industry already had a long history of periodic physical examination of workers. Id., 489 U.S. at 627-628, 109 S.Ct. 1402, 103 L.Ed.2d 639. Thus, the court found that in that particular industry, where the safety of employees and the public was paramount, and where the industry involved was already highly regulated as to safety, the testing procedures promulgated were constitutional.

{¶31} In *Natl. Treasury Emp. Union v. Von Raab* (1989), 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685, the court found constitutional the employee drug-testing program implemented by the United States Customs Service. The Customs Service required urinalysis tests for employees who sought transfer or promotion to three categories of positions: (1) those with direct involvement in drug interdiction, (2) those that required carrying of a firearm, and (3) those

requiring the handling of classified materials. The testing was deemed necessary for the first two categories of positions for the safety of the customs agents. As for the third category of positions, the Commissioner of Customs determined that persons who held classified information might be susceptible to bribery or blackmail by reason of their own illegal drug use.

{¶32} Again, the court found that, with regard to the first two categories, the warrant requirement would be impractical even given the expertise of the Customs Service, because imposing a warrant requirement "would serve only to divert valuable agency resources from the Service's primary mission." Id. at 666, 109 S.Ct. 1384, 103 L.Ed.2d 685. Again, the court weighed the valid public interests advanced by the policy against its interference with individual liberty.

{¶33} The court found that "operational realities" necessarily would affect a Customs Service employee's individual expectation of privacy:

{¶34} "While these operational realities will rarely affect an employee's expectations of privacy with respect to searches of his person, or of personal effects that the employee may bring to the workplace, it is plain that certain forms of public employment may diminish privacy expectations even with respect to such personal searches." (Citation omitted.) *Von Raab*, 489 U.S. at 671, 109 S.Ct. 1384, 103 L.Ed.2d 685.

{¶35} For instance, the court pointed out, employees of the United States Mint should expect to be subject to routine personal searches. The court found that those holding Customs Service jobs that involve interdiction and the use of firearms would naturally have a diminished expectation of privacy with respect to the intrusions caused by a urine test, "[u]nlike most private citizens or government employees in general." Id. at 672, 109 S.Ct. 1384, 103 L.Ed.2d 685.

{¶36} However, as to the persons who had contact with classified material, the court was unwilling to uphold the Customs Service policy due to the lack of a sufficient record. Since the range of people tested under this category

seemed to include such positions as accountant, animal caretaker, and messenger, the court remanded that portion of the case for a determination of whether category three was overly broad. The lower court eventually found that the persons mentioned by the Supreme Court were not in fact included in category three and that those who were so categorized did encounter classified material, and thus should be subject to testing. *Natl. Treasury Emp. Union v. Hallett* (E.D.La. 1991), 756 F.Supp. 947.

{¶37} Again in *Von Raab*, the court was careful to take note of the specific job or position involved to determine whether there truly were legitimate "special needs" of the government. Also, the nature of the employment of Treasury employees meant that their expectations of privacy were markedly different from those of private citizens.

{¶38} In *Vernonia School Dist. v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564, the court found that the school district's policy requiring urinalysis drug testing of all students who participate in the district's athletics programs did not violate the Fourth Amendment. In *Vernonia*, the school district required students to consent to urinalysis in order to participate in sports. The court found that the school district's interest in discouraging drug use, protecting student health, and maintaining discipline was compelling. The district convinced the court that a drug culture, led by athletes, had led to a general state of rebellion in the local schools, with disciplinary actions reaching "epidemic proportions." Id. at 663, 115 S.Ct. 2386, 132 L.Ed.2d 564. While the court admitted that testing based upon particularized suspicion might be less intrusive, it stated in *Vernonia* that reasonableness is not limited to the least intrusive search practicable. Id. at 663, 115 S.Ct. 2386, 132 L.Ed.2d 564. In fact, the court found that testing based upon suspicion would be worse than blanket, suspicionless testing. The court pointed out that teachers, untrained for the task, would be called upon to make decisions on whom to test, and that this would force teachers into an adversarial

role that might cause difficulties in student-teacher relationships. Id. at 664, 115 S.Ct. 2386, 132 L.Ed.2d 564. All of those factors led to the special-needs finding.

{¶39} The court then weighed the district's compelling need against the privacy interests of the students. The court found that students, especially student athletes, have a lower expectation of privacy than members of the general population, because school sports involve public locker rooms, group showers, and changing clothes in the presence of others. Therefore, the court found the district's policy to be constitutional.

{¶40} In *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513, the court found that the government's special needs were not sufficient to allow for the mandatory drug testing for candidates for certain state offices in Georgia. Georgia had enacted a statute in 1990 that required candidates for nomination or election to certain state offices to provide proof that they had taken a drug test in the prior 30 days and that the results were negative in order to qualify for a place on the ballot. See former Ga.Stat. 21-2-140. The court found that this requirement "[did] not fit within the *closely guarded* category of constitutionally permissible suspicionless searches." (Emphasis added.) *Chandler*, 520 U.S. at 309, 117 S.Ct. 1295, 137 L.Ed.2d 513.

{¶41} Georgia argued that holding high state office is incompatible with unlawful drug use. Id. at 318, 117 S.Ct. 1295, 137 L.Ed.2d 513. The court found that the hazards cited by the state were merely hypothetical, without any indication of a concrete danger justifying departure from the Fourth Amendment. Id. The court found that "the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake." Id., 520 U.S. at 322, 117 S.Ct. 1295, 137 L.Ed.2d 513.

{¶42} In the cases where the court has allowed the suspicionless drug testing, the targeted individuals either have a demonstrated history of abuse, e.g., *Skinner* and *Vernonia*, hold a unique position, e.g., *Von Raab*, or have the

potential for creating risks of catastrophe if under the influence of a mind-altering substance, e.g., *Von Raab* and *Skinner*. The overriding idea is that the situations and targeted groups are unique and discrete.

{¶43} H.B. 122 does not fit within the parameters of what the court has found to be the "closely guarded" category of constitutionally permissible suspicionless searches. H.B. 122 does not target a group of people with a documented drug and alcohol problem. It is not directed at a segment of the population with drug use known to be greater than that of the general population—its target group *is* the general population. It does not target a segment of industry where safety issues are more profound than in other industries. It does not target certain job categories where drug or alcohol use would cause a substantial danger to workers, co-workers, or the general public.

{¶44} In the cases where suspicionless testing of employees was allowed, *Skinner* and *Von Raab*, it was the exceptional nature of the employment situations that created the requisite special governmental needs to override the warrant requirement. The searches allowed by H.B. 122 involve everyone who works in Ohio. While *Von Raab* spoke of Treasury employees being "[u]nlike most private citizens or government employees in general," id., 489 U.S. at 672, 109 S.Ct. 1384, 103 L.Ed.2d 685, H.B. 122 addresses those same private citizens and government employees and treats them as though they hold extraordinary positions.

{¶45} The BWC points to certain statistics from its own Drug-Free Workplace Program to demonstrate Ohio's special needs. The BWC claims that "[s]tudies have shown that between 38 and 50% of all workers' compensation claims are related to the use of alcohol and drugs in the workplace." First, there is a significant difference between claims being "related to" alcohol and drugs and being proximately caused by them. Second, that citation does not come from the BWC's own analysis of claims brought in Ohio but upon a study by the National

Council on Compensation Insurance. There are no statistics relied upon by the BWC or its amici that result from studies done by the BWC or other state agencies regarding workplace injuries in Ohio that are proximately caused by substance abuse in the workplace.

{¶46} We do not mean to state that drug and alcohol use in the workplace is not a problem, just as we do realize that it is also a problem outside the workplace. The problem by its nature is a general one, spread out across all socioeconomic levels, throughout all levels of the workforce. Substance abuse can be a problem for anyone. But suspicionless testing, the court instructs, is not a solution for just anyone. Suspicionless testing can be applicable to certain carved-out categories of workers, but not to all workers.

{¶47} Even if there were special needs successfully asserted by the state, the expectation of privacy of Ohio's workers would outweigh them. The vast majority of Ohio workers are not subject to the "operational realities" cited by the court in *Von Raab*. Id., 489 U.S. at 671, 109 S.Ct. 1384, 103 L.Ed.2d 685. Most employees do not work in industries as highly regulated as that in *Skinner*. Most do not operate inherently dangerous machinery that can cause catastrophic damage to the public. In fact, amicus curiae Greater Cleveland Growth Association, Counsel of Smaller Enterprises points out in its brief that according to a 1999 federal study, the highest rate of heavy drinking and illicit drug use occurs among restaurant workers and bartenders.

{¶48} Under H.B. 122, all kinds of workers who suffer their injuries in a myriad of ways must face the prospect of undergoing drug and alcohol tests. A secretary suffering from carpal tunnel syndrome, a passenger in a company-owned vehicle who is blindsided by a drunk driver, a painter who happens to be near a boiler in a manufacturing plant when it explodes, a chemistry teacher burned while putting out a fire started by a student—all would be subject to an employer-requested drug test upon their injury. Their failure to agree would

result in a rebuttable presumption that drug or alcohol use proximately caused their injury. While that presumption may be overcome in a hearing, the presumption changes the way an employee presents his or her case. Whether or not the presumption in the end affects their claim, the fact remains that they are subject to a government-imposed sanction for failure to submit to the chemical testing. Ordinary people working ordinary jobs do not have the expectation that they are subject to searches without reason.

{¶49} Moreover, in Ohio, workers have an additional expectation of privacy when it comes to workers' compensation. The workers' compensation system is designed to avoid the adversarial character of the civil justice system, allowing workers to recover for injuries they suffer on the job without having to undertake the risk and expense of a civil trial. In return, employers are protected from large civil damage awards. In *Blankenship v. Cincinnati Milacron Chem., Inc.* (1982), 69 Ohio St.2d 608, 614, 23 O.O.3d 504, 433 N.E.2d 572, this court explained the philosophy behind the system:

{¶50} "The workers' compensation system is based on the premise that an employer is protected from a suit for negligence in exchange for compliance with the Workers' Compensation Act. The Act operates as a balance of mutual compromise between the interests of the employer and the employee whereby employees relinquish their common law remedy and accept lower benefit levels coupled with the greater assurance of recovery and employers give up their common law defenses and are protected from unlimited liability."

{¶51} Under such a system of compromise for mutual benefit, a worker would not expect to face the indignity of drug and alcohol testing without any suspicion of wrongdoing. Workers would not anticipate that their sobriety would be called into question merely for suffering an industrial accident. They would expect that since Ohio's workers' compensation system is a creature of the Ohio Constitution, they would not have to jump through an embarrassing hoop to gain

the protection of the system. They would have the expectation that Section 34, Article II of the Ohio Constitution would also protect them from baseless searches: "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and *providing for the comfort, health, safety and general welfare of all employees.*" (Emphasis added.)

{¶52} We therefore find that the individual expectation of privacy of Ohio's workers outweighs any special needs asserted by the state and that H.B. 122 therefore violates the Fourth Amendment.

{¶53} Further, we find that H.B. 122 also violates the Ohio Constitution. "The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall." *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, syllabus. We find that the Ohio Constitution, which prohibits unreasonable searches and also contains special considerations for Ohio's workers, provides additional and independent protection against the searches allowed by H.B. 122.

{¶54} Accordingly, 2000 Am.Sub. H.B. No. 122, which permits the warrantless drug and alcohol testing of injured workers without any individualized suspicion of drug or alcohol use, violates the protections against unreasonable searches contained in the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution.

{¶55} We therefore grant relators' writ of mandamus.

Writ granted.

DOUGLAS, RESNICK and F.E. SWEENEY, JJ., concur.

MOYER, C.J., and LUNDBERG STRATTON, J., dissent.

COOK, J., dissents.

MOYER, C. J., dissenting.

{¶56} The majority errs in reaching the merits of the issue of the constitutionality of R.C. 4123.54, as amended by 2000 Am.Sub.H.B. No. 122. Two reasons support this conclusion: (1) the relators lack standing, and (2) the case before us does not present facts justifying the exercise of the original jurisdiction vested in this court by Section 2(B)(1), Article IV of the Ohio Constitution. Moreover, upon resolving to reach the merits in this case, the majority errs in finding the current statute unconstitutional. I therefore respectfully dissent.

I

Standing

{¶57} In Ohio, it is well established that standing exists only where a litigant "has suffered or is threatened with *direct* and *concrete* injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury." (Emphasis added.) *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469-470, 715 N.E.2d 1062. Similarly, an organization or association attempting to litigate on behalf of its members must establish that its members have suffered *actual* or *concrete* injury, rather than an abstract or suspected injury, in order to justify a finding of standing. *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 643 N.E.2d 1088.

{¶58} The relators herein cannot meet these burdens. They do not allege that any workers' compensation claims have been filed in which a party has urged the application of any of the presumptions created by R.C. 4123.54(B). It follows that the relators do not allege facts showing that any of their members have been injured or are under an imminent threat of suffering a concrete injury.

{¶59} Rather the relators speculate that, sometime in the future, H.B. 122 "will be applied" to deny future workers' compensation claims, and "will be used by Employers" to compel workers to undergo drug testing. They claim that the

provisions of H.B. 122 "potentially" apply to every injured worker. Perhaps most illustrative of the speculative nature of the relators' claim of injury is their assertion that the respondents, the Ohio Bureau of Workers' Compensation, its administrator, and the Industrial Commission, "will apply the presumptions of R.C. 4123.54, as amended, to deny injured workers who have otherwise valid claims the right to receive workers' compensation." Because these assertions fall far short of the actual or imminent concrete injury required by long-standing Ohio law to justify recognition of standing, the court should dismiss this case.

{¶60} In *Sheward*, however, the court also recognized and applied a "public action" exception to the traditional standing rule, and allowed several Ohio organizations and a private individual to present a constitutional challenge to comprehensive tort reform legislation enacted as 1996 Am.Sub.H.B. No. 350 as an action in mandamus in this court. The relators in the case at bar argue that *Sheward* justifies a finding of standing in their challenge to H.B. 122.

{¶61} My vehement opposition to *Sheward* is well documented, not only in my written dissent to the decision itself, id. at 516-531, 715 N.E.2d 1062, but in separate opinions written thereafter. See *Burger v. Cleveland Hts.* (1999), 87 Ohio St.3d 188, 198, 718 N.E.2d 912 (Moyer, C.J., dissenting); *State ex rel. United Auto Aerospace & Agricultural Implement Workers of Am. v. Ohio Bur. of Workers' Comp.*, 95 Ohio St.3d 408, 2002-Ohio-2491, 768 N.E.2d 1129, ¶17-28 (Moyer, C.J., dissenting).

{¶62} With the passage of time, other observers have joined me in vociferously criticizing *Sheward*. The decision has been characterized as "an example of blatant judicial violation of jurisdictional doctrine." Loeb, Abuse of Power: Certain State Courts are Disregarding Standing and Original Jurisdiction Principles So They Can Declare Tort Reform Unconstitutional (2000), 84 Marq.L.Rev. 491, 492. It has been deemed "a manifestly gross example of political opportunism, allowing the majority to invalidate a disfavored law using a

questionable approach." Tracy, Ohio Ex Rel. Ohio Academy of Trial Lawyers v. Sheward: The End Must Justify the Means (2000), 27 N.Ky.L.Rev. 883, 885. A writer in the Harvard Law Review characterized the reasoning of *Sheward* as "awkward[]" and "overreaching" and as having "misappropriated" constitutional principles. Note, State Tort Reform—Ohio Supreme Court Strikes Down State General Assembly's Tort Reform Initiative (2000), 113 Harv.L.Rev. 804, at 804, 807. See, also, Black, State ex rel. Ohio Academy of Trial Lawyers v. Sheward: The Extraordinary Application of Extraordinary Writs and Other Issues; The Case That Never Should Have Been (2001), 29 Cap.U.L.Rev. 433; Werber, Ohio Tort Reform in 1998: The War Continues (1997), 45 Cleve.St.L.Rev. 539. Nevertheless, until overruled, *Sheward* must be acknowledged as precedent.

{¶63} In summarizing its holding, the court wrote in its syllabus in *Sheward* that "[w]here the object of an action in mandamus and/or prohibition is *to procure the enforcement or protection of a public right*, the relator need not show any legal or special individual interest in the result, it being sufficient that the relator is an Ohio citizen and, as such, interested in the execution of the laws of this state." (Emphasis added.) *Sheward,* 86 Ohio St.3d 451, 715 N.E.2d 1062, paragraph one of the syllabus. However, contrary to this broad language, it is clear from the express representations made in the *Sheward* opinion, as well as its context, that the term "public right" as used in the syllabus requires more than a showing that a statute of questioned constitutionality is of widespread public interest, or even that it potentially may affect a large number of Ohio citizens.

{¶64} In *Sheward* the relators alleged that Am.Sub.H.B. No. 350 represented a legislative assault on the doctrine of separation of powers, a fundamental principle of our democracy. The court characterized the General Assembly as having "reenacted legislation which this court has already determined to be unconstitutional and/or in conflict with the rules we have prescribed pursuant to Section 5(B), Article IV of the Ohio Constitution

governing practice and procedure for Ohio courts." Id. at 474, 715 N.E.2d 1062. The court determined that the relators' challenge to the comprehensive legislation contained in Am.Sub.H.B. No. 350 raised issues "of such a high order of public concern as to justify allowing this action as a public action." Id. It noted that "[t]he people of this state have delegated their judicial power to the courts, and have expressly prohibited the General Assembly from exercising it," and observed that "it is difficult to imagine a right more public in nature than one whose usurpation has been described as the very definition of tyranny." Id.

{¶65} In short, the majority in *Sheward* believed that the legislative branch of government, in enacting Am.Sub.H.B. No. 350, had engaged in misconduct of such magnitude that the general rules of standing should be disregarded in order to protect the very fabric of our democracy. Inappropriately in my view, it deemed this "reenactment" to be an encroachment by the General Assembly into the judicial sphere, violating the principle of separation of powers.

{¶66} However, the majority expressly assured the bench and bar that it would "entertain a public action only *'in the rare and extraordinary case'* where the challenged statute operates, *'directly and broadly, to divest the courts of judicial power.'* " (Emphasis sic.) Id. at 504, 715 N.E.2d 1062. It specifically represented that it would "not entertain a public action to review the constitutionality of a legislative enactment unless it is of a magnitude and scope comparable to that of Am.Sub.H.B. No. 350." Id. We now know that this express promise of future judicial restraint made by the majority in *Sheward* was a hollow one.

{¶67} Nothing even approaching the circumstances described in *Sheward* exists in the case before us. It is true that the workers' compensation system in Ohio is of great importance to thousands of Ohio workers and employers. This does not mean that every time the General Assembly revises some aspect of workers' compensation law, an action challenging its constitutionality is a "public

action" involving a "public right." If so, then virtually any legislative enactment affecting the public can be short-circuited to this court for immediate constitutional review.

{¶68} In my dissent in *Sheward*, I expressed my concern that thereafter "those dissatisfied with enactments of the General Assembly * * * will no longer consider a writ of mandamus or prohibition to be an extraordinary remedy: instead they will consider them the remedy of choice." Id. at 517, 715 N.E.2d 1062. Unfortunately, today my prognostication has been realized.

{¶69} I continue to believe that *Sheward* was wrongly decided. However, even assuming the validity of *Sheward*, no fundamental "public right" analogous to that found to exist in *Sheward* exists in the case at bar. Or, perhaps more accurately, the majority's extension of the public-right exception of *Sheward* to the case at bar allows that exception to engulf traditional standing rules.

{¶70} The relators do not allege facts justifying a finding that they have standing to bring this action. The case should therefore be dismissed.

II

Wrongful Exercise of Original Jurisdiction

{¶71} In order to be entitled to a writ of mandamus, the relator must establish (1) that the relator has a clear legal right to the relief prayed for, (2) that the respondent has a clear legal duty to perform the requested act, and (3) that the relator has no plain and adequate remedy at law. *State ex rel. Seikbert v. Wilkinson* (1994), 69 Ohio St.3d 489, 490, 633 N.E.2d 1128, 1129; R.C. Chapter 2731.

{¶72} As I noted in my dissent in *Sheward*, "[t]he Ohio Constitution does not vest this court with original jurisdiction to issue either a declaratory judgment or injunctive relief." Id., 86 Ohio St.3d at 516, 715 N.E.2d 1062 (Moyer, C.J., dissenting), citing Section 2, Article IV, Ohio Constitution; *State ex rel. Pressley*

v. Indus. Comm. (1967), 11 Ohio St.2d 141, 40 O.O.2d 141, 228 N.E.2d 631. As in *Sheward,* the action before us is in effect an action seeking declaratory judgment and injunctive relief and does not fall within the parameters of our original jurisdiction in mandamus.

{¶73} Moreover, as in *Sheward,* the relators before us have an adequate remedy at law in the form of resort to the trial courts of the state, followed by appellate review. If R.C. 4123.54, as amended by H.B. 122, is indeed unconstitutional, that conclusion would be reached through the ordinary course of law where issues of fact and law are determined in the first instance by a trial court in a particular case, followed by appellate review. The original jurisdiction of this court to issue the extraordinary writ of mandamus established in the Ohio Constitution does not exist as a mechanism to bypass regular procedure to allow claims of unconstitutionality to be heard initially in this court. As I stated in *Sheward,* the trial courts of this state are the appropriate forum for initial determination of the validity of the relators' arguments, and even then only if they are presented as part of an actual justiciable controversy.

{¶74} In addition, the relators have neither alleged nor established that the respondents have failed to perform a duty required of them by law, that being a fundamental requisite for the proper exercise of original jurisdiction in mandamus by this court. The relators allege that "[b]ecause R.C. 4123.54, as amended, is unconstitutional, Respondents have a clear legal duty to refuse to apply it and to instead apply the previous version of R.C. 4123.54." The simple response to this contention is that there is nothing in the record to demonstrate that the respondents have yet been asked either to apply or to disregard the presumptions established in R.C. 4123.54. Because the respondents have not yet been presented with a case in which the presumptions of R.C. 4123.54, as amended by H.B. 122, have been in issue, it is eminently clear that the respondents have not yet failed to perform a duty required of them under the

questioned. I cannot accept as valid such a fundamental restructuring of the law of constitutional review.

{¶76} The relators do not allege facts supporting an exercise of this court's original jurisdiction to issue an extraordinary writ of mandamus. The case should therefore be dismissed.

III

Constitutionality

amended statute. Thus, they are under no clear legal duty to apply the statute at all. The conclusion is unavoidable that the purpose of this action is to obtain an advisory declaration of unconstitutionality before amended R.C. 4123.54 is implemented. Such an action seeks declaratory and injunctive relief, which this court has no original jurisdiction to grant.

{¶75} Moreover, as noted, relators argue that the respondents will have a clear legal duty to implement the pre-H.B. 122 version of R.C. 4123.54 if and when they are called upon to apply the presumption contained in the amended statute. Implicit in this assertion is the premise that the BWC should itself review the constitutionality of H.B. 122, conclude that it is unconstitutional, and disregard it. However, the BWC and the Industrial Commission do not even have the authority, much less a duty, to adjudicate the constitutionality of duly enacted legislation. Such a contention is contrary to well-settled law. *State ex rel. Columbus S. Power Co. v. Sheward* (1992), 63 Ohio St.3d 78, 81, 585 N.E.2d 380, 382 ("It is settled that an administrative agency is without jurisdiction to determine the constitutional validity of a statute"). It follows that, if mandamus is appropriate in the case at bar because the respondents, as administrative agencies, have a clear legal duty to follow only constitutional statutes, then mandamus is appropriate in every case where the constitutionality of a statute prescribing procedures or imposing duties upon any governmental official is questioned. I cannot accept as valid such a fundamental restructuring of the law of constitutional review.

{¶76} The relators do not allege facts supporting an exercise of this court's original jurisdiction to issue an extraordinary writ of mandamus. The case should therefore be dismissed.

III

Constitutionality

{¶77} The court should not reach the issue of the constitutionality of H.B. 122 at this time. It nevertheless has determined to do so. I therefore write to express my disagreement with the majority's resolution of this substantive issue as well.

{¶78} I acknowledge that reasonable minds may well differ as to the wisdom of the amendments to R.C. 4123.54 made by H.B. 122, now codified as R.C. 4123.54(B). However, in the absence of unconstitutionality, this court does not have authority to invalidate the policy judgments of the General Assembly as incorporated into statutory law.

{¶79} R.C. 4123.54(B) establishes rebuttable presumptions where a worker tests over prescribed drug or alcohol limits, or refuses drug testing after an injury. Therefore, the change accomplished by H.B. 122 does no more than reallocate the burden of going forward with evidence in workers' compensation claims where an issue of the worker's possible intoxication as a cause of the injury has been framed. In so doing, the General Assembly has placed the burden of proving a worker's condition where alcohol or illegal drug intoxication may have existed at the time of an injury upon the party most able to provide evidence of that condition. Such a change is well within the constitutional authority of the General Assembly, and the majority therefore errs in invalidating R.C. 4123.54(B).

{¶80} The majority reaches its conclusion of unconstitutionality based on its analysis of questions of statutory interpretation that have not been presented or fully adjudicated. The syllabus to the majority opinion herein states that "2000 Am.Sub.H.B. No. 122 * * * permits the warrantless drug and alcohol testing of injured workers." In drawing this conclusion the majority accepts relators' proposition that H.B. 122 creates rights in employers to demand, and a requirement in employees to submit to, drug testing. However, nothing in the language of the statute authorizes anyone, and specifically Ohio employers, to

require employees to submit to drug testing: the word "employer" appears nowhere in R.C. 4123.54(B).

{¶81} Missing from this rationale for its conclusion is any expression of concern by the majority for the workers whose health and safety may be jeopardized by the errant conduct of another employee who may be under the influence of alcohol or drugs. Why the extraordinary concern for an employee whose conduct may suggest a drug test is warranted at the expense of other employees whose conduct is appropriate?

{¶82} R.C. 4123.54(B) is drafted in the passive voice. It provides, for example, that the rebuttable presumptions created by the statute exist "provided that an employee *is given,* or *has been given* notice" of test results or the consequences of a refusal to be tested. (Emphasis added.) Similarly, the statute creates a rebuttable presumption where an employee "refuses to submit to a requested chemical test," but does not identify the person or persons who might make such a request. R.C. 4123.54(B)(5). It is only the relators' interpretive gloss on the statute that supports their premise that R.C. 4123.54(B) "permits" or requires testing. In fact, the statute does not do so, although it does rest on an *assumption* that drug testing has been, or will be, requested by some unidentified actor.

{¶83} Similarly, the conclusions made by the majority that "under H.B. 122, every Ohio worker injured on the job must submit to an employer-requested chemical test" and that the rebuttable presumption created in R.C. 4123.54(B) is "the hammer that forces an employee to take" a drug test are unfounded. R.C. 4123.54(B) does not *require* an injured employee to take a test—it imposes an evidentiary consequence to a worker's refusal to submit to a drug test. Any worker may refuse drug testing and choose instead to proceed with his claim, confident that his testimony, or that of others, would rebut the presumption of impairment or of impairment as a causal factor in his injury. The majority's

contrary conclusions assume the existence of provisions that the General Assembly simply did not adopt.

{¶84} Several states, including Alaska, Utah, and Arizona, have in fact enacted statutes governing an employer's right to demand drug tests of its employees, and providing guidelines and employee protections for drug testing by employers. See Alaska Stat. 23.10.600 et seq.; Utah Code Ann. 34-38-1 et seq.; Ariz.Rev.Stat.Ann. 23-493.01 et seq. See, generally, Zarou, The Good, the Bad and the Ugly: Drug Testing by Employers in Alaska (1999), 16 Alaska L.Rev. 297.

{¶85} The General Assembly, however has not enacted legislation similar to the Alaska, Utah, and Arizona statutes, and the legality of an employer's ability to demand drug testing in Ohio is dependent upon the common law and any contractual obligations that may have been negotiated. The relators in this case are, in effect, issuing a preemptive strike challenging the constitutionality of a statutory scheme that simply does not exist in Ohio statutory law.

{¶86} I therefore dissent from the majority's holding that R.C. 4123.54, as amended by H.B. 122, is unconstitutional.

LUNDBERG STRATTON, J., concurs in the foregoing dissenting opinion.

COOK, J., dissenting.

{¶87} I join the view expressed by the Chief Justice that the court should dismiss this cause based on the relators' lack of standing.

Stewart Jaffy & Associates, Stewart R. Jaffy and Marc J. Jaffy, for relators Ohio AFL-CIO and William Burga.

Steve E. Mindzak, for relators United Auto Aerospace & Agricultural Implement Workers of America, Region 2 and Region 2-B.

Betty D. Montgomery, Attorney General, Cheryl J. Nester, Assistant Attorney General, and Elise W. Porter, Assistant Solicitor, for respondents.

Philip J. Fulton & Associates, Philip J. Fulton, William A. Thorman III and Jonathan H. Goodman, in support of relators for amicus curiae Ohio Academy of Trial Lawyers.

Jillian S. Davis and Raymond Vasvari, in support of relators for amicus curiae American Civil Liberties Union of Ohio Foundation, Inc.

Cloppert, Portman, Sauter, Latanick & Foley, Frederic A. Portman and Christopher A. Flint, in support of relators for amicus curiae Ohio Education Association.

Joyce Goldstein & Associates, L.P.A., and Joyce Goldstein, in support of relators for amicus curiae Service Employees, International Union Local 47.

Joseph P. Sulzer, in support of relators for amicus curiae various Members of the Ohio General Assembly.

Crosby, O'Brien & Associates and Elizabeth A. Crosby, in support of respondents for amicus curiae Greater Cleveland Growth Association Council of Smaller Enterprises.

Garvin & Hickey, L.L.C., Preston J. Garvin and Michael J. Hickey; Vorys, Sater, Seymour & Pease L.L.P., Robin Obetz and Robert A. Minor; Bricker & Eckler, L.L.P., Thomas R. Sant and Kurtis A. Tunnell, in support of respondents for amici curiae Ohio Chamber of Commerce, Ohio Self-Insurers' Association, Ohio Chapter of the National Federation of Independent Business, Ohio Farm Bureau Federation, and Ohio Manufacturers' Association.

Guidelines on understanding pain and using opioids to treat it

Chris Runge

By Scott McConnell
Internal Audit Manager
Kentucky Employers' Mutual Insurance

Opioid (narcotic) medications are a significant issue for AASCIF funds because they are frequently prescribed for claimants, and the potential for abuse is significant.

If your fund's experience is similar to that of KEMI, one-third of the prescriptions provided to claimants in terms of cost, quantity and frequency are for opioids. While pain management and the use of opioids will always be a significant factor in claim management, efforts must be made to assure they are prescribed and used responsibly. We must understand what behaviors both physicians and claimants should demonstrate. By doing this, we will increase our chances of reducing fraud, abuse and related claim costs.

This article addresses three primary subjects as they relate to opioid prescriptions—pain, opioid use, and expectations of physicians. Exceptions to these guidelines will occur, and information presented may be more applicable to situations where long-term opioid use is anticipated.

Pain management

More complex than simply having medication prescribed, pain management involves:

- Understanding the different types of pain that can occur.
- Assessing pain.
- Providing the correct drug and dosage for the type of pain diagnosed.
- Establishing treatment goals.
- Gauging treatment effectiveness.

Of particular importance in understanding the effectiveness of pain management is recognizing strategies physicians should demonstrate with respect to patient management.

Pain can be classified into the following three types:

- Somatic pain arises in skin, bone and muscle.
- Visceral pain involves the visceral organs.
- Neuropathic pain results from injury to nerves.

Pain can be further classified as acute or chronic. Acute pain is sharp and intense and is associated with observable physical and autonomic changes. Chronic pain is characterized as being constant and unrelieved. Autonomic changes are not usually observed in chronic pain patients.

Another descriptive term important to understand is breakthrough pain. Breakthrough pain occurs when medication doses are insufficient to control the pain and it "breaks through." Breakthrough pain may come on suddenly or gradually and may be brief or prolonged.

Because not all pain conditions are treated the same way, understanding the type of pain being experienced is the first step in successful pain management. Treatment approaches should be individualized to the patient, and drug selections should be tailored to the type of pain diagnosed.

Prior to the issuance of medication, a detailed assessment of the claimant's condition must be performed and documented by the treating physician. One of the main problems in assessing patients with pain is that pain is an experience, not an objective finding. A physical examination and laboratory tests often do not provide the information necessary to gauge pain severity and assess outcomes. Therefore, pain is generally assessed indirectly by questioning the patient. It is important to understand how the pain has impacted the patient's life.

The following is an assessment format that should be demonstrated in gauging the severity of pain and in determining the degree of disability:

- Understanding exacerbating factors that to this point have affected the claimant's ability to cope with the pain.
- Understanding the patient's emotional state and to what degree the claimant is preoccupied mentally with the symptoms being experienced.
- Understanding functional status at home and at work.
- Understanding the degree to which analgesic medications are utilized.

Establishing treatment goals is also important in the management of pain because they can have a direct impact on the type of pain medication prescribed. It is essential for the physician and patient to collaborate in developing goals to guide treatment and the means to assess progress. As these goals are established, the physician's treatment plan should also address side effects of medication, maximizing the patient's quality of life, and minimizing the possibility for abuse or dependency.

Use of opioids for pain management

All types of pain can be treated with opioids, but they should not necessarily be the first therapy utilized for pain management, nor are they recommended as the only treatment.

Whenever possible, opioids should be used as part of a comprehensive treatment plan involving other non-opioid medications and modalities. Non-opioid drugs affect different neurological pathways and receptors to alter pain perception.

However, in some cases, opioids alone are

the best method of treatment as the dosages can be increased without the worry of exceeding maximum daily dosages of non-opioids like acetaminophen.

The amount and frequency of opioid treatment are individualized according to each patient's need for pain control. There is no maximum dosage for single ingredient opioid therapies as long as pain is present. Factors that limit the use of opioids are the occurrence of adverse reactions.

Because pain is a subjective experience, there is a great degree of subjectivity in prescribing opioids. Physicians should adhere to some reasoned methodology to determine correct dosing. The goal is not to minimize the dose of opioid, but rather to determine the correct dosage to provide adequate pain relief with a minimum of side effects. Initially there must be frequent contact between clinician and patient so that dosage adjustments can be made.

Ideally, when opioid therapy is commenced, the necessary dose is established by using short-acting drugs taken every three to four hours. As a rule, it is best to begin treatment with a low test dose to avoid serious side effects. Should these arise, an alternate opioid may be tried. If initial dosing is ineffective, opioid strengths may be increased as necessary and as tolerated. Once pain relief has been achieved, the relevant dose may be repeated at four- to six-hour intervals.

If a claimant is in continuous pain and has responded well to short-acting opioids, long-acting sustained release drugs can be utilized. The initial daily dose should be roughly equivalent to the average daily amount of short-acting opioid that provided relief. Most patients taking long-acting opioids should be supplied with a fast-acting rescue opioid to treat breakthrough pain. Whenever possible, the rescue dose should be the same opioid as the long-acting one.

Appropriate drug selection is important. Both adverse and beneficial effects must be evaluated in the context of an individual patient's current physical condition. Choosing the right opioid for a patient can be a matter of guesswork because patient reactions in terms of drug effectiveness and side effects can vary. It would not be unusual for a patient to be prescribed trial doses of two or three opioids before achieving satisfactory pain relief without intolerable side effects. Drug therapy should be tailored to the patient versus the patient being tailored to the drug.

Short-term, immediate-release opioids have durations from four to six hours, and many are combination products containing other medications such as acetaminophen. Short-term opioids are typically recommended for use in acute pain, for intermittent pain conditions, for use in chronic pain during dose analysis, and for use in chronic pain as a supplemental agent for breakthrough pain.

Sustained-release opioids provide 8 to 12 hours of pain relief and have a distinct advantage over short-term combination products. Long-acting formulation requires less frequent dosing and provides a smoother blood level so that there is more consistent pain relief and less euphoric effect.

Another possible advantage is that total daily dosing of opioids may be lower when sustained-release opioids are used. Recent advances in pain management theory suggest that if the sustained-release opioid is correctly dosed on a schedule, breakthrough medication is typically only necessary one or two times daily. By negating the need for breakthrough pain medication, total dosing is reduced.

Expectations for opioid therapy

Opioids should provide improvement in activities of daily living if pain impairs these activities. Most adverse side effects of opioids resolve on their own as tolerance to the drug grows with continued use.

Whether tolerance develops to the pain-relieving effects of opioids is a matter of controversy. Most of the data on opioid tolerance and physical dependence involves people who were not in pain. Studies of patients with chronic pain taking opioids for a long time indicate that once the dose

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Pain management

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required for pain relief is established, it generally remains stable unless: the underlying disease progresses, there is an increase in physical activity, or a deterioration in psychological status, such as depression.

There are negative side effects associated with the use of opioids, the most prominent being the potential for drug dependence and addiction. Physical dependency on opioids is an expected occurrence in all individuals if they are continually used. However, physical dependence has nothing to do with addiction. It simply means that a habituated user will experience certain physical symptoms if the drug is stopped abruptly. For opioids, these withdrawal symptoms include anxiety, irritability, goose bumps, salivation, nausea and vomiting, abdominal cramps, and insomnia.

One of the important facts differentiating addiction from dependency is that addiction constricts one's life, whereas appropriate drug use will enhance it. A patient's level of functioning will be a clear indication of this. If they are using the drug for other than pain relief, their loss of control will become apparent soon enough.

A patient who is addicted to drugs will show some of the following signs:

- Medication is not taken as prescribed.
- Frequent requests for early refills. Patient seeks prescriptions from different doctors and has them filled at multiple pharmacies.
- Patient visits different emergency rooms to obtain opioid drugs.
- Requesting specific medications.
- Resisting changes in therapy repeatedly despite adverse drug effects.
- Hoarding drugs during periods of reduced symptoms.
- Complaining aggressively about the need for more medicine.
- Demonstrating functional deterioration related to drug use.

By establishing expectations of physicians that prescribe opioids, we further enhance our claim management guidelines and increase the odds of identifying fraudulent behavior, and placing the injured worker at MMI.

The following is a list of strategies physicians should demonstrate in the management of their patients if opioids are prescribed beyond short-term needs:

- A thorough patient history is obtained and physical examination is performed. A specific diagnosis and pathological process as to what is causing pain should be documented. Family history of alcoholism and other addictions should be questioned.
- Examination notes should be specific and detailed as to patient observations. Explanations as to why opioid analgesics will be helpful, what alternatives have been considered, and how the patient will be followed over time should be provided.
- An understanding on behalf of the injured worker should be documented indicating an understanding of the treatment proposed.
- Referral to specialist in the field of pain management by the primary care practitioner if the use of opioids continues for a prolonged period of time.
- If the use of opioids is necessary for a prolonged period, long-lasting opioids should be prescribed to achieve consistent pain management.
- Patients receiving opioid analgesics should be seen on a regular basis. Open-ended prescriptions with refills should not be provided.
- Reductions in daily dosages of opioids should occasionally be tried to determine the minimum dose necessary to maintain function and useful activities of daily living.
- A urine drug screen should be ordered if warranted by the injured worker's behavior.

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From the AASCIF president

Russell R. Oliver
Newly elected
AASCIF PRESIDENT

Comedian George Gobel once said on Johnny Carson's Tonight Show "I feel like the world is a tuxedo and I am just an old pair of brown shoes." Following Pat Johnson as AASCIF President makes me feel like an old pair of brown shoes. Pat has provided smart, rock-solid and stylish leadership for AASCIF.

After working with Pat over the past two years and watching her run "AASCIF Central," as she calls it, I fully understand that the title of AASCIF President is not an honorary title. A significant commitment of time and energy, both physical and mental, is required. While I may not match Pat's effervescent personality, I'll do my best to match her commitment and work ethic.

I want to thank Fran Kaitala and Linda Boys for their work in getting AASCIF's accounts and records in better shape than ever. They have given me and my staff a great roadmap to follow in keeping up with the details of shepherding the association. Special thanks also go to Mark Ladwig for doing marvelous work on the AASCIF newsletter for the past two years and to Dave Kaiser for improving the AASCIF website.

Our association's members continue to wrestle with challenges large and small. Notable victories were won this year in Arizona and Utah in court battles over who "owns" their assets, and the ongoing political battle in Oregon over whether to abolish SAIF is capturing our attention. Other challenges include tight budgets for our members who are part of government, as well as the challenges of handling burgeoning business volumes and market shares in a number of states.

When we consider the challenges our fellow AASCIF members are facing, the axiom "If you've seen one state fund, you've seen one state fund" comes to mind. None of our business entities are identical, nor do we face identical problems, challenges or successes. But there are common issues that bind us together—the role of the "designated market" in our respective jurisdictions, the need to provide top-tier customer service, the political implications involved in operating this type of entity, and others. Even though the last several years have seen our workers' compensation insurance world change, with some of our U.S. members writing coverage outside our states' borders through partnerships or subsidiaries, we still pursue a common goal: to serve our customers who need affordable workers' compensation insurance by providing the best value we can.

As a new CEO in the mid 1990s, I benefited tremendously from the willingness of many other CEOs who were willing to share their time, advice, experience and information with me. Their help kept me away from some pitfalls and helped me direct our company toward important improvements. As my AASCIF President predecessors have reminded us before, that willingness to share experience, best practices and new ideas is still the major strength of AASCIF. We will continue to strive to give you opportunities to learn from each other

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AASCIF News is the quarterly publication of the American Association of State Compensation Insurance Funds. Published in 2003-04 by Minnesota State Fund Mutual Companies, Bloomington, MN. Direct inquiries to AASCIF Communications Director Mark Ladwig, (952) 838-4270 or markla@sfmic.com.

Articles and other contributions to the *AASCIF News* or to the AASCIF website may be emailed to info@aascif.org. Past issues of the *AASCIF News* are available online at www.aascif.org in the Library archives.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1119

Page 4, line 22, replace "may" with "shall" and after "adopt" insert "administrative" .

Page 4, line 23, after "testing" insert "prior to implementation"

North Dakota Human Rights Coalition

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Testimony
House Bill 1119
Senate Industry, Business & Labor Committee
February 28, 2005

Chairman Mutch and members of the Committee, I am Cheryl Bergian, Director of the North Dakota Human Rights Coalition. The Coalition includes a broad-based, statewide membership of individuals and organizations interested in the furtherance of human rights in North Dakota; the Coalition's mission is to effect change so that all people in North Dakota enjoy full human rights.

We oppose the addition of "reasonable basis" drug testing in HB 1119. Workforce Safety & Insurance already has the ability in statute to "at any time require an employee to submit to an independent medical examination" if WSI wishes to review the diagnosis, prognosis or treatment of an injured worker. To permit WSI to order drug testing of an injured worker, simply on WSI's "reasonable basis," is an unnecessary and unwarranted intrusion into the life of an injured worker. WSI says that they need this ability to ensure that an injured worker is rehabilitated as quickly as possible. Surely, the unbridled ability of WSI to order an independent medical examination would fulfill this need.

If WSI it to be permitted to do drug testing, the requirement for drug testing of injured workers should be far higher than "reasonable basis." For example, I have asthma. If I were an injured worker, and had shaky hands because of my asthma medication, or a "breathy" voice because of my asthma, I anticipate that that would be enough, under a "reasonable basis" determination, for WSI to order me to be drug tested for legal or illegal drugs. That would be an appalling intrusion into the privacy of my medical condition, which should be between me and my physician. If WSI needs to evaluate my medical condition, it should be through a physician, an option it already has under statute, not through a drug testing program.

We ask for a do not pass recommendation on House Bill 1119. I appreciate this opportunity to testify on behalf of the North Dakota Human Rights Coalition.

BILL 1119

THESE ARE THE MEDICATIONS I'M TAKING INJURED WORKER LeROY VOLK

Every 6 hours	Hydrocodone APAP	10/650 mg.
Every 6 hours	Skelaxin	800 mg.
4 times a day	Metoclopramide	10 mg.
1 time a day	Celebrex	200 mg.
2 times a day	Prevacid	15 mg.
1 time a day	Wellbutrin	300 mg.
Every 8 hours	C Promethazine	25mg.
2 times a day	Crestor	10 mg.

I'm going to use myself as an example: If I only take meds as needed for pain, (Not everyday or as often as prescribed because I'm feeling better) and a blood test is done - if the meds that WSI pays for don't show up on the test, will I be kicked off? Why take the meds every day if you don't need to.

Now if a patient takes meds for High Blood Pressure, Sugar Diabetes, Heart pills, Cholesterol, etc. and these meds show up on the blood test - will we be kicked off?

Also It has been known to take 5 to 10 days to get a prescription ok'd by WSI to be filled. If a patient is in need of the meds the doctor prescribed why should it take so long to be ok'd to be filled. Why do we have to wait and suffer?

In my case why would I want to take more meds if I don't need to because they are messing up my system and giving me stomach problems, who is going to be reading these tests when given, my analyst?, someone who doesn't have a medical degree and has no idea what they are reading? Or will they take the word of the Patients Doctor?

I feel the WSI office needs to take care of the problems they already have in their office such as getting the people their medicine faster, and not worry about the drug testing, which most doctors already do anyway.

Will we get paid more for driving around to comply with the gas at the price it is? We don't get paid enough to go running around just because WSI thinks we need to comply with these new rules. . Also why does WSI say it is ok to have things like MRI's or Injections and then turn around in the same sentence and say that they may not pay for things to be done.

TESTIMONY AGAINST PRESCRIPTION DRUG TESTING-HB 1119

HONORABLE LADIES AND GENTLEMEN OF THE SENATE IBL COMMITTEE AND GUESTS

My name is Marilyn Schoenberg and I am against prescription drug testing. To tell you a little bit about who I am, I will begin with the usual way. I was born at a very early age in Dickinson, North Dakota 58601 at St. Joseph's Hospital on September 26, 1948 to Ella Magdalena Mittelsteadt Guenther (whose German parents had immigrated from Russia, now known as the Ukraine and around the Odessa area), and to Milton Gottlieb Guenther whose German with a smattering of Scotch, and perhaps, Welch blood ancestors had been living in Iowa for awhile. I grew up on the brink of the Badlands about seven and a half miles north of Dunn Center, which geographically was supposed to be the center of Dunn County but which never became the county seat because Manning was closer to the regional metropolis of Dickinson.

I was a very happy, cheerful and pleasant baby, I am told by my mother, rocking myself to sleep by gently and rhythmically pushing the slats of my crib. I continued to be happy, cheerful and people-pleasing throughout my childhood and adolescense. Always and forever the caretaker and people-pleaser, I started playing piano for group singing at our one-room country school house at age ten where I was the only one in my grade for seven years. At age eleven, I was playing for Sunday School singing in Dunn Center and then on to be the church organist at age twelve. I moved on to become the piano accompanist for the high school at Killdeer, North Dakota where I also graduated top of my class of 44 with a 4.0 Grade Point Average. At age eighteen I was off to college at Minot State where my musical talents gained me the post of piano accompanist for the college women's choir and where I graduated "magna cum laude" (3.8 GPA) in 1970.

My outstanding scholastic achievement with a double major in English and Elementary Education obtained for me one of the best posts in western North Dakota, which was teaching fifth grade in Williston, North Dakota, heart of the oil industry at that time. Failing miserably at teaching that first year, I determined to hide out for the rest of my life somewhere deep in the prairies or badlands and never look at another child or young person younger than I for the rest of my life, I married a friend of my sister's husband whose father owned a ranch south of Halliday. I planted about a half an acre of garden and coerced my husband into buying me a milk cow. I ground my own wheat, I made my own bread. I made my own yogurt, cottage cheese and ice cream. I was going to be a hermit and never venture forth into civilization again.

Unfortunately for me, I had a college degree. A new law was passed which said the state had to educate everyone under twenty-one. I was the only one in the area with a college degree who wasn't working full-time as a teacher in 1975, so I was recruited to tutor the severely and profoundly developmentally disabled. I went to Topeka, Kansas for two weeks of training at the Menninger Foundation that summer while I was hugely pregnant. I tutored until I could quit about two weeks before my son was born on Dec. 27, 1975.

In 1978 a teacher at Twin Buttes had to follow her husband out-of-state in February and I was enlisted to finish her term there for third and fourth grades. I taught the next year there for grades one and two then quit because of stress but continued to substitute and teach kindergarten for Halliday's spring program until my divorce in 1982.

I felt like a failure as a teacher, as a wife, as a mother and as a person. Nobody ever said anything to me but I had been suicidally depressed for fifteen years until I turned myself in for alcoholism at age 32. I had lived a double life and nobody had ever talked to me about depression. My husband of twelve years had never noticed I was depressed. Granted, I was a good actress; but don't you think he might have been a bit insensitive?

Everybody around me was blind, deaf and dumb. Nobody paid any attention to emotional clues of disturbance or frustration. Everybody was busy surviving and vying for power or simply trying to forget the pain of existence.

After I started counseling, everybody was on my case to cover up the fact that I was in counseling. My mother tried to talk me out of it after two months saying counseling could be addictive, too. My husband and his family were horrified that I would embarrass them by going to counseling. My world had now become divided.

My husband couldn't handle the drama and trauma of self-examination and disclosure and promptly divorced me. My own family plotted a cover-up, and I moved to Minot to go back to college and find me a suit after resenting long, hot hours of no-fun in the sun watching my cowboy husband rope and ride in those boring rodeos.

I carried on with counseling after having been diagnosed with a depressive disorder in 1981. Five years into recovery, I started having flashbacks. I was told I was an incest survivor and channeled into intensive therapy for that for five years. My fragmented and confusing world now crashed and shattered breaking into tiny shards of shrapnel bursting through my brain. No amount or quality of drugs could bring back the fantasy and fairytale land of the idyllic and pastoral scene of my youth and childhood. My world had become divisive. The world I had always known and trusted was "Gone With the Wind."

Now on two tracks, one for mental illness which only required the ingestion of drugs, and the other for post traumatic conflict resolution which required hours of effort in therapy, I was pulled apart by two opposing systems and beliefs.

I went home to my family for verification of the early childhood sexual abuse. Everybody denied it. My brother went to my first psychiatrist in Dickinson and that naïve and hurtful man told my brother that "Marilyn is mentally ill and makes things up—your father is too nice a man to do that." Yet the incest therapists told me I had every characteristic of an incest survivor and my father had every characteristic of a perpetrator. The war was on. Confusion reigned. Nobody knew what to think.

After five years in incest therapy, all the symptoms of PTSD left me. I knew I had experienced a miraculous healing. But the psychiatrists would not release me. They said

I was born with a chemical imbalance in my brain, and like Huntington's Chorea, it doesn't kick in until a certain age and it has nothing to do with what happens in your environment. It's nobody's fault. It's genetic and all you have to do is take drugs the rest of your life and continue to see your doctor -- who is a psychiatrist – and who makes about $120,000 a year in Dickinson, North Dakota 58601 – no matter what he does.

Psychiatrists turned my family against me and destroyed that family as well as many of my friends' families I have observed. God has intervened in my behalf to allow me to reconcile with my family. Reuniting with my family is contingent on me keeping my mouth shut about the child abuse in our past, however. I have to censor everything I say to be part of my family and attend holiday and reunion functions. I cannot be myself and speak my mind freely in my family – nor with most of my friends – nor anywhere, actually.

I was forced to take drugs for many years. I know what it is like to go from being "America's little princess and darling" to "most despised and despicable". I know what it's like to be put upon a pedestal and worshipped and adored then spit upon and shunned for being inherently and innately defective and dangerous. I know how the African slaves felt being treated with contempt as inferior and ignorant. I know how the Native Americans felt being persecuted and hounded and chased until there was no more advantage for retreat. I know the agony of defeat. I long for the triumph of victory.

I believe that I have recovered from mental illness because my psychosis was not caused by an inherited chemical imbalance but by the delayed effects of traumatic child abuse. I doubt you will find a psychiatrist willing and able to deny and defy the authority of another psychiatrist nor the established belief in the "disease concept" for social disorders. There is no way to prove that I am not mentally ill under the current belief system because if I am doing well, it is said I am simply "in remission." We need a paradigm shift. Slaves were believed to be a sub-species who were dependent and inferior by the way God created them. They needed to be taken care of and supervised all of their lives because they were not capable of learning, growing and changing. Slaveholders were agents of God to look after these poor, hapless creatures. This spiritual belief of creation justified enslaving and abusing a whole race of dark-skinned people.

We have come a long ways – from Africa to America, from 1500 to 2000. And nothing has changed – except the color. It is still believed that some people are born inferior and defective by the way God made them. They cannot change and develop. They are not created equal. They are not slaves to work now. They are slaves to drugs. But they are still slaves and they are called "mentally ill." These are the new slaves. They are drug slaves. They make money for their masters, not by working but by "not" working. All they have to do is take their drugs, sit down, shut up and don't talk back. Don't bother anybody. Don't annoy anybody. And don't threaten anybody. Stay in your concentration camps of hospitals, halfway houses, social clubs, jails and prisons.

The "Diseasing of America" concept has spread from the mentally ill to alcoholics and drug addicts and sex offenders and the poor on welfare, developmentally disabled and now... injured workers. We are all expected to be on drugs or confined by bars or government programs.

Testing for prescription drugs is a sure sign of the growing paranoia of the established authorities and leaders of this land. You in power are afraid of us whom you consider defective and defiant. You don't like us and you don't trust us. You don't think our brains work and you don't think we will take the drugs prescribed to us by doctors, your henchmen, executioners and newly appointed law enforcers.

We who are deemed as permanently defective by an act of birth are considered to be a threat to the safety and security and well-being of society. Furthermore, we are viewed as a drain on your resources. Our defects, disorders, disabilities and injuries cost you money and your plan, however conscious or subconscious, is to eliminate us from respectable and proper society so that you can go about your pleasure-driven lives in safety and comfort.

Your attitude towards the disadvantaged is exactly the same as the attitude of the Nazis towards the Jews and other socially imperfect and undesirable aliens to the perfect Aryan Race. Your justification to deny the injured worker healthcare and financial support is that some "pond scum" take advantage of the system.

People in power are credited when they take advantage of investments, concerts, lectures, free health screenings, great book deals, invitations to divine dining engagements or the theater or opera. But poor people are judged and condemned if they "take advantage."

Let's face it, my friends or enemies – you Nazis, it's time to get real and get honest. The rich have never liked the poor and the poor have never been able to understand the rich. In times of peace and prosperity, friendships have a chance to thrive between the two worlds, but we are in a time of unrest and uncertainty. People feel threatened and uneasy. Hate and fear are casting shadows of darkness over congeniality between people with differences. I think we should declare war and go for each other's throats.

I had to go off of prescription drugs to recover from mental illness, and I had to escape from psychiatrists to go off their drugs. I am now a runaway slave and total rebel against the mental health system. I know that pharmaceutical companies have deceived doctors into believing that most diseases and disorders can only be treated with drugs. I also know that the government has corrupted doctors into becoming law enforcers instead of healers and helpers when social disorders are presented to them – or injured workers trying to get help from government insurance programs.

I also know something that you in power will go to great lengths to deny and defy. America is not free and we have neither democracy nor equality. America is not free for me. I am a runaway slave. And if America is not free for one, it is not free for all. "E pluribus unum." You have made a mockery of the constitution which states, "We hold

these truths to be self-evident, that all men are created equal, that they are endowned by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. ..." I doubt that more than a couple of people in this room believe that "I" am created equal. Most of you believe that I am created defective and need to take "my" medication.

I am tired of trying to prove my worth to a nation of deceived people who would rather spend billions of dollars to exterminate me and my kind or group of pariahs and outcasts than to try and help me grow and develop and become a productive citizen. I doubt I will be publicly supported to be a leader because you would rather believe wealthy and educated doctors even if they are trained to believe and teach lies than to help me achieve my potential. According to the medical model and definition of mental illness, I have no potential, no intrinsic worth and no future. I am believed to be static, innocent and incompetent. I am not a real person and no psychiatrist I know has the ability to see me as a human being. I am treated with contempt and derision as are all people labeled as I am with a social disease.

Once idolized and worshiped and adored and put on a pedestal and made the pet of the community for service and talent, I have become scorned and ridiculed and eliminated. You can not imagine how it feels to be treated with contempt until you "are" treated with contempt. Once you have felt it from an authority designated to take care of you, you become rebellious and defiant. If that contempt and derision continue and if your needs are not met somewhere, somehow by someone and you become hungry and frustrated, you can become so enraged because there is no love and concern and caring in your life that you can become murderously angry.

I still have – or have again – enough love and respect in my life to keep me from being a killer. But I wonder about the growing number of people you are oppressing and treating like trash. You don't trust people to do what's right and what's good for them. You don't trust people to do what doctors tell them to do to get well and get off your public insurance so you have more money for yourselves to go play. You don't trust people. You don't like people. You treat people with contempt. People will only take being pushed around for so long. If you don't start treating people with respect and dignity, those people are going to rise up against you – and kill you.

I am tired of your blindness, deafness and dumbness. I cannot believe that this bill was even conceived much less passing the house. I am so upset that I do not trust this legislative body anymore. I am ready to give up and go to war. I know only one person that I can trust in the North Dakota Legislature and that is Frank Wald. Frank has despised and detested me from the day he met me. Frank has threatened to sue me and call the police if I ever came near his house or wife or office equipment again. Frank has never pretended to like me. Frank has never smiled at me. I know I can trust Frank to hate me and to be honest about it.

How about the rest of you? Why don't you just admit that you hate me and want to eliminate me from you environment along with every social misfit and idiot like me?

Don't be a coward. Don't be a fool. Take heart. Take courage. Get honest. Get real. Pass this sucky nazi bill.

Let's make North Dakota number one leading the way to starve the poor. Number One in injustice. Number One in contempt. Number One warship. Let's begin to end. I'm tired of waiting to start this war. So give me a hand, we'll be the star of the land. I'm ready to die for freedom and friends. War is more fun than football and golf. Real people to kill. So let's make a big deal. We'll have population depletion and more for less. Whoever's left can party down. New Hampshire says, "Live Free or Die." If you don't want to play, I ask you, "Why?"

Marilyn Schoenberg
Box 333
Hebron, ND 58638

(701) 290-7633

Friday, February 25, 2005

To Chairman and Senator Nuttall
"Will you fight for freedom and equality for the poor and disabled and all? Live Free & Fight for others or Die with the Oppressed
(New Hampshire state quarter)

The alternative to oppression and coercion
The solution is education and inspiration to produce an enlightened and spiritually mature population; integrated personalities leading fulfilled, productive and balanced lives - in harmony with nature and our Creator, God.

I am one of the poorest people in Hebron and in the state or nation, but I have an education. Because of a good education and because I have a personal relationship with Jesus Christ, I can handle poverty and tolerate discrimination.

If government and industrial leaders would get the same education I have in human and social and spiritual relationships and could feel close to God as a personal friend, I doubt they would be

"Rise Above" classes scheduled to be held here for 12 week period

Marilyn Schoenberg, Hebron, has scheduled a series of 12 classes to be held in the Phoenix Room on Hebron's Main Street. The series of classes will be entitled "Rise Above".

Schoenberg plans to hold the classes to help individuals rise above their dependency on drugs – either prescription or street drugs.

Schoenberg reports that the group will study from a book written by Dr. Mary Ann Block entitled "No More Ritalin Treating ADHD Without Drugs".

The first session will be an information session on Tuesday, March 1 at 7 p.m.

During the next ten weeks the sessions will continue each Tuesday at 7 p.m. Each class will be one hour in length.

The final evening will be entitled "graduation".

Schoenberg moved to Hebron in 2001. She has been a full time instructor in schools in Williston, Halliday and Twin Buttes. She has also done substitute teaching in Hebron, Dodge, Dickinson and New England. She holds a degree in elementary education and English.

An accomplished pianist, she is organist at the St. John Church. She has also been an accompanist at Minot State and at the Killdeer High School.

Parents who have children on Ritalin or are contemplating having their children take Ritalin, or other individuals who use prescription drugs, are invited to attend.

Schoenberg is now raising money so each student can obtain one of Dr. Block's books priced at $15.00 and to pay the rental fee at the Phoenix Room.

Persons who would like further information are asked to telephone Schoenberg at 290-7633.

Marilyn Schoenberg

"Seeking to find and publish the truth, that the people of a great state might have a light by which to guide their destiny."

— Stella Mann, Tribune publisher, 1939

www.bismarcktribune.com

Opinion

Sunday, February 20, 2005

WSI goes too far

By MARILYN SCHOENBERG
Hebron

A disturbing Workforce Safety and Insurance bill, HB1119, has passed the state House and been forwarded to the Senate. It proposes drug testing of injured workers to see if they are taking their prescription drugs and not taking illicit drugs.

I am aghast that such an invasion of privacy and personal rights would ever be even thought of in a civilized nation, along with giving doctors a mandate to rule, reign and ruin. There are often natural alternatives to prescription drugs that work better, are safer and don't need to be controlled by doctors.

This diabolical bill would allow WSI to discontinue disability payments, if the right prescription substances were not found in the blood or if illegal substances were found.

This smacks of more oppression of the poor and disenfranchised, along with WSI trying to get out of paying claims.

How much money might be saved for the state if WSI would simply pay those claims, rather than always trying to get out of it?

A bigger question is, why would a free country want to force people to take drugs? Given that everybody's chemistry is a little different; that some prescription drugs are toxic, even deadly, to some people; and that depriving people of self-determination is profoundly undemocratic.

We have created a class division in this country by labeling people with social disorders of addiction, mental illness, criminality, poverty and sexual offensiveness as permanently, terminally and chronically diseased. The "diseasing of America" concept has established a class of social outcasts. Believing that this outcast group cannot change or grow or be rehabilitated has instigated a climate of fear and hate.

The prevailing attitude in the United States today is that this group of social misfits must be contained and restrained, controlled and regulated by drugs and confinement. Welcome to Nazi America.

Nobody uses what we have

By VERN KESSEL
Belfield

I do not believe it is my business or anyone else's what the Eberts sell their ranch for. I personally hope they make millions on the sale. It's just plain good for the economy.

But I don't think that Billings County or the state of North Dakota or the federal government needs any more playgrounds. We already have two units of the national park and a couple of state parks in the West, plus numerous state parks around the rest of the state.

The problem I see is that just in our little community we have three city parks, a bike path and a swimming pool.

These facilities are being used less and less, and our park board is struggling with finances to keep operating. On a good day, you might count three people using the bike path; the weeds are coming up, and there are no maintenance funds to keep it up.

Late this summer, we took a little trip. Our first stop was at the drawbridge camping area east of Fairview, Mont. Nice camping area, but we were the only ones there.

Next, we went up to Fort Union, and we and one other couple were the only ones there. On to the Lewis and Clark State Park, and we and one other fisherman were the only ones there. Not only that, i was a free day to recognize our veterans.

Then over to the Four Bears casino — and every one was there.

On a recent trip to Arizona, we spent the weekend at Patagonia State Park, an absolutely beautiful spot right on the road, and discovered that there were more park employees than there were campers.

So, unless someone can figure out how to get rid of the idiot box, computers, the Internet and casinos, I feel that our playgrounds will become obsolete.

And the soothsayer did say, "Beware the Buffalo Commons." Or maybe not.