MICROFILM DIVIDER

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

ROLL NUMBER

1504

DESCRIPTION

2005 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1504

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1504

HOUSE INDUSTRY, BUSINESS AND LABOR

☐ Conference Committee

Hearing Date 1-25-05

Tape Number	Side A	Side B	Meter #
4	x		2.0-22.9
Committee Clerk Signature			

Minutes:

Rep. Keiser: Called the meeting to order on HB 1504. All committee members were present.

Representative Charging, District 4: Appeared in support of HB 1504 and also was a sponsor. Currently under the provisions of the law, it does not include marital and family counseling, we have found that several cases have been challenged in the court, and the courts found evidence of the admission of marriage counseling for an injured worker was necessary for the injured worker health and well being. An injured worker who suffers from a disability that was not a part of their life process, prior to the injury, under goes a tremendous amount of stress and pain and anxiety. Here are just a few reasons the injured worker needs that additional marital counseling, for one the pride factor, they are no longer the head of the household, # 2 they are unable to perform the average household duties from simple to difficult things, and #3 embarrassment, in their inability to perform sexually, # 4, unable to lift or carry a child.

David Boeck, Legal Council, Protection and Advocacy Project: Appeared in support of bill and provided a written statement (SEE ATTACHED TESTIMONY).

Dave Kemnitz, President, AFL-CIO: Appeared in support of HB 1504.

Leroy Volk, Injured Workers Association: Appeared in support of bill. I was a injured worker, I couldn't do anything with my children, I couldn't work, a lot of this takes place where we need counseling, we get frustrated and take it out on our families.

Dan Finemann, Dickinson: I am neutral, language needs to be clarified to include family.

Jodi Bjornson, Legal Counsel, WSI: We have provided this in the past, but at the discretion of the doctor.

Hearing closed.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1504

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 1-26-05

Tape Number	Side A	Side B	Meter #
3		xx	10.0--10.7
Committee Clerk Signature	Pam Dever		

Minutes:**Chair Keiser:** Let's look at HB 1504. We are adding *marriage counselor service.*

Rep Froseth: I move a DO PASS.

Rep. Vigesaa: I second.

VOTE: 14 - YES, 0 - NO, 0 - Absent. PASSED. Rep. Ruby will carry the bill.

FISCAL NOTE

Requested by Legislative Council
01/18/2005

Bill/Resolution No.: HB 1504

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: Definition of Rehabilitation Services

BILL NO: HB 1504

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 amends the definition of rehabilitation services to include marriage counseling.

FISCAL IMPACT: No material impact is anticipated. To the extent costs are incurred, they will be factored into future premium levels.

DATE: January 23, 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:**	01/24/2005

Date: 1-26-05

Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1504

House **INDUSTRY, BUSINESS AND LABOR** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Rep. Froseth Seconded By Rep. Vigesaa

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) 14 No 0

Absent 0

Floor Assignment Rep. Ruby

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

REPORT OF STANDING COMMITTEE

HB 1504: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1504 was placed on the Eleventh order on the calendar.

2005 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1504

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1504

Senate Industry, Business and Labor Committee

❑ Conference Committee

Hearing Date 3-01-05

Tape Number	Side A	Side B	Meter #
1	xxx		950-3598
Committee Clerk Signature	Lisa VanBerkom		

Minutes: **Chairman Mutch opened the hearing on HB 1504. All Senators were present.**

HB 1504 relates to worker's compensation coverage of marriage counseling.

Dave Kemnitz, AFL-CIO, introduced the bill.

Dave: There were issues that this bill hadn't been addressed in previous sessions, that there were concerns that the bureau would have an opportunity to be more holistic. I think yesterday you saw claimants that were in situations like this that probably would have helped.

Senator Klein: We are providing additional service to the injured worker during the times when he is trying to get back out there, not only to provide counseling to him and education, but also if he so needs, to provide that go-between.

Senator Nething: The bill already says that counseling is suppose to be provided. Why wouldn't that include marriage counseling?

Dave: Appearantly, that is a gap that is not always addressed. Counseling in other settings, is.

Chairman Mutch: That wouldn't necessarily be work-related though.

Dave: It would be if the other was experiencing the trama of the injury to another person.

Senator Heitkamp: If WSI says that counseling covers exactly what it does, is there a need for the bill?

No one answered.

Leroy Volk, injured worker, stated his support for the bill.

Sandy Blunt, WSI CEO, spoke from a neutral position.

Sandy: Currently, today, we can pay for it, which is why we are neutral. The difficulty we get into is it's not clear.

Chairman Mutch: Who would you charge for this?

Sandy: The employer.

Senator Fairfield: Couldn't we amend it to include all counseling?

Senator Krebsbach: Would this marriage counseling be joint, or individual?

Sandy: It would be joint, if the injury has caused the stress in the marriage.

Senator Nething: Extending counseling to both parties in another area, for instance, alcoholism?

Sandy: It would depend on the case.

Senator Krebsbach: Do you know, has this been a problem, with denials?

Sandy: I believe in her prior testimony she mentioned difficulties in her marriage due to an injury.

Dave Kemnitz: The house passed the bill ananimously and the floor passed it 84 to 7. If that...

Senator Nething: We cannot use that information in debate because we are prohibited by our rules.

Senator Heitkamp: My fear of this is that if we start getting specific, and don't leave it broad with couseling, we are going to hurt more than help.

Cebald Vetter stated his support for the bill.

Glen Baltrousch stated support for the bill.

Rep. Charging, sponsor of the bill, submitted written testimony.

The hearing was closed. No action was taken.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1504

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date 03-01-05

Tape Number	Side A	Side B	Meter #
3	xx		1128-1600
Committee Clerk Signature	Lisa VanBerkom		

Minutes: **Chairman Mutch allowed committee discussion during committee work. All Senators were present. HB 1504 relates to worker's compensation coverage of marriage counseling.**

Senator Heitkamp: I think if we open up marriage counseling, we are going to open the flood gates. If I heard the director right, he said he already had the power to do it. If in a couple of years, people come into this committee and say they went there and didn't get it, I'm sure there will people in the committee who remember it.

Senator Heitkamp moved a DO NOT PASS.

Senator Fairfield seconded.

Senator Krebsbach: If we would have said counseling, including marriage counseling, it would have been clarified.

Senator Fairfield: You would have to amend in terms of commas and such.

Senator Nething: I am inclined to be concerned that is we just put in marriage counseling, there is going to be an interpretation that other counseling may fall by the board in definition because we are so crystal clear on marriage counseling.

Chairman Mutch called the question.

Roll Call Vote: 5 yes. 2 no. 0 absent.

Carrier: Senator Fairfield

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

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1504

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

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DNP

Motion Made By HeitKamp Seconded By Fairfield

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) 5 No 2

Absent 0

Floor Assignment Fairfield

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

REPORT OF STANDING COMMITTEE

HB 1504: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **DO NOT PASS** (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1504 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

HB 1504

Chairman Keiser, Industry Business & Labor Committee Members
House Bill 1504 – January 25, 2005

My name is Dawn Charging, I represent District 4, the second largest district in North Dakota.

Today I bring before you House Bill 1504 for your kind consideration.

At first glance, committee members you may wonder why should marriage counseling be included to Subsection 27 of section 65-01-02 of the ND Century Code?

As you can see, counseling is a term already included in the statute. It reads;

"Rehabilitation services" means nonmedical services **reasonably necessary** to **restore** a disabled employee to substantial gainful employment as defined by section 65-05.1-01 as near as possible. The term may include vocational evaluation, counseling, education, workplace modification, and vocational retraining including on-the-job training or training for alternative employment with the same employer, and job placement assistance.

Currently under the provision of the law, it does not include marital or family counseling.

After researching this, with the help of legislative council, we discovered several cases have been challenged in the courts and the courts found evidence that the addition of marriage counseling for an injured worker was **necessary for the restoration of the injured workers health and well being.**

In the Modern Workers Compensation Database, Some states, found treatment reasonably required to cure or relieve the effects of a work related injury includes the services of marriage, family and child councilors and clinical social workers if referred by a physician and approved by the employer.

In **Mace vs Industrial Commission of Arizona,** marriage counseling qualified as a compensable service.

In **Jarallah vs. Pickett Suite Hotel**, the State Board of Workers Compensation was required to make the findings indicating whether portion of cost of counseling for claimants family's marital problems was compensable under statutory standard; record reflected that claimant's treating him for emotional and mental problems arising from work related accident, and recommended ongoing program of family and marital therapy involving the claimants wife as **integral part his overall therapy and treatment of disability.**

The addition of marriage counseling will help not only the injured worker, but will help hold together the fabric of the injured workers family.
An injured worker who suffers from a disability that was not part of their life process prior to the injury, under goes a tremendous amount of stress, pain and anxiety. This has all been proven and the law provides for it. But I strongly feel we need to take it a step further and add this provision to the law, to be proactive and help keep our families together.
Here are a few reasons why an injured worker needs additional marital counciling;

1. Injured worker is no longer the head of the household – the provider for his/her family.
2. Unable to perform average household duties-lifting, carrying garbage, mowing lawn, share in the day to day life activities and work load
3. Unable to perform sexually
4. Unable to lift or carry a child, possibly unable to carry a child/pregnancy.

And the list goes on and on depending on the severity and duration of the injury.

I believe the checks and balances are already in place for the determination of whom and under what circumstance an injured worker may apply for these additional services.
I strongly urge this committee and its members to look at this addition to the law favorably.

I'm proud to be from North Dakota where our family values are strong. HB 1504 would help further our commitment as lawmakers to benefit the citizens of ND and especially to those who have been injured while on the job.
Why make our injured workers go through the embarrassment of going to court for a service or benefit that they may not have needed prior to the injury.
Our injured workers need help to get through these adjustments in their life – not just at the workplace but at home.
An injury and disability is not just experienced by the worker, but also the spouse and the children of the family member, who is now known as a "claimant"

Thank you for your kind consideration

House Industry, Business and Labor Committee
Fifty-eighth Legislative Assembly of North Dakota
House Bill No. 1504
January 25, 2005

Good morning, Chairman Keiser, and Members of the House Industry, Business and Labor Committee. I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project. The Protection & Advocacy Project advocates for people with disabilities.

I am supporting the addition of marriage counseling to the nonmedical services that are available as rehabilitation services to injured workers. Specifically, I support marriage-counseling services for workers who suffer disabling injuries. Preserving marriages and families are among the family values North Dakotans cherish.

Suffering a disabling injury is among the major life stressors. The stress of a disabling injury weighs heavily on individuals, family members, and families. Unchecked, these pressures often lead to family breakup and divorce.

A supportive spouse and supportive family can help a disabled worker to achieve a quicker and more complete recovery. Happily married workers are better equipped to rehabilitate quickly and return to work.

Thank you.

Industry Business & Labor Committee Members
House Bill 1504 – January 25, 2005

Senate Hearing March 1, 2005

Senators,

Thank you for holding the hearing open this morning. The following text is my written testimony for HB 1504. Early this morning, I was unable to access this file and with help, restored the document.

My name is Dawn Charging; I represent District 4, the second largest district in North Dakota.

Today I bring before you House Bill 1504 for your kind consideration.

At first glance, committee members you may wonder why should marriage counseling be included to Subsection 27 of section 65-01-02 of the ND Century Code?

As you can see, counseling is a term already included in the statute. It reads;

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Here are a few reasons why an injured worker needs additional marital counciling;

1. Injured worker is no longer the head of the household – the provider for his/her family.
2. Unable to perform average household duties-lifting, carrying garbage, mowing lawn, share in the day to day life activities and work load
3. Unable to perform sexually
4. Unable to lift or carry a child, possibly unable to carry a child/pregnancy.

And the list goes on and on depending on the severity and duration of the injury.

I believe the checks and balances are already in place for the determination of whom and under what circumstance an injured worker may apply for these additional services.
I strongly urge this committee and its members to look at this addition to the law favorably.

I'm proud to be from North Dakota where our family values are strong. HB 1504 would help further our commitment as lawmakers to benefit the citizens of ND and especially to those who have been injured while on the job.
Why make our injured workers go through the embarrassment of going to court for a service or benefit that they may not have needed prior to the injury.
Our injured workers need help to get through these adjustments in their life – not just at the workplace but at home.

An injury and disability is not just experienced by the worker, but also the spouse and the children of the family member, who is now known as a "claimant"

I urge you to consider a DUE PASS motion.

Thank you for your kind consideration
Representative
Dawn Charging
District 4

Dawn Charging

The Burden of Acquired Brain Injury
Central West Health Planning Information Network
(ca. 2003)
Online January 25, 2005, at
http://www.cwhpin.ca/cwhpin/reports/report_2002_03.pdf

(from page 4)

The effect that ABI has on marital relationships is another major issue facing families. Wood & Yurdakul (1997) looked at the incidence of divorce and separation in couples where one partner had an ABI. These authors discovered that nearly half of the sample population reported divorce or separation over a 5-8 year period. It was also indicated that factors which may predict the outcomes of relationships include severity of injury, length of relationship, and the amount of time since the injury occurred (Wood & Yurdakul, 1997). Children of parents with ABI can also be negatively affected to a significant degree. One study reviewed (Pessar, Coad, Linn, & Willer, 1993) focused on the effects that parental ABI has on children, and found that most children in the sample experienced some degree of negative behavioural change in the time since their parents' injuries.

All of the studies reviewed investigating burden on the caregiver and family following an adult ABI, point to the negative effects that occur for sometimes years after the injury. The factors most associated with the level of burden experienced appear to be related to the behavioural and emotional changes in an individual, and the amount of support given to the family. These studies point to the need for rehabilitation services targeting not only the person who has incurred the ABI, but their caregivers and families as well.

Washington State cost-benefit analysis of its ergonomics rule (WAC 296-62-05101) and associated costs, benefits and economic impacts
(ca. 2001)
Online January 25, 2005, at
http://www.lni.wa.gov/wisha/ergo/rule_docs/CBA/CBAText.PDF

(from page 55)

Family relationships

Injuries and illnesses are very disruptive to family life. There is evidence that workers who sustain WMSDs have elevated levels of stress and higher incidence of divorce than workers who do not (Morse et al., 1998; Feuerstein et al 1985).

Children are often expected to take on additional household responsibilities and to care for injured parents, and that may detract from normal social development. (Reid et al, 1991).

Injured workers testified that as a result of pain caused by their WMSDs, they were not able to interact with their children in normal ways, or to participate in other family members' development.

treatise

MWCs 202:22

Modern Workers Compensation
Database updated December 2004

Part 9. COMPENSATION & BENEFITS
Chapter 202. MEDICAL BENEFITS

References; Index

<section> 202:22. Counseling

Research References:

89 ALR3d 87, Future Medical Expenses--Head Injury

40 ALR3d 1012, Workmen's Compensation--Other Insurance

65 ALR4th 142, Value of Home Care by Relative

67 ALR4th 765, Spouse--Recovery for Home Care

3 ALR5th 907, Refusal of Medical Care

72 ALR4th 905, Medical Care--Reasonable s' Compensation, <section> 74, Petition or application--For adjudication of worker' s compensation claim--Injury

Trial Strategy

10 Am Jur POF3d 669, Workers' Compensation -Compensable Coronary Episode
(Heart Attack)

7 Am Jur POF3d 143, Workers' Compensation for Attendant Care Services by
Family Members

9 Am Jur Trials 131, Actions on Health and Accident Insurance Policies

6 Am Jur Trials 1, Presenting Plaintiff's Medical Proof-- Common Injuries and
Conditions

Forms

25A Am Jur Pl & Pr Forms (Rev), Workers' Compensation, <section> 74, Petition
or application--For adjudication of worker's compensation claim--Injury

25A Am Jur Pl & Pr Forms (Rev), Workers' Compensation, <section> 115, Medical
and hospital expenses

25B Am Jur Pl & Pr Forms (Rev), Workers' Compensation, <section> 296, By
insurance carrier--For declaratory relief--Decision as to insurance carrier's
nonliability for employee's future medical expenses under compromise

settlement agreement

Compensable medical benefits may include psychiatric treatment necessitated by a work-related injury.[FN14] The employer must also pay for reasonably required psychological counseling,[FN15] at least if prescribed by a doctor.[FN16] In some states, treatment reasonably required to cure or relieve from the effects of a work-related injury includes the services of marriage, family, and child counselors and clinical social workers if referred by a physician and approved by the employer.[FN17] An employer is never required to pay for unnecessary social worker services.[FN18] A claimant is not entitled to recover expenses for psychotherapy services performed by a counselor with a doctorate in education, since such a counselor is not a duly licensed practitioner of the healing arts.[FN18.1] A psychologist is not a physician for purposes of a statute governing physical examination of claimants and subjecting physicians to penalties.[FN18.2]

[FN14]

New Hampshire

Appeal of Sutton, 141 NH 348, 684 A2d 1346 (1996), holding that the evidence was sufficient to support a finding that the claimant's emotional problems were not related to her eye injury and that she was thus not entitled to medical benefits for psychological counseling. Although the claimant's treating mental health worker diagnosed the claimant as suffering from post-traumatic stress disorder resulting from her eye injury, the Compensation Appeals Board was free to reject that testimony in favor of a physician who testified that the claimant's psychological problems were unrelated to her eye injury.

Tennessee

Cigna Property & Casualty Ins. Co. v Sneed, 772 SW2d 422 (1989, Tenn), holding that the trial judge did not err in allowing a workers' compensation claimant to recover medical expenses that were related to the claimant's severe depression, even though the claimant incurred the depression during the time that she was off work between the time that she re-injured her arm and shoulder and her second attempt to return to work, where the depression

was
incident to and was combined with an admittedly compensable physical injury.

Texas

Peeples v Home Indem. Co., 617 SW2d 274 (1981, Tex Civ App San Antonio) (jury's finding that medical care by psychiatrist was not reasonably required
for worker as result of leg injury was against the great weight and preponderance of the evidence in view of psychiatrist's testimony as to treatment's natural relationship with the worker's loss of the use of his leg,
and testimony of orthopedic surgeon that he had referred worker to psychiatrist).

[FN15]

California

Cal Lab Code <section> 3209.3, but also providing that when treatment or
evaluation for an injury is provided by a psychologist, provision shall be
made for appropriate medical collaboration when requested by the employer or
the insurer. Bergenstal v Workers' Comp. Appeals Bd., 45 Cal App 4th 1272, 53
Cal Rptr 2d 266, 61 Cal Comp Cas 437, 96 CDOS 3820, 96 Daily Journal DAR 6191
(1996, 2nd Dist), review den 1996 Cal LEXIS 5115 (Cal), holding that where
there is sufficient consultation and supervision to satisfy the intent of the
statute setting forth the requirements for psychological assistants, a psychological assistant can be considered an agent of a treating psychologist
for purposes of allowing workers' compensation benefits for care provided by
the assistant.

Idaho

Harrison v Osco Drug, Inc., 116 Idaho 470, 776 P2d 1189 (1989), holding that
the evidence supported the decision of the Industrial Commission awarding
medical compensation for continuing treatment, including psychological counseling, for injuries that were caused by a workers' compensation claimant's slip and fall, where the Commission determined that the claimant's
slip and fall and resulting lumbrosacral sprain and herniated disc caused the
claimant's conversion hysteria and inverted the claimant's left foot; and
where the employee still was within the period of recovery required by

Idaho
Code <section> 72-408.

Minnesota

Minn Stat <section> 176.135, subd 1(a).

Wisconsin

Wis Stat <section> 102.42(1).

[FN16]

Texas

Tex Civ Rev Stat, Art 8308-1.03(20)(C); Tex Labor Code <section> 401.011(19)(C).

[FN17]

Arizona

Because counseling services are compensable treatment within the meaning of workers' compensation statute that addresses industrial injuries, and because an employer is required to compensate a claimant for services provided to a third party that were reasonably required to treat the effects of the claimant's industrial injury, an insurance company was responsible for compensating a claimant for any medical services, including marriage and family counseling, reasonably required to treat the effects of the industrial injury provided the claimant could establish the counseling was necessary to treat the injury or that the injury had caused the need for counseling. An expert testified that the primary problem addressed during marriage counseling had to do with the husband's difficulty controlling emotions after the accident and this evidence supported the claimant's contention that marriage counseling had been undertaken primarily as treatment for his industrial injury. However, the evidence did not support the claimant's contention that family counseling had been undertaken primarily as treatment for his industrial injury as the claimant's expert testified that an identified patient was the claimant's son and that "there were conflicts within the family in a global sense." Mace v. Industrial Com'n of Arizona, 62 P.3d 133 (Ariz. Ct. App. Div. 2 2003).

California

Cal Lab Code <section> 3209.8.

Louisiana

La RS <section> 23:1021(11), including board-certified social workers within
the term "health care provider."

[FN18]

Tennessee

Wilhelm v Kern's, Inc., 713 SW2d 67 (1986, Tenn), holding that the expense of
employing social worker to assist a workers' compensation claimant's relocation to a halfway house type facility was not compensable as a medical
expense under TCA <section> 50-6-204, since if the relocation had been reasonably required, the social worker's services in selecting a proper facility may have been necessary; however, the relocation was not reasonably
required because the only reason given for the claimant's travel was that he
was bored and desired to move to another part of the country.

[FN18.1]

Pennsylvania

Foyle v Workmen's Compensation Appeal Bd. (LIQUID Carbonic I/M Corp.), 635 A2d
687 (1993, Pa Cmwlth).

[FN18.2]

California

Stress Care, Inc. v Workers' Comp. Appeals Bd., 26 Cal App 4th 909, 32 Cal
Rptr 2d 426, 59 Cal Comp Cas 388, 94 Daily Journal DAR 9991 (1994, 2nd Dist),
ops combined at 94 CDOS 5536 (Cal App 2nd Dist).

[8, 9] ¶ 18 Citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), defendant Gonzales–Perez alternatively argues that the trial court's dismissal order should be upheld as a valid exercise of its inherent power to manage its calendar. We do not disagree with the general proposition that courts have inherent power to manage their case loads and the conduct of parties appearing before them. *See Precision Components, Inc. v. Harrison, Harper, Christian & Dichter, P.C.*, 179 Ariz. 552, 880 P.2d 1098 (App.1993). The sanctions in *Chambers* and *Precision Components*, however, were fee-based, unlike the dismissal sanction at issue here. More importantly, although Arizona's courts have the inherent power to regulate the conduct of parties and attorneys appearing before them, *see Precision Components*, that power cannot override applicable rules of procedure and case law governing dismissals. *See State v. Hannah*, 118 Ariz. 610, 578 P.2d 1039 (App.1978) (while trial court has inherent power to dismiss prosecution on its own motion, that power does not include authority to dismiss with prejudice except in accord with Rule 16.6(d)); *see also Societe Internationale Pour Participations Industrielles Et Commerciales, S.A., v. Rogers*, 357 U.S. 197, 207, 78 S.Ct. 1087, 1093, 2 L.Ed.2d 1255, 1264 (1958) (trial court's inherent power to dismiss complaint for discovery violation may not be exercised in manner inconsistent with rule "address[ing] itself with particularity to the consequences of a failure to make discovery"). Because Rule 16.6 applies here, the trial court's ruling cannot be justified as an exercise of inherent power.

¶ 19 Finally, to the extent any of the parties urge us to interpret the effect of the trial court's unappealed pretrial orders, we are essentially asked to issue an advisory opinion. This we will not do. *See Progressive Specialty Ins. Co. v. Farmers Ins. Co. of Arizona*, 143 Ariz. 547, 694 P.2d 835 (App. 1985).

Disposition

¶ 20 We reverse the trial court's order dismissing the indictment and remand for further proceedings consistent with this decision.

CONCURRING: WILLIAM E. DRUKE, Presiding Judge and JOSEPH W. HOWARD, Judge.

204 Ariz. 207

David MACE, Petitioner Employee,

v.

The INDUSTRIAL COMMISSION OF ARIZONA, Respondent,

Tremco, Inc., Respondent Employer,

Liberty Mutual Insurance Group, Respondent Insurer.

No. 2 CA–IC 2002–0010.

Court of Appeals of Arizona, Division 2, Department A.

Jan. 30, 2003.

After workers' compensation claimant was awarded monthly permanent partial disability relief for injuries sustained in an industrial accident, claimant sought to reopen his claim to seek benefits for marital and family counseling. The Industrial Commission, ICA Claim No. 93113–314110, Jerry C. Schmidt, Administrative Law Judge (ALJ), denied additional benefits. Claimant filed a special action. The Court of Appeals, Brammer, P.J., held that: (1) insurance company was responsible for compensating claimant for marriage and family counseling provided claimant could establish counseling was necessary to treat injury or that injury had caused the need for counseling; (2) evidence supported claimant's contention that marriage counseling had been undertaken primarily as treatment for injury; and (3) evidence did not support claimant's contention

that family counseling had been undertaken primarily as treatment for injury.

Award set aside.

1. Workers' Compensation ⇐1935

Court of Appeals views the evidence and all reasonable inferences therefrom in the light most favorable to sustaining workers' compensation award.

2. Workers' Compensation ⇐1738

In issuing a workers' compensation award, administrative law judges (ALJs) should explicitly state their resolution of conflicting evidence on material and important issues, find the ultimate facts, and set forth their application of law to those facts.

3. Workers' Compensation ⇐1947

If the Court of Appeals, in a workers' compensation case, cannot determine the basis of an administrative law judge's (ALJ's) conclusions and whether they are tenable, Court of Appeals must set aside the award.

4. Administrative Law and Procedure ⇐486

An administrative law judge's (ALJ's) findings are sufficient, such that they can be upheld on appeal, if the Court of Appeals can glean the basis for the ALJ's conclusions.

5. Workers' Compensation ⇐1001

Court of Appeals could glean from workers' compensation judge's order, which denied benefits for marriage and family counseling based on prior opinion that denied benefits for child care, that basis for denial was that statutory reference to "other treatment" did not encompass treatment provided to a third party, and thus Court of Appeals could review judge's ruling, even though judge failed to fully explain basis of its denial. A.R.S. § 23–1062, subd. A.

6. Workers' Compensation ⇐1001

Whether workers' compensation statute, concerning benefits for those who suffer an industrial injury, authorizes benefits for either marriage or family counseling is a question of law subject to de novo review by the Court of Appeals. A.R.S. § 23–1062, subd. A.

7. Workers' Compensation ⇐966

As counseling services were compensable treatment within the meaning of workers' compensation statute that addressed industrial injuries, and as an employer was required to compensate a claimant for services provided to a third party that were reasonably required to treat the effects of the claimant's industrial injury, insurance company was responsible for compensating claimant for any medical services, including marriage and family counseling, reasonably required to treat the effects of his industrial injury provided claimant could establish counseling was necessary to treat injury or that injury had caused the need for counseling. A.R.S. § 23–1062, subd. A.

8. Workers' Compensation ⇐998

Evidence supported workers' compensation claimant's contention that marriage counseling had been undertaken primarily as treatment for his industrial injury, for purposes of determining whether claimant was statutorily entitled to benefits for counseling; expert testified that primary problem addressed during marriage counseling had to do with husband's difficulty controlling emotions after accident, and insurance company's expert agreed with claimant's expert. A.R.S. § 23–1062, subd. A.

9. Workers' Compensation ⇐998

Evidence did not support workers' compensation claimant's contention that family counseling had been undertaken primarily as treatment for his industrial injury, for purposes of determining whether claimant was statutorily entitled to benefits for counseling; claimant's expert testified that identified patient was claimant's son, and that "there were conflicts within the family in a global sense," and administrative law judge (ALJ) did not find that claimant's industrial accident had caused need for counseling or that the counseling was intended to treat injury. A.R.S. § 23–1062, subd. A.

Brian Clymer, Tucson, Attorney for Petitioner Employee.

The Industrial Commission of Arizona By Laura L. McGrory, Phoenix, Attorney for Respondent.

Jones, Skelton & Hochuli, P.L.C. By K. Casey Kurth and Andrea L. Kravets, Phoenix, Attorneys for Respondents Employer and Insurer.

OPINION

BRAMMER, Presiding Judge.

¶ 1 Petitioner David Mace seeks review of the administrative law judge's (ALJ) award denying him workers' compensation benefits to pay for conjoint marriage and family counseling to which he and his family had been referred by his psychiatrist. He argues the ALJ's decision was erroneous because the counseling was "reasonably required" to treat his condition. *See* A.R.S. § 23–1062(A). Citing *Post v. Industrial Commission*, 160 Ariz. 4, 770 P.2d 308 (1989), he also argues the ALJ's findings are insufficient to allow appellate review. Although we disagree with his *Post* argument, we set aside the award because we find that counseling services reasonably required to treat the effects of a claimant's industrial injury qualify as compensable services under Arizona's workers' compensation system regardless of whether the services are provided, in part, to a third party.

Background

[1] ¶ 2 We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the award. *Rent A Center v. Industrial Comm'n*, 191 Ariz. 406, 956 P.2d 533 (App.1998). Mace was injured in a 1993 industrial accident and was awarded monthly permanent partial disability benefits of $702.20 in 1998. In 1999, he filed a petition to reopen his claim. Respondent insurer Liberty Mutual Insurance Group agreed to reopen the claim but refused to pay for marital counseling for Mace and his wife or for family counseling for Mace, his wife, and their two children. Mace requested a hearing.

¶ 3 In its decision upon hearing, the ALJ stated that Mace's marriage counselor had testified that Mace's industrial injury was a "substantial contributing cause of the marital problems" for which Mace had sought counseling. The ALJ noted that Liberty Mutual's medical expert had agreed with that assessment and that the experts had agreed the counseling was reasonably required to treat the effects of Mace's industrial injury. The ALJ also found that Mace and his family had been referred to a family therapist because "they [we]re in need of long-term conjoint therapy." Citing *Hughes v. Industrial Commission*, 188 Ariz. 150, 933 P.2d 1218 (App.1996), the ALJ then wrote:

> [Division One of this court] held that child care is not considered medical treatment and is a service provided to a third person, not to the injured worker. Accordingly the Court of Appeals held that ARS § 23–1062A did not include payment for child care. The instant case is distinguishable from *Regnier v. Industrial Commission*, 146 Ariz. 535, 707 P.2d 333 ([App.] 1985)[,] and *Terry Grantham Co. v. Industrial Commission*, 154 Ariz. 180, 74[1] P.2d [3]13 ([App.] 1987).

AWARD

> IT IS HEREBY ORDERED that the applicant take nothing by reason of the REQUEST FOR HEARING pursuant to ARS § 23–1061J heretofore filed February 5, 2001.

This statutory special action followed the ALJ's denial of administrative review.

Discussion

[2, 3] ¶ 4 We first address Mace's argument that the ALJ's findings are insufficient to allow appellate review. In issuing an award, "administrative law judges should explicitly state their resolution of conflicting evidence on material and important issues, find the ultimate facts, and set forth their application of law to those facts." *Post*, 160 Ariz. at 8, 770 P.2d at 312. If we cannot determine the basis of an ALJ's conclusions and whether they are tenable, we must set aside the award. *Id.*

[4] ¶ 5 Other than citing *Hughes*, the ALJ here failed to explain the basis for denying Mace's request for benefits. And

his curt recitation of applicable law failed to respond to Mace's arguments. However, findings are sufficient if we can "glean the basis for the [ALJ's] conclusions." *Douglas Auto & Equip. v. Industrial Comm'n*, 202 Ariz. 345, ¶ 9, 45 P.3d 342, ¶ 9 (2002). We therefore determine whether we can discern the reason for the ALJ's reliance on *Hughes*.

[5] ¶ 6 As a result of an industrial injury, the claimant in *Hughes* underwent numerous surgeries and received psychiatric treatment. She requested a hearing after the insurer denied her request for child care expenses incurred because of her hospitalizations. In reviewing the ALJ's denial of her request, Division One noted not only that the requested services would have been "provided to a third person, not to the injured worker," *Hughes*, 188 Ariz. at 154, 933 P.2d at 1222, but also that child care does not resemble medical care and is not, therefore, "other treatment" within the meaning of § 23–1062(A).

¶ 7 Unlike in *Hughes*, there is no question here that counseling is "treatment" within the meaning of § 23–1062(A). *See McAllister v. Industrial Comm'n*, 88 Ariz. 25, 352 P.2d 359 (1960). Because the ALJ relied on *Hughes* in denying Mace's request for benefits, we can only deduce he concluded that § 23–1062(A) does not encompass treatment provided, in part, to a third party. Accordingly, because we can glean the basis of the ALJ's award, the findings sufficiently permit appellate review. *See Douglas Auto.*

[6] ¶ 8 Turning to the merits of Mace's issue, employees subject to Arizona's workers' compensation scheme who suffer an industrial injury are entitled to receive "such medical, nurse and hospital services and medicines . . . as are provided by this chapter." A.R.S. § 23–1021(A). Assistance to an employee encompasses "medical, surgical and hospital benefits or other treatment, nursing, medicine, surgical supplies, crutches and other apparatus, including artificial members, reasonably required at the time of the injury, and during the period of disability." § 23–1062(A). Mace claims the counseling he sought is permissible under this provision. Whether the statute authorizes benefits for either marriage or family counseling is a question of law subject to our de novo review. *See Mejia v. Industrial Comm'n*, 202 Ariz. 31, 39 P.3d 1135 (App.2002).

¶ 9 Citing *Hughes*, Liberty Mutual contends that § 23–1062(A) "unambiguously excludes marital and family counseling" simply because the statute does not expressly include either in its list of permissible services. A statute's silence on a particular subject, however, certainly does not equate to an unambiguous exclusion of that subject, particularly when the statute expressly includes "other" similar subjects, as § 23–1062(A) does. *Hughes*. Moreover, Liberty Mutual's interpretation flies in the face of numerous decisions interpreting § 23–1062(A) as including a broad range of services and equipment not expressly enumerated in the statute, *see, e.g., McAllister* (psychiatric treatment); *Terry Grantham Co. v. Industrial Comm'n*, 154 Ariz. 180, 183, 741 P.2d 313, 316 (App.1987) (modified van provided based on claimant's evidence that it "was essential to restore virtually any mobility"). Further, Liberty's interpretation cannot survive after even a cursory reading of *Hughes*. As already mentioned, the court in *Hughes* found that, regardless of whether the service was recommended by the claimant's psychiatrist, child care is not a compensable service within the meaning of § 23–1062(A) because it is a service provided entirely to a third party and is not medical in nature. Finally, interpreting the statute as Liberty Mutual suggests would also violate our obligation to liberally construe the workers' compensation statutory scheme in favor of the injured worker. *See No Ins. Section/Special Fund Div. v. Industrial Comm'n*, 187 Ariz. 131, 927 P.2d 791 (App. 1996); *Regnier v. Industrial Comm'n*, 146 Ariz. 535, 707 P.2d 333 (App.1985).

¶ 10 Citing *Regnier*, Mace argues that the counseling services he sought fall within the ambit of compensable services under § 23–1062(A) because, unlike in *Hughes*, the counseling is to be provided not only to his family members, but also to him. It is uncontradicted that, except for an introductory marriage counseling session attended solely by Mace's wife, Mace attended all the counsel-

ing sessions with other members of his family.

¶ 11 In *Regnier*, because the claimant had been paralyzed in an industrial accident, he requested payment for a procedure that could allow him to become a father by having his sperm artificially inseminated into his wife. On review of the ALJ's denial of the request, Division One held that the procedure could qualify as "medical benefits" within the meaning of § 23–1062(A). *Regnier*, 146 Ariz. at 539, 707 P.2d at 337. Although there is no indication the employer in *Regnier* argued the procedure was an invalid provision of benefits to a third party, *see Hughes*, the court noted the procedure was compensable because it "would replace a bodily function lost as a result of the injury." *Regnier*, 146 Ariz. at 538, 707 P.2d at 336. By implication, the procedure to artificially inseminate the claimant's wife was authorized by § 23–1062(A) because it was directly related to the claimant's industrial injury. Courts in other jurisdictions have adopted this approach. *See, e.g., Spyhalsky v. Cross Constr.*, 294 A.D.2d 23, 743 N.Y.S.2d 212 (2002); *Tobias v. Workmen's Compensation Appeal Bd.*, 141 Pa.Cmwlth. 438, 595 A.2d 781 (781).

¶ 12 Courts in other jurisdictions also have addressed issues akin to the one presented here. In *Stables v. Rivers*, 562 So.2d 784 (Fla.Dist.Ct.App.1990), an industrial accident rendered the claimant paraplegic. The claimant requested counseling for her family, shown by the medical testimony to be "necessary and proper to facilitate [her] own psychological treatment." *Id.* at 786. The Florida appellate court held that the counseling services were compensable because they had been found "useful in mitigating the effects" of her industrial injury. *Id.* at 785; *see also Southern Indus. v. Chumney*, 613 So.2d 74, 76 (Fla.Dist.Ct.App.1993) (employer responsible for compensating paralyzed claimant for running board installed on specially equipped van; claimant's wife, who provided attendant care, "require[d] the running board to enable her to care for claimant's medical needs"). In holding that "the pertinent inquiry should be the injured employee's medical need for, rather than the nature of, these services," *Stables*, 562 So.2d at 786, the Florida court rejected dicta to the contrary from one of its earlier decisions. *See Prestressed Decking Corp. v. Medrano*, 556 So.2d 406 (Fla.Dist.Ct. App.1989). And Georgia's appellate court reached a similar conclusion in *Jarallah v. Pickett Suite Hotel*, 204 Ga.App. 684, 420 S.E.2d 366 (1992). The court there held that the claimant was entitled to marriage and family counseling, except that portion "that in effect treats [the claimant's] wife or any other member of his family." *Id.* at 370; *see also* § 23–1021(A) (claimant can only receive "compensation for loss sustained on account of the [industrial] injury").

[7] ¶ 13 Because counseling services are compensable treatment within the meaning of § 23–1062(A), *McAllister*, and because an employer must compensate an employee for services provided to a third party that are reasonably required to treat the effects of the employee's industrial injury, *Regnier*, Liberty Mutual is responsible for compensating Mace for any medical services reasonably required to treat the effects of his industrial injury. Accordingly, we examine the evidence presented to the ALJ on the issues of marriage and family counseling.

[8] ¶ 14 At the hearing, Mace presented evidence that the prescribed marriage counseling had been undertaken primarily as treatment for his industrial injury. His expert testified that the "primary problem" addressed during marriage counseling "had to do with [the Maces'] interactions, mostly about arguing, arguing because of the fact that [Mace] had trouble controlling his emotions" after the accident. Not only did Liberty Mutual fail to challenge this testimony, the ALJ found that its expert had agreed with it. Because the experts agreed that the marriage counseling was reasonably required to treat Mace's industrial injury, the ALJ erred by relying on *Hughes* in denying his claim for these services. *See Regnier*.

[9] ¶ 15 With respect to the family counseling, Mace's expert testified that, although Mace's son was the "identified patient" in the family, "there were conflicts within the family in a global sense." And, although the ALJ summarized the experts' testimony that

Mace and his family required family counseling, the ALJ did not find either that Mace's industrial accident had caused that need or that the counseling was intended to treat Mace's industrial injury. Without these findings, we cannot determine whether the family counseling constitutes a compensable service under § 23–1021(A).

Conclusion

¶ 16 Although we are unable to determine on this record whether the family counseling Mace sought was reasonably required to treat his industrial injury, the ALJ did find that the experts had agreed that the marriage counseling Mace sought was necessary, causally connected, and intended to treat his industrial injury. Accordingly, because the marriage counseling qualifies as a compensable service, we set aside the ALJ's award denying Mace's claim.

CONCURRING: JOSEPH W. HOWARD and JOHN PELANDER, Judges.

204 Ariz. 212

In re OTEL H., Petitioner,

v.

The Honorable Janet E. BARTON, Judge of the Superior Court of the State of Arizona, in and for the County of Maricopa, Respondent Judge,

The State of Arizona, ex rel., Richard M. Romley, Maricopa County Attorney, Real Party in Interest.

No. 1 CA–SA 02–0153.

Court of Appeals of Arizona, Division 1, Department A.

Jan. 30, 2003.

Juvenile was charged with minor consumption of alcohol and the Superior Court, Maricopa County, Cause No. JV-141613, Janet E. Barton, J., ordered juvenile to be taken into custody pending his adjudication hearing. Juvenile filed a petition for special action. The Court of Appeals, Noyes, J., held that citation was insufficient to support the Superior Court's finding of probable cause to believe that juvenile committed offense.

Petition denied due to mootness.

Garbarino, J., filed a dissenting opinion.

Infants ⇐192

Citation was insufficient to support the Superior Court's finding of probable cause to believe that juvenile committed the offense of minor consumption of alcohol; citation merely stated that charging officer believed that juvenile committed the charged offense, and citation did not contain any factual allegations. 17B A.R.S. Juv.Ct.Rules of Proc., Rule 23, subd. D.

Maricopa County Public Defender by David Katz, Deputy Public Defender, Phoenix, for Petitioner.

Richard M. Romley, Maricopa County Attorney by Linda Van Brakel, Deputy County Attorney, Phoenix, for Real Party in Interest.

OPINION

NOYES, J.

¶ 1 A police officer issued Petitioner an Arizona Traffic Ticket and Complaint (the "citation") for "minor consumption alcohol," and released him on his promise to appear in court. The citation contained no description of facts or circumstances; it just contained the officer's signature below printed language stating, "I hereby certify that I have reasonable grounds to believe and do believe that the person cited herein committed the offense described herein contrary to law." The question is whether this certification by the officer, standing alone, supports a judicial finding of probable cause to believe that the accused committed the offense. The answer is "no."

ord reveals that no objection was made to the charge. "Failure to object to the trial court's instruction to the jury before the jury returns its verdict constitutes a waiver of the right to raise the issue on appeal, [cits.], and we find no substantial error which would require our review under the exception set forth in OCGA § 5-5-24(c). [Cit.]" *Sanders v. Hughes*, 183 Ga.App. 601, 603(2), 359 S.E.2d 396 (1987).

7. In his final enumeration of error, appellant contends that the trial court erred in denying his motion for new trial based on the evidence. " 'The denial of (a motion) for new trial on the ground that the verdict is contrary to the evidence addresses itself only to the discretion of the trial judge. [Cits.]' [Cit.] It is of no consequence on review of the denial of a motion for new trial based on the sufficiency of the evidence that the evidence adduced at trial would have authorized a verdict for either party. [Cit.] A reviewing court must view the evidence in a light most favorable to upholding the jury's verdict and any evidence which supports the jury's verdict is sufficient to sustain the trial court's denial of a motion for new trial based on the sufficiency of the evidence. [Cits.]" *Clark v. United Ins. Co. of America*, 199 Ga.App. 1(1), 404 S.E.2d 149 (1991). Based on our review of the evidence, we conclude that the trial court did not err in denying appellant's motion for new trial.

Judgment affirmed.

SOGNIER, C.J., and McMURRAY, P.J., concur.

204 Ga.App. 684

JARALLAH

v.

PICKETT SUITE HOTEL et al.

No. A92A0462.

Court of Appeals of Georgia.

June 26, 1992.

State Board of Workers' Compensation rejected administrative law judge's findings and concluded that claimant, who was receiving worker's compensation benefits for total disability, had undergone change of condition authorizing suspension of disability income benefits. The Cobb Superior Court, Glover, J., pro hac vice, affirmed. Claimant appealed. The Court of Appeals, Cooper, J., held that: (1) under any evidence standard, Superior Court did not err in affirming decision of full board with respect to change of conditions; (2) however, remand to Board was necessary for calculation of claimant's post change-of-position wages and benefits, if any, to which claimant was still entitled; (3) Board's finding denying payment for claimant's orthopedic expenses was supported; (4) findings were required with respect to payment of portion of treatment for claimant's family/marital therapy; and (5) claimant was not entitled to direct prescription charge account.

Affirmed in part; reversed and remanded with direction in part.

1. Workers' Compensation ⇐2030

Some evidence supported determination of State Board of Workers' Compensation that claimant, who was receiving disability income benefits, had undergone economic change of condition for the better; there was evidence that claimant, despite mental and emotional difficulties, was self-employed as caterer.

2. Workers' Compensation ⇐2043

Full board to State Board of Workers' Compensation was required to make specific findings on amount of wages that claimant, who was receiving disability income benefits, was making or was capable of making after change of condition in order to calculate reduction or elimination of benefits.

3. Workers' Compensation ⇐998

Misstatement in fact-findings of full board of State Board of Workers' Compensation, regarding whether claimant sought

medical treatment for orthopedic problems after certain date, did not render Board's decision to deny payment for orthopedic expenses unsupported under any evidence standard; Board's other detailed findings supported its decision.

4. Workers' Compensation ⇐999

State Board of Workers' Compensation was required to make findings indicating whether portion of cost of counselling for claimant's family's marital problems was compensable under statutory standard; record reflected that claimant's treating psychiatrist, who was treating him for emotional and mental problems arising from work-related accident, recommended ongoing program of family/marital therapy involving claimant's wife as integral part of his overall therapy and treatment of disability. O.C.G.A. § 34-9-200(a).

5. Workers' Compensation ⇐966

Claimant was not entitled to prescription charge account; statutory law did not require insurer to establish such account, although State Board of Workers' Compensation would, in its judgment, have authority to authorize direct billing system. O.C.G.A. § 34-9-200(a).

George, Trammell & Bartles, Lavinia B. George, Alex B. Wallach, Forest Park, for appellant.

Cone & Shivers, Judith A. Hodges, Atlanta, for appellees.

COOPER, Judge.

Appellant was employed by appellee hotel as an assistant food production manager in September 1987 when he fell onto a concrete floor and suffered a head injury. An ALJ found appellant disabled as a result of the injury and awarded appellant workers' compensation benefits for total disability in November 1988. In December 1989, appellees requested a hearing on a change in condition, asserting that appellant had returned to work as a caterer; that he had generated income from his work; and that he suffered a new accident as the result of a January 1989 automobile accident. After a hearing, an ALJ concluded that appellant had not experienced a change of condition which would authorize the employer to suspend disability income benefits; that the employer remained responsible for the payment of expenses related to appellant's orthopedic problems; that appellant's claims for family/marital/sexual counseling should be paid by the employer; and that the insurer should be ordered to establish a charge account or a direct billing system with a pharmacy in order to furnish necessary medicines to appellant. Appellees appealed to the State Board of Workers' Compensation, and the full board ordered independent psychiatric and orthopedic evaluations of appellant. The full board, after de novo consideration of all the evidence, as well as the additional evidence ordered, concluded that appellant's income benefits should be suspended due to appellant's ongoing, income-producing catering business; that appellees are not responsible for appellant's orthopedic claims since his current problems are the result of a new accident; that appellees are responsible for expenses relating to appellant's continuing mental and emotional problems; and that appellant's claims for a prescription charge account and payment for family/marital/sexual counseling should be denied. The superior court affirmed the award of the full board under the "any evidence" standard, and appellant then brought the instant appeal, raising four enumerations of error.

[1] 1. Appellant first contends that the full board suspended his income benefits on grounds other than a change in condition and that the findings of the full board did not support the decision to suspend the benefits. Although the full board did not recite the phrase "change of condition" in its decision, it did state as follows: "[I]t has been shown by substantial evidence that the employee's mental/emotional problems have not prevented him from operating a catering business out of his home. Based on the employee's demonstrated ability to engage in self-employment activities, the Board finds that a suspension of income benefits is warranted at this time.... Based on [appellant's] numerous admis-

sions regarding his self-employment activities, the Board finds that [appellant's] catering business has been ongoing. The Board does not find credible [appellant's] claim that his self-employment activities were of limited duration. Having found that the employee has hidden his outside earnings from the employer/insurer, the employer/insurer's request for authorization to suspend income benefits should be granted." OCGA § 34-9-104(a) defines "change of condition" as "a change in the wage-earning capacity, physical condition or status of an employee." We have held that " '[i]n order for the board to terminate an employee's eligibility for benefits, the evidence must prove an improved economic condition. [Cit.] This is proved by evidence that the employee's physical condition has improved to the point that he has either already returned to work or has the ability to return to work.... [Cits.]' [Cit.]" *Fairway Transp. v. Brewer*, 192 Ga.App. 871, 872, 386 S.E.2d 674 (1989). See *Hopper v. Continental Ins. Co.*, 121 Ga.App. 850(1), 176 S.E.2d 109 (1970). Further, in *Carrollton Coca-Cola Bottling Co. v. Brown*, 185 Ga.App. 588, 594(2), 365 S.E.2d 143 (1988), we held that the issue of a change of condition must be addressed by the full board "[i]f the facts show [the claimant] is able to work and to some particular degree is working." (Emphasis omitted). The text of the full board's decision, together with the full board's findings set forth in its award, evidence to us that the full board's decision was based upon the proper statutory standard of change in condition.

The full board set forth five detailed findings of fact supporting its decision regarding a change of appellant's economic condition. The record verifies the full board's findings that appellant admitted to catering at least four or five, and possibly more, events while he was receiving disability benefits; that appellant told an insurance investigator that he was self-employed as a caterer and that he earned $250 per week; that appellant gave the investigator a business card indicating he was in the catering business; that appellant indicated that he was self-employed on a patient information sheet; that an investigator testified to conversations with appellant in which he agreed to cater a party for her and in which he stated he was currently involved in catering another event; and that appellant indicated that he owned his own catering service and earned $25,000 per year when he purchased a new car. There was medical evidence in the record as to the mental and emotional impairment of appellant, and the opinion of the full board stated that all the evidence had been considered. Despite the medical evidence, the full board concluded that appellant had undergone an economic change of condition for the better. " 'The Full Board is not " 'bound in every way to accept the literal statements of a witness before it, merely because such statements are not contradicted by direct evidence. Implications inconsistent with the testimony may arise from the proved facts and in still other ways the question of what is the truth may remain an issue of fact, despite uncontradicted evidence in regard thereto.' [Cits.]" [Cit.]' [Cit.]" *Raley v. Lanco Paint & Drywall*, 190 Ga.App. 462, 465(3), 379 S.E.2d 196 (1989). " 'The superior court was required to construe the evidence in the light most favorable to the employer as the party who prevailed before the Full Board. [Cit.]' [Cit.]" *Fairway Transp.*, supra 192 Ga. App. at 871, 386 S.E.2d 674. "The law is well established that a finding of fact by the [full board], when supported by any evidence, is conclusive and binding upon the court, and ... neither the superior court nor the Court of Appeals has any authority to substitute itself as the fact finding body in lieu of the board." (Citations and punctuation omitted.) *Skelton v. Dept. of Transp.*, 191 Ga.App. 835, 836, 383 S.E.2d 162 (1989). There being some evidence to support a conclusion that appellant has undergone an economic change of condition for the better, the superior court did not err in affirming the decision of the full board with respect to the change of condition.

[2] Appellant, however, also contends that the full board's decision to suspend his income benefits cannot be supported be-

cause the full board failed to make specific findings on the amount of wages appellant is making or is capable of making after the change in condition. Such a finding is not necessary as an element of proof to support a determination of a change in condition; however, a showing of a specific amount of wages is necessary so that " 'an intelligent calculation can be made of the compensation to be paid.' " *Newton v. Liberty Mut. Ins. Co.*, 148 Ga.App. 224, 225, 251 S.E.2d 138 (1978). See also *Zurich American Ins. Co. v. Drivas*, 143 Ga.App. 232, 233, 237 S.E.2d 726 (1977); *Hardeman v. Liberty Mut. Ins. Co.*, 124 Ga.App. 710(1), 185 S.E.2d 789 (1971). In its award, the full board recites appellant's contradictory admissions that he earned $250 per week and $25,000 per year. While this evidence supports the conclusion that an economic change of condition had occurred, the full board made no findings to support a determination that appellant's current wages are such as would require a suspension of all income payments. As appellant points out, if his wages were found to be $250 per week, then he may still be entitled to receive partial benefits since his wages with the employer were originally determined to be in excess of $250 per week. Therefore, as to this issue, we reverse the superior court with direction to remand to the full board for the entry of findings as to appellant's post change of condition wages and a calculation of the benefits, if any, to which appellant is entitled as a result of those findings. Compare *Newton*, supra.

[3] 2. Appellant next argues that the full board's decision to deny payment for appellant's orthopedic expenses was not supported because it was based on an erroneous finding of fact. The full board made several detailed findings of fact to support its decision that appellant suffered a new injury as a result of the automobile accident in January 1989 and that his physical problems cannot be attributed to the work related injury at the hotel. The full board found in part that appellant sought no further medical treatment for his orthopedic problems from June 1988 until a few days after the automobile accident. Appellant brings our attention to a statement by his treating psychiatrist that the psychiatrist had been administering medication for appellant's physical problems since June 1988 per an agreement with the physician who first treated these problems. Even if the full board did misstate this fact, "a misstatement of significant testimony is a ground for remand to the Board only 'where it is possible that a proper understanding of the evidence might have caused the finder of fact to reach a different conclusion.' [Cit.]" *Murray County, etc., v. Wilbanks*, 190 Ga.App. 611(3), 379 S.E.2d 559 (1989). In light of the remaining detailed findings that do support the full board's decision, including the Board-ordered independent medical report, we do not think that a different understanding of the contested evidence would have resulted in another conclusion by the full board. Since the award of the full board was authorized under the "any evidence" standard, "it must be affirmed even though the award was based on an erroneous finding and conclusion of fact. [Cit.]" *Liberty Mut. Ins. Co. v. Thomas*, 99 Ga.App. 124, 125(1), 108 S.E.2d 180 (1959).

[4] 3. In his third enumeration, appellant asserts that the award should be remanded to the full board for the entry of findings of fact with respect to the denial of payments for appellant's family/marital/sexual counseling. We agree. OCGA § 34-9-200(a) states that "[t]he employer shall furnish the employee entitled to benefits under this chapter such medical, surgical ... and other treatment, items, and services which are prescribed by a licensed physician ... which in the judgment of the State Board of Workers' Compensation shall be reasonably required and appear likely to effect a cure, give relief, or restore the employee to suitable employment." The claimant bore the burden of "proving that the services for which [he] sought compensation were such to 'give relief' directly to [his] work-related injury and were exclusively for [his] benefit." *Berry College v. Storey*, 199 Ga.App. 298(2), 404 S.E.2d 640 (1991). Since "[t]he purpose behind OCGA § 34-9-200(a) is to

provide services prescribed by a licensed physician which 'give relief' to the work-related injury of the employee exclusively ..., the employer is liable under [the statute] to compensate the injured employee for the full amount of [such services] only where the factfinder determines that all those services are for the exclusive benefit of the injured employee and directly give relief to the work-related injury. Otherwise, the employer is liable only for a proportional share of the [services] to relieve the work-related injury of the employee exclusively...." Id. at 299-300, 404 S.E.2d 640. In its award, the full board made no findings to support or explain its decision to deny appellant's claim for marital counseling. The full board did, however, acknowledge appellant's continuing mental and emotional problems and ordered that the employer remain responsible for the costs to treat such problems. The record reflects that appellant's treating psychiatrist recommended an ongoing program of family/marital therapy involving appellant's wife as an integral part of his overall therapy and treatment of his disability. Although we agree with appellees that any portion of this treatment that in effect treats appellant's wife or any other member of his family is not compensable under OCGA § 34-9-200(a), see *Berry College*, supra, the full board failed to make findings indicating whether the remaining portion of such treatment is or is not compensable under the statutory standard. Accordingly, we reverse the superior court on this issue with direction to remand to the full board for the entry of such findings.

[5] 4. In his fourth enumeration, appellant contends that the full board's decision to deny a prescription charge account was erroneous because OCGA § 34-9-200(a) requires an insurer to establish a direct billing system with a pharmacy. Appellant bases his argument on the amended statutory language which states that the employer "shall furnish" the services to the employee, rather than stating that the employer shall furnish compensation for the services. Appellant cites no authority which would make a prescription charge account mandatory, and we decline to so hold. The statutory language indicates that the full board, in its judgment, would have the authority to authorize a direct billing system, but such a system is not mandatory in every case. Especially in light of the full board's findings regarding a change in appellant's economic condition and his ability to work and generate income, the superior court was correct in affirming the full board's decision to deny appellant's request for a prescription charge account.

Judgment affirmed in part and reversed and case remanded with direction in part.

SOGNIER, C.J., and McMURRAY, P.J., concur.

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ROBB

v.

CSX TRANSPORTATION, INC.

No. A92A0898.

Court of Appeals of Georgia.

June 26, 1992.

Railroad worker sought damages for hearing loss injury under Federal Employers' Liability Act (FELA). The Fulton Superior Court, Hull, J., granted railroad's motion for summary judgment, ruling that suit was time barred. Worker appealed. The Court of Appeals, McMurray, P.J., held that worker knew or should have known of work-related hearing loss long before the three-year limitation period had run, and suit was thus untimely.

Affirmed.