

2009 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1542

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1542

House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: January 28, 2009

Recorder Job Number: 8077

Committee Clerk Signature

Chairman Keiser: Opened the hearing on HB 1542 relating to construction of worker's compensation claims.

Representative Amerman: Introduces HB 1542.

Dave Kemnitz~President of the North Dakota AFL-CIO. We are in support to the change back to the previous language of 65-01-01. Lines 14-16 were added in 1995, we said that was an aberration back then and still is of the concept of Worker's Compensation. It's clear to us, that the courts and all the judicial reviews look at statute as strict or liberal. This is the only state in the nation that one agency does both. They make the decision making, the award, and the keeping of the clock. We need to return back to the mission statement back then.

Vice Chairman Kasper: I understood your definition of strict construction very well. When you stop at liberal construction umbrella, you lost me.

Kemnitz: Umbrella means to me to protect workers when they are injured, when all the things are job related. Once they prove that, the system ought to open up. To get to that, is a whole another question. Dave gives definition from the Sutherland statutory construction of liberal and strict definitions.

Representative Schneider: I looked remedial or liberal construction as "the tie goes to the

runner". Let's look at the evidence in the light of the most favorable to the injured worker. In

recognizing that the Worker's Compensation act was enacted to do just that, to provide workers insure certain relief, but recognizing that this isn't a normal litigation situation. You have injured workers who have given up their constitutional right to access the courts. You can't sue your employer. They have to play within that system. Justice systems urge this type of legislation because their hands are tied. The courts have to follow the law and there is no recourse. This would open things up a bit. I found interesting on the fiscal impact on the report that jumped out at me that WSI will have to increase the uncertainty of all counts per claims subject to judicial review. I read that as that there is a lot of certainty now. What it says is that all things being equal, let's look at the evidence in the light most favorable to the injured worker and appeal let judges and the judicial process weight all the evidence and make a decision.

Chairman Keiser: If we had a standard of preponderance of 51% or more and it's 51/40%, it's not a tie. The courts lean towards the client?

Representative Schneider: The judicial process interprets the law.

Kemnitz: Preponderance is more likely than not, but bottom line for us is, we believe that 65-01-01 is a mission statement. If it's read the way we think it should, is to afford relief, and avoid forfeiture. That is not true today when it can't be construed.

Representative Thorpe: Was it in there all these years?

Kemnitz: To my knowledge, yes.

Representative Ruby: There is some other language here being removed. On line 15 "it must be based solely on the merits of the action or claim. Why is it wrong if they are looking at the merits of the claim.

Kemnitz: I would like to defer to Representative Schneider.

Representative Schneider: This is a philosophical discussion of what we want WSI to be. It's designed to take care of the injured worker. Although it make the statue more liberal, idea is to take care of the injured worker. The down side, it's a financial disaster for the worker.

Kemnitz: In the red book on page two, of 65-01-01, the purpose of the legislature to insure relieve to an employee injured in the course of employment. In all cases would have had the right of action in common law? Now in 1995 when the language inserted, the mission changed.

Chairman Keiser: Doesn't the protection go both directions.

Kemnitz: The way we look at it and it seems to be, the employer can't be sued for any reason, even gross negligence. That is ultimate complete protection.

Sylvan Loegering~North Dakota Injured Workers Support Group. See testimony attachment.

Sebald Vetter~C.A.R.E. I support HB 1542. This bill gives certain relieve to injured workers.

Does 65-01-01 do what it should? I don't think so and maybe we need to make some changes.

Anyone here in opposition of HB 1542.

Ann Green~Councel Staff for WSI. See testimony attachment.

Representative Thorpe: What is the worker's option of an unfair decision?

Green: The injured worker's recourse is the same ability which to appeal it to the next level.

Representative Thorpe: (Inaudible-speaker talks low).

Green: The burden is on the injured worker of the preponderance, which means more likely or not.

Representative Thorpe: The worker has to prove beyond a 51% as of the law right now.

Green: That correct.

Chairman Keiser: Conceptually, there is a clear case that is not work related, there is a clear part that is work related and then there is a gray area in the middle. Rather than taking the gray area and dividing it in the middle, we would include that gray area in the work related. So, at what point, would the courts look at it?

Green: The burden to prove entitlement benefits is along as you work there. It has to prove by 51% of preponderance of the evidence said. There is an entitlement to benefits. If that's not the case, if a claim comes in and WSI reviews and makes a determination that it not compensable, that claim is denied. That process is based on the law that's provided to WSI.

Chairman Keiser: That's preponderance.

Green: That correct.

Chairman Keiser: Now they go to court.

Green: The requirements of our court system are to apply the law as it is given to them.

Chairman Keiser: What if this was the law?

Green: If this were the law, the courts would have the ability to decide what they believe the entitlement to benefits. They would be required to tip that scale in favor of the injured worker, regardless of whether or not evidence supported it.

Representative Schneider: Judges decide the gray size area.

Green: Because of the statutory beast at its nature, our obligation is to apply the as you pass them.

Vice Chairman Kasper: If we look at the current statue and we judge solely on the merits of the evidence and goes to court. The court says by preponderance there are no benefits, then the court would rule the injured worker would receive no benefits. Is that correct under current law?

Green: That's correct.

Vice Chairman Kasper: If this bill passed, now under the bill's law, if the injured worker is 49% right, would the court be able to say and WSI would have to pay 49% of the benefit?

Green: No, it would be 100%.

Vice Chairman Kasper: There could be less than 51% and the court could say, pay the benefit.

Green: That's absolutely correct.

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

Representative Thorpe: Referring back to the deficit that we had in the early 90's, you are saying that the majority of that deficit was because we were too liberal about taking care of injured workers. How much of the percentage of that was the employers too low a rate on the premium versus too much being paid to the injured workers.

Shalhoob: There were a huge number of years the funds due to political reasons, when premiums were underfunded by as much as 60 million dollars a year. I hope we get sound decisions based on facts.

Representative Schneider: I agree with you about have a fair advantage, I believe this law was on the books was about being fair.

Shalhoob: I think you did a great job on the philosophical things here, we certainly understand that struggle. What is lost in the conversation is that the employers really desire to see that every injured worker gets that relief. How we get there and avoid the other side the question/problem is involving non insured relief.

Representative Schneider: We need to keep in mind that under normal litigation situation the plaintiff make a conscious decision to sue. In this situation, they have play by the rules set forth in chapter 65.

Shalhoob: Understood, it all plays into the difficulty of addressing these issues.

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House Industry, Business and Labor Committee

Bill/Resolution No. 1542

Hearing Date: January 28, 2009

Chairman Keiser: Closes the hearing on HB 1542.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1542

House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Hearing Date: February 2, 2009

Recorder Job Number: 8416

Committee Clerk Signature

Ellen Letoury

Chairman Keiser: Opened the committee work session on HB 1542.

Chairman Keiser: We held this bill because he was on a different hearing but he said that we go ahead and address the bill. Representative Schneider is carrying this bill relating to liberal construction of Worker's Compensation claims.

Chairman Keiser: What are the wishes of the committee?

Representative Ruby: I still maintain that cases reviewed under merits and actions is the most sensible way to have them reviewed.

Representative Ruby: Moves a Do Not Pass.

Representative Clark: Second.

Chairman Keiser: Further discussion?

Representative Thorpe: I'm going to resist the do not pass. I think the workers of our state with what they gave up for the right not to sue; I surely think they should have this. Maybe you don't understand, a person convicted of a felony has more rights than the injured worker.

Vice Chairman Kasper: The injured worker does have rights to appeal, all the way to the Supreme Court. When the Supreme Court makes a decision, when do we get finality when they make a decision?

Representative Thorpe: I hear you and this could be the possibility. I think it's talking about the construction of the case for the bureau.

Chairman Keiser: From liberal construction has nothing to do with taking the case to court. It has a lot to do how the court interprets the evidence and the degree of flexibility the court has in taking evidence and making a determination. Liberal construction creates a larger window for the courts operate in. From a felony standpoint, you still have to have preponderance of the evidence.

Representative Schneider: I glad that Representative Zaiser brought the bill forward. I'm going to resist the motion.

Voting roll call was taken on HB 1542 for a Do Not Pass with 8 ayes, 4 nays, 1 absent and Representative Schneider is the carrier.

FISCAL NOTE
Requested by Legislative Council
01/21/2009

Bill/Resolution No.: HB 1542

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

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

2007-2009 Biennium			2009-2011 Biennium			2011-2013 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2A. Bill and fiscal impact summary: *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

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

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

WORKFORCE SAFETY & INSURANCE
2009 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: HB 1542

BILL DESCRIPTION: Workers' Compensation Law Construction

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

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

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

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

DATE: January 24, 2009

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

Name:	John Halvorson	Agency:	WSI
Phone Number:	328-6016	Date Prepared:	01/24/2009

Date: Feb 2-2009
Roll Call Vote # 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1542

House House, Business & Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken ☐ Do Pass ☒ Do Not Pass ☐ As Amended

Motion Made By Ruby Seconded By Clark

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	1		Representative Amerman		1
Vice Chairman Kasper	1		Representative Boe		
Representative Clark	1		Representative Gruchalla		1
Representative N Johnson	1		Representative Schneider		1
Representative Nottestad	1		Representative Thorpe		1
Representative Ruby	1				
Representative Sukut	1				
Representative Vigasaa	1				

Total (Yes) 8 No 4

Absent 1

Floor Assignment Schneider

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

REPORT OF STANDING COMMITTEE (410)
February 3, 2009 1:43 p.m.

Module No: HR-21-1513
Carrier: Schnelder
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1542: Industry, Business and Labor Committee (Rep. Keiser, Chairman)
recommends **DO NOT PASS** (8 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING).
HB 1542 was placed on the Eleventh order on the calendar.

2009 TESTIMONY

HB 1542

REMARKS FOR IBL COMMITTEE re HB1542

Sylvan Loegering, Volunteer Coordinator, ND Injured Workers Support Group

January 28, 2009

We are all familiar with 65-01-01 but sometimes it seems we slide over 5 important words. The statute says in part, ".....sure and certain relief is hereby provided **regardless of questions of fault.....**". While 65-01-01 does allow for provisions to do some limiting, it seems to me that the framers of this document anticipated hassle-free relief for workers injured in hazardous employment. The workers' compensation experience of many injured workers is not free of hassle.

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

I have to wonder, are we smarter now than the courts were for 70 years or have we allowed ourselves to be steered off the path? Are our workers, their families or our state better off when we stray from what was apparently the original design of our workers' compensation system? Speaking of our state being better off, there is wide-spread agreement among our leaders, including, I'm sure, members of this committee that this state needs economic development. We work hard to make North Dakota a good place to do business. However, the one thing businesses need is good workers. I know North Dakota has those but one of our struggles is to keep those workers while attracting more. If we make North Dakota a less than desirable place to hold a job through oppressive workers' compensation laws we make economic development more difficult. I don't bring up this thought lightly. While testifying before the interim IBL committee last year an injured worker said that while he considered North Dakota a good place to live he would not take another job in North Dakota because of his experience with WSI. I believe part of his statement was, "I'll live in ND but I'll drive across the river to work." Living near a border city (Fargo) I have heard almost the identical sentiment from many other workers.

Regardless whether your motivation is empathy for injured workers, the desire to hang on to tradition, economic development or simply the desire to do what is right I urge you to vote "do pass" on HB 1542.

2009 House Bill No. 1542
Testimony before the House Industry, Business, and Labor Committee
Anne Jorgenson Green, Staff Counsel
Workforce Safety and Insurance
January 28th, 2009

Mr. Chairman, Members of the Committee:

My name is Anne Green. I am staff counsel for Workforce Safety and Insurance (WSI). I am here to testify in opposition to House Bill 1542 which reverses this legislature's message to the Courts in 1995 that the law is to be followed as written and passed by the legislative branch of government. The WSI Board of Directors opposes this bill.

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

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

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

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

For these reasons, WSI requests a "do not pass" on HB 1542. That concludes my testimony. I am happy to answer any questions that you might have.



Testimony of Bill Shalhoob
North Dakota Chamber of Commerce
HB 1542
January 28, 2009

Mr. Chairman and members of the committee, my name is Bill Shalhoob and am here today representing the ND Chamber of Commerce, the principle business advocacy group in North Dakota. Our organization is an economic and geographical cross section of North Dakota's private sector and also includes state associations, local chambers of commerce development organizations, convention and visitors bureaus and public sector organizations. For purposes of this hearing we are also representing seven local chambers with total membership over 7,000 members and ten employer associations. A list of those associations is attached. As a group we stand in opposition to HB 1542 and urge a do not pass from the committee on this bill.

HB 1542 eliminates the requirement that judicial review of claims be decided solely on their merits and establishes a bias in favor of the claimant. In all of our business and other dealings all of us would like a "fair advantage" in our negotiations or contracts. The basis for any dispute resolution assumes each will get a fair and equal hearing during the process. The prejudice HB 1542 establishes is unacceptable.

Thank you for the opportunity to appear before you today in opposition to HB 1542. I would be happy to answer any questions.

THE VOICE of NORTH DAKOTA BUSINESS