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**Testimony before the
Legislative Council
Workers' Compensation Review Committee
August 5, 2009**

Good morning Chairman Ruby and members of the Workers' Compensation Review Committee. My name is Dean Haas, General Counsel to the North Dakota Medical Association. To receive workers compensation, the worker must prove a "compensable injury," which is narrowly drawn to exclude from compensation a broad range of dormant pre-existing susceptibilities to injury. See N.D.C.C. § 65-01-02(10)(b)(7) (excluding from compensation "[i]njuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity"); and N.D.C.C. § 65-01-02(10)(b)(9) (excluding from compensation "[a] latent or asymptomatic degenerative condition, caused in substantial part by employment duties, which is triggered or made active by a subsequent injury.)"

Thus, a denial of compensation may occur in any case where the body has some pre-existing defect: say degenerative disc disease, or spinal stenosis, or spondylolisthesis. In many of these cases, the worker may not even know he is afflicted, but radiographic evidence (e.g., MRI or x-ray) may show that the condition had been there prior to the injury, and, according to the doctor, the degenerative condition itself looks the same now on a repeat of the MRI or x-ray. In *Geck v. N.D. Workers Comp. Bureau*, 1998 ND 158, 583 N.W.2d 621, the court considered a claim where the employee contended that a fall at work caused a worsening of her preexisting arthritis of the knee, which prior to injury had been completely asymptomatic. *Id.* at ¶ 9. The Court reversed WSI's denial of benefits, but remanded the case ordering the agency to consider whether the fall at work had significantly worsened her symptoms, finding the distinction between worsening the "condition

itself" and the symptoms to be without significance. *Geck*, 1998 ND at ¶ 10, n.2. A summary from a law review article states it thus:

If, for example, an independent medical evaluation (IME) states that a worker's fall from a ladder merely triggered symptoms in degenerative disc disease but did not alter the course of the disease, one must ask what is being measured. The IME opinion will almost certainly rest on the fact that the condition itself, as measured radiographically by narrowing of the disc space, did not show any change after the fall. Yet, the worker's life might be utterly shattered. If the fall triggers symptoms that require medical attention and result in disability, the worker certainly suffers a significant worsening in the severity of his or her condition. The answer should be that we look to the effect of the fall on the worker's health, life, his need for medical attention, and disability, not on whether the fall altered the appearance of an MRI.

Dean J. Haas, *Falling Down on the Job: Worker's Compensation Shifts from a No-Fault to a Worker-Fault Paradigm*, 79 N.D. Law Rev. 203, 238 (2003).

The problem is that causation is notoriously difficult to untangle. "Putatively, almost every injury could, with sufficient scrutiny, be linked to some preexisting weakness or susceptibility." *Balliet v. N.D. Workmen's Comp. Bureau*, 297 N.W.2d 791, 794 (N.D. 1980). Thus, NDMA recommends that the legislature consider amending N.D.C.C. § 65-01-02(10)(b)(7). The statute should provide that the relevant measurement determining whether the work injury should be compensated is the *effect of the injury*, not whether the pre-existing condition changes its appearance on an MRI. For example, subsection 7 could be amended to read that non-compensable injuries include: "Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity, as measured by the changes in symptoms, need for medical attention and disability."

NDMA also recommends that the legislature consider repealing N.D.C.C. § 65-01-02(10)(b)(9), because when work causes degeneration to the point where any event is likely to trigger symptoms, it should be compensated whether the trigger to the symptoms happens at work or at home. The reason, again, is that the issue is whether work is one of the substantial causes of the need for medical care and disability, and where it is, workers' compensation should be there to pay benefits.