

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1516

2007 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1516

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1516

House Industry, Business and Labor

Check here for Conference Committee

Hearing Date: **5 February 2007**

Recorder Job Number: **2855**

Committee Clerk Signature

Jan Prindle

Minutes:

Representative Lee Kaldor, District 20, introduced HB 1516. (Testimony Attached.)

Representative Zaiser: Do you see this as moving the bar regarding the burden of truth.

Representative Kaldor: Not really, because I assume their reason for denying the claim are concrete or at least explainable. When the WSI decides to overturn an Administrative Law Judge's decision which is contrary to their original decision, it seems appropriate to at least have the burden of proof shifted back.

Vice Chairman Johnson: Wouldn't the reason the case was there was why they didn't agree with it.

Representative Kaldor: When you tell the ALJ you don't agree, there should be a requirement for them to say why they didn't like the decision. Why go through the process if it's going to be overturned.

Representative Boe: Can I skip the ALJ step and go directly to the court? Or do I have to take that step.

Representative Kaldor: I am not sure, but I assume you must.

Chairman Kaiser: We can get clarification on that.

Representative Kasper: On line 23 where you state, "the burden of proof shifts to the organization to prove by a preponderance of the evidence. . ." Can you tell me what that means?

Representative Kaldor: This is the lowest burden of proof--51%.

Senator Tom Fiebiger, District 45, testified in favor of the bill. (Testimony Attached.)

Representative Kasper: Can you give us any idea of how many cases you have been involved with that address the issue before us.

Senator Fiebiger: I don't typically work with WSI type cases. I have been involved with administrative hearings. The idea behind this is the basic concept behind this is if there is a reason you are not following this decision, it should be explainable.

Representative Kasper: How do you get to a preponderance of the evidence?

Senator Fiebiger: You have to decide if it's more likely than not.

Chairman Kaiser: Do you know who pays for the hearing? At the ALJ level, is it exactly the same process as to the material presented as it would be at district court?

Senator Fiebiger: I think the agency pays, but am not sure. Perhaps the agency people testifying can clarify that. It's my understanding that it is a full-fledged hearing with witnesses and I believe the review following that is a record review of what happened at the hearing and that is primarily the record you would have.

Sebald Vetter, CARE, testified in favor of the bill. I want to comment a bit on my help and supporters here. I want to comment on you, Kaiser for what you're doing. I think you could do a little more for injured workers instead of sitting up here and we're pleading for help and we don't get no help. I heard a lot of testimonies on bills. There was HB 1285 that some of us made some real good remarks but when the voting time come you guys didn't hear the words. I wonder why. You got your people trained real good. I must say it's not democrats or republicans as we sit in here we can see which side goes which. I don't think its right Kaiser

to do this. You are controlling your people. They all follow you and that's all. There are some good men in here I think. We are pleading for help and we don't get it. I'm sorry I forgot to mention the woman too. It's not fair. We're pleading here and we're not asking much but I'm showing you a bill here that was argued this morning. Now you stop and figure. They said this morning that there are about 50 permanent total disabilities before, not it's going to 40. Not you just stop and add up, this does not come out. If there's more disability more than there was the last 30 years, is this system working better. Why are all them bills here for you this year? It's hard to decide, Kaiser. I know you are a well liked guy and we talked about this this summer. I don't think it's helping our organization. You hear a lot of sad testimony and I don't know why you are against us injured workers. I gotta mention Ruby. Who has he got at home for working now? Who is hauling his garbage? You got employees. What if they get hurt what are you going to do—throw them in the garbage and haul them to the garbage. Are you going to treat them like we are getting treated now? Stop and think. You probably got some good people there. I've begged before but I can see it don't help not the way you people vote—9-5 no matter what. If your doctor says you are permanent total disability from a back injury and workman's comp does not accept it. Why? You gotta be in the situation to learn what the situation is all about. Since 1997 I've been in it. President is going to church every day. He's asking for help. He wants to work with the democrat people. Remember folks, this can happen here. We're going to work a lot harder here. You lost quite a few this time; you'll lose a lot more next time. Stop and wake up. You're gonna be begging and we'll treat you people like you treat us.

Representative Kasper: I'm speaking just for myself. Representative Kaiser doesn't run me or talk to me about what I'm going to or not going to do in this committee. He has never, and I don't think he ever will. I don't think any person on this committee has ever had that request from him. He's a fair man. He may not be the way you would like him to be as far as his

votes, but he's a fair man and runs this committee very fair. I've been here since 2001 and on the IBL Committee since then. When I got here as a freshman I didn't know WSI from Job Service and I've learned and I've seen the benefits changed and enhanced by this Committee and passed by the republicans up there that you don't like. I ask you, have we made any positive progress from your perspective? Have we moved the benefits forward from 2001? Or has everything we've done and continue to try to do based on being able to afford and based on the testimony we here, have we made any progress in your eyes at all or is it all a bunch of garbage?

Vetter: Yes, you did make some good. I'm not saying that I hate the republicans. When we testified for that spouse bill I thought we had 100%. I'm not saying you are supposed to pass all the bills. The way it looks here it looks like he has you all trained. I didn't know much about Workman's Comp when I started, but I learned a lot since '97. I couldn't believe that Workman's Comp was that way and you didn't know anything and I believe it. A lot of you don't know. Kaiser knows the most. He should speak up a little more. It makes your hair stand up the way some are treated and you don't believe it.

Dan Finneman: I support the bill. I would like to thank you all for giving the opportunity to come up here to testify about things I thought was wrong with Worker's Comp. I have had to learn to forgive the things that they have done just like I will forgive you because your voting has been consistently not in favor of labor. That's your choice. Until you go through something and are injured no body knows what it's like. I forgive them for lying to me when I went out and got a job and they sent me a letter congratulating me on my job. I wanted to go and do something that was under my restrictions and only to be lied to when I got a letter saying your benefits are being cut. I talked to Dawn Bender and she said don't worry about it that was sent by mistake. After I requested information I found the job was not under my restrictions. I can also forgive them for taking from me, for robbing, for stealing from me about

\$180.0 to \$200.0 between DPI (?) benefits and wages. But I can say this to you that you will

have to sit down in a quiet place and decide if we are all up here telling lies to you or telling you the truth. I know this that come May when my son graduates, ND won't be my home. I was born and raised in this state and thought it was a good state to raise children up in, but if my son or daughter would be unfortunately injured in this state and knowing how many years I've come up here on my gas, my money, my expense—no body paid for it, and hoping that I would change things in this legislature, that you would say we need to take a look at doing something different because obviously things aren't working and there should be some type of system where you can back through and change things because you are supposed to right the wrongs that have been done. I can say if it were your son or daughter that was injured and went through the testimony you heard and you failed to change things, you would say this isn't right what's going on, we need to something. I wish you all the best and I harbor you no bitterness against you or against Worker's Comp. I think it's sad when I have to go out of this state to find a job when I'm willing to work. Charles Degaul, president of France, said this, "I have come to the conclusion that politics is too serious of a matter to be left up to politicians." I thank you very much and wish you all the best.

Leroy Volk: I apologize for being upset. My grandpa told me when I was a kid to plug one ear so things don't go right on through. I think that's what's happening here. I have relatives sitting in this room. I've got an uncle upstairs that's one of you guys and we get into it all the time. The only reason he made all his money is robbing people out of insurance. I know that if his dad were alive he would slap him to the other side of the room for not having any common sense. Thank you.

Ed Christiansen: I am in favor of HB 1516. I lose my cool sometimes and I'm not disappointed in some of the ways you guys vote. I just get pissed off a little. I didn't get disappointed because you vote just the way I thought you were going to vote. A guy takes the

time to write this bill and it takes less than 30 seconds. You know we were writing this bill; we talked to you about it. I understand that you guys are doing what you think is right. I do know the process. Everybody gets whipped. There's a whip on your side of the aisle and there's a whip on the senate side aisle. There's no body I'd sooner argue with than Workforce Safety. I think there are a couple of bills here that should have been considered. Some of them may be a little costly. There was a bill you guys voted down last week that was zero. Zero! They were the ones that wrote the bill and testified for it. It was to put ND people to work. I hope that Boe can take it on the floor and make somebody understand what it all meant. It was just putting people to work. Is there anything wrong with that? There were some bills that should have had more consideration than they did. You guys can go through some bill fast. I'd like to thank you for not having me thrown in jail.

Chairman Kaiser: This is an emotional subject and I just want you to know that we respect all of you guys. I want to reaffirm what Representative Kasper said and I'm speaking for everybody here at this table. We don't just look at this bill the day you walk up here to testify. We've read these bills in anticipation. I was up here Saturday and Sunday reading these bills and studying them. It's not a casual thing. We take this very seriously. We do believe we have a difference of opinion.

Dave Kemnitz, president of the ND AFL-CIO: We support this with just one suggestion. On line 22, change preponderance of the evidence to clear and convincing and I think we have a better bill. *Everyone laughs.*

Jodi Bjornson, general counsel, WSI, on behalf the WSI Board of Directors, testified in opposition to the bill. (Testimony Attached.)

Representative Boe: Can someone skip the ALJ and go strait to district court?

Bjornson: No. It is a prerequisite.

Representative Boe: What would happen if the ALJ hearing was binding?

Bjornson: That, in my perception, would turn the administrative agencies practice act on its head. I think that is a cornerstone of the act. For all practical purposes we do treat it as a binding decision unless we feel strongly on an issue we have to move forward on.

Chairman Kaiser: If it were binding, it would be binding for both parties. So the claimant couldn't go forward either.

Representative Thorpe: (unable to hear speaker).

Representative Kasper: WSI only rejects the ALJ recommendation 3% of the time. Would that be about 6 claims per year then?

Bjornson: There were 12 reversals in 2004, 2005, and 2006. That's how we came up with the average of 4 per year.

Representative Kasper: So we have 60,000 claims and 4 per year get to this bill? So the bill is asking us to change the total way WSI looks at handling these cases?

Bjornson: Correct.

Representative Zaiser: That puts a different light on it. You also talked about the extent of aspects of the ADJ hearing and all the work that went into it. Given the fact that there is that few number of overrides, do you think this would undue harm on the agency in terms of staff work. The other question on the flip side is would that maybe present a positive image whereby you could explain why you disagree with the judge.

Bjornson: *(Unable to hear part of this response.)* We would absolutely in those cases where WSI reverses, jeopardize everyone's interest. What we are going to end of doing in all cases even though in small numbers is having a full-fledged trial in the district court. I talked to our outside litigation counsel on this bill and it is their opinion It's not workable. *(This is only part of Bjornson's response.)*

Representative Zaiser: I wonder if we could get your outside counsel's opinion relative to

what you stated. Many of the positions that WSI has taken it has been stated that it was the board's position. Is there something that could be brought in from the board as well?

Representative Amerman: In the second to last paragraph in your testimony you say the added burden already exists under law where WSI must adequately explain, etc. Who are you explaining this to?

Bjornson: I think the best thing I can do is provide you with a statutory cite. That is 28.32.46. That is our administrative agency practices act. *(She read from the statute and it is unintelligible.)* . . .we take that very seriously. When reversing the ALJ we have to clearly define with specificity how we can support that. That burden is on us.

Representative Zaiser: If that burden is already there, I'm wondering given the few situations that occur why that is so difficult to render. Right now the burden of proof is in the hands of the injured employee in the same situation you are.

Bjornson: I don't know how to answer your question.

There being no further testimony, Chairman Kaiser closed the hearing of HB 1516.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1516**

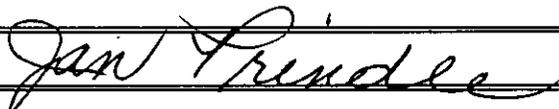
House Industry, Business and Labor

Check here for Conference Committee

Hearing Date: **6 February 2007**

Recorder Job Number: **2886**

Committee Clerk Signature



Minutes:

Chairman Kaiser opened discussion of HB 1516. This is Representative Kaldor's bill relating to district court appeals of WSI.

Representative Dietrich: This bill will shift the burden of proof to WSI during the appeals process.

Representative Zaiser: I move Do Pass.

Representative Amerman: I second.

Representative Ruby: I want to make sure that I understand this right. If it is ruled that WSI is not going to provide or process a claim where it is acceptable to the worker, the worker can request a hearing and the determination, when all the evidence is looked at and reviewed, is consistent and not going to fall on the side of the worker; then it goes to district court and what this would require then is that all that evidence would be looked at again where right now only the procedures are reviewed by the district court. Is that correct? They do not rejudge or retry the information that was presented.

Representative Zaiser: They do address issues of fact. So it's not just procedural.

Representative Boe: The part that I have a tough time understanding is the fact that the finding of an administrative law judge is not binding. When you go through that procedure

WSI has the right to either accept or deny it. They can overturn that. I would have thought it

would have been binding. I think if you go through the time and expense of this the outcome would be binding for both sides. Or, if they want to appeal it to district court it would be up to the court to decide the overturning for either side. I don't know if this is a step in the right direction or not.

Representative Zaiser: One of the things I found amazing that WSI would make such a big deal out this. I would think this is a softer approach than making it binding. Given the fact that WSI has legal assistance and the injured employee is in most cases probably poorer and cannot afford to hire an attorney. They then go through all this process and work and then the poor individual who doesn't have the finances has the burden of proof against this big agency. It seems like fighting city hall or David versus Goliath.

Representative Amerman: In a nutshell, there was statute mentioned by Mr. Bjornson that states that after the ALJ that ". . . the judge must affirm the order of the agency unless it finds any following present. . ." If the agency denies what the ALJ did, if they ruled in favor of the employee and were denied by the bureau, now the bureau must tell why they deny instead of the injured worker having to tell them why they won it in the first place. This is my understanding.

Representative Thorpe: This might be an attempt to go back to jurisprudence.

Chairman Kaiser: What will happen if this bill passes?

Representative Zaiser: The burden of proof moves to WSI. They have to provide a reason why rather than be silent. I'm not so sure it's true that this would change the ALJ situation as WSI testified.

Representative Dosch: I look at it and say "how big of a problem is this?" In WSI testimony they indicated that since 2005, they only rejected ALJ recommendations about 3% of the time. They go on to say where they reverse the ALJ decision; it's usually done over concern over a misapplication of the statute and not because of a factual disagreement. You could say that

98%-99% of the time it's not a problem. Are we going to change something here for that 1% or 2%?

Representative Boe: For perspective on that, for WSI it's a very small problem; but, if you are the injured worker, it's a huge problem. You have the expense to retry the case. If they overturn it, they should have to bear the burden of why they did it.

Representative Clark: I think WSI already explained that in the last sentence of their testimony. "WSI must adequately explain their reason for rejecting for evidence." They have to take that to the next level. They can't sit there silent and not say anything about why they overturned it. Am I right in my understanding of that?

Chairman Kaiser: Yes, but not quite.

Representative Zaiser: Let's assume you are right. If they have to adequately do it anyway, why not make it available to the claimant?

Representative Kasper: Yesterday when I made my comments to Sebald and I asked him if we haven't made some progress to benefit injured workers. He reluctantly admitted that the answer was yes. If we go back on things like this which is small problem, I think what we do is have the potential to cause a detriment to the fund which will cause a detriment to the ability to provide more benefits down the road. So rather than going backward we should go forward and continue to look at how we enhance benefits because this is such a small part of the problem.

Chairman Kaiser: I encourage you the last paragraph on the first page of ---?'s testimony. This is a really big policy question for us relative to WSI. When we established the ALJ its purpose was a buffer to avoid court for the injured worker and have somebody look at it. You don't have to hire an attorney and get prepared for a major court case. We put this preliminary level in there to review and look at the facts of the case. It's a resource for the claimant to go to. When they go to the court, it's still the preponderance of the evidence. It

doesn't matter which side takes it to court. I remember the Supreme Court saying please put in a buffer that can review the administrative part before they get to us. ALJs are not ruling on things like medical evidence, I think they are ruling on procedural things. That's my understanding. In contrast to the testimony of the bill sponsor, I see this as being a detriment to the injured worker. My argument is if you go to court, both sides have to present a preponderance of evidence. You cannot win unless you produce the evidence. The ALJ is an independent review outside of WSI.

Representative Dosch: We have to remember that 97% of the time, WSI accepts what the ALJ finds. If this switches to the preponderance to the evidence by WSI, guess what's going to happen. Rather than just 3% of these cases having to move forward to the next level, WSI will not agree with the ALJ and they will appeal it. You will have a lot more cases. Do we really want to take that step backwards? The ALJ was put in place to avoid every single case having to go to district court and the expense on both sides. If 97% of these are accepted, do we really want to go back to where the majority of them are settled in court and then what have we done for the injured worker.

Representative Kasper: Our job as legislators is to set policy. This is a policy issue. If 97% of the time the policy works, we ain't got nothing to fix.

Representative Amerman: Numbers are numbers. If 97% are accepted I don't see it as causing a huge rush to go to district court.

A roll call vote was taken: Yes: 6, No: 8, Absent: 0 The motion failed.

Representative Kasper: I move Do Not Pass.

Representative Ruby: I second.

A roll call vote was taken: Yes: 8, No: 6, Absent: 0

Representative Dosch will carry the bill.

FISCAL NOTE
Requested by Legislative Council
01/19/2007

Bill/Resolution No.: HB 1516

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.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 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.*

2005-2007 Biennium			2007-2009 Biennium			2009-2011 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 shifts the burden of proof to the organization in the event a claimant appeals a WSI decision in which WSI did not accept the recommended findings of the administrative law judge.

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
2007 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: HB 1516

BILL DESCRIPTION: Appeals of WSI Decisions

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 shifts the burden of proof to the organization in the event a claimant appeals a WSI decision in which WSI did not accept the recommended findings of the administrative law judge.

FISCAL IMPACT: Although the proposed legislation may serve to increase litigation costs in a small number of cases, based on current litigation levels we do not anticipate that the proposal will have a significant impact on statewide premium rate or reserve levels. To the extent the levels of litigation would increase, costs would increase accordingly.

DATE: January 26, 2007

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:	328-3760	Date Prepared:	01/26/2007

Date: 2-6-07
 Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. AB 1516

House Industry Business & Labor Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DO PASS

Motion Made By Rep Zaiser Seconded By Rep. Amerman

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser		X	Rep. Amerman	X	
Vice Chairman Johnson		X	Rep. Boe	X	
Rep. Clark		X	Rep. Gruchalla	X	
Rep. Dietrich	X		Rep. Thorpe	X	
Rep. Dosch		X	Rep. Zaiser	X	
Rep. Kasper		X			
Rep. Nottestad		X			
Rep. Ruby		X			
Rep. Vigesaa		X			

Total Yes 8 6 No 8 8

Absent 0

Floor Assignment Rep. ~~Dietrich~~ Dosch

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

Date: 2-6-07
Roll Call Vote #: 2

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1516

House Industry Business & Labor Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DO NOT Pass

Motion Made By Rep Kasper Seconded By Rep Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep. Amerman		X
Vice Chairman Johnson	X		Rep. Boe		X
Rep. Clark	X		Rep. Gruchalla		X
Rep. Dietrich	X	X	Rep. Thorpe		X
Rep. Dosch	X		Rep. Zaiser		X
Rep. Kasper	X				
Rep. Nottestad	X				
Rep. Ruby	X				
Rep. Vigesaa	X				

Total Yes 8 No 6

Absent 0

Floor Assignment Rep Dosch

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

REPORT OF STANDING COMMITTEE

HB 1516: Industry, Business and Labor Committee (Rep. Keiser, Chairman)
recommends **DO NOT PASS** (8 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING).
HB 1516 was placed on the Eleventh order on the calendar.

2007 TESTIMONY

HB 1516

Testimony on HB 1516
House Committee on Industry, Business and Labor
Rep. Lee Kaldor
February 5, 2007

Mr. Chairman and members of the the IBL committee, thank you for the opportunity to appear before you today to introduce HB 1516 amending 65-10-01 relating to district court appeals of workforce safety and insurance decisions.

HB 1516 is a fairly simple bill, but it is also simply fair. What it says is that if Workforce Safety and Insurance (WSI) choose not to follow the findings of the administrative law judge (ALJ) denying a claimant's right to recovery, then, the burden of proof shifts to WSI for their choice not to follow the decision.

In the appeal process, the ALJ presides over the hearing, hears the testimony and arguments from both attorneys, reviews all the evidence and then writes their "recommended" conclusions of law and statement of facts. These "recommendations" or findings are often 10 to 25 pages in length.

The problem is that both sides have gone to considerable expense, time, and effort going through this legal proceeding only to ultimately give WSI the ability to overturn all of that work without providing even a reason for their decision. This seems inherently wasteful and unfair and it begs the question of why the ALJ's decision is not binding? Ideally, it probably should be, but this bill does not go that far. This bill leaves the power to overturn the ALJ's decision, but it just goes on to say that if they do not concur, they have to provide a good reason for doing so.

One would think that they would always have a good reason when they overturn an ALJ's decision, so that in this case; it should not be a problem to disclose it to the claimant and the ALJ.

House Bill 1516

Mr. Chairman, members of the Industry, Business and Labor Committee, my name is Tom Fiebiger, Senator, District 45, Fargo. I am here in support of HB 1516 and to encourage you to give this bill a "Do Pass" recommendation.

This bill is a common sense bill that provides that if Workforce Safety and Insurance (WSI) elects not to follow the recommendation of the Administrative Law Judge (ALJ), then the burden of proof shifts to WSI to articulate why they chose not to follow the ALJ.

In the appeal process, the ALJ is the one who presides over the hearing, hears all the testimony, has the ability to judge the credibility of the witnesses, hears the arguments of the attorneys and then writes their "recommended" conclusions of law and statement of facts. Often times this is a detailed ten to twenty five page decision. What is the logic behind requiring both sides to go through this long, involved and costly process, relying upon the ALJ's expertise, than not requiring WSI to give any reason for not following that ALJ decision?

Perhaps the ALJ decision should be binding. Currently, it is not. This bill does not go that far, but it does seek to require valid reasons why the ALJ's decision is not being followed by WSI. As a practical matter, there should certainly be a good and explainable reason that WSI should be able to articulate if it chooses not to follow an ALJ's detailed decision. Otherwise, the ALJ decision should be upheld.

I have been a practicing attorney for over twenty years, spending most of that time representing North Dakota workers in labor and employment matters. This small change would go a long way towards addressing one of the most frequent concerns I have heard from many of our citizens, that being please provide a process that fosters a real and fundamental fairness for all that participate. I urge a "Do Pass" to help make this part of the process fairer to all.

2007 House Bill No. 1516
Testimony before the House Industry, Business and Labor Committee
Presented by: Jodi Bjornson, General Counsel
Workforce Safety & Insurance
February 5, 2007

Mr. Chairman, Members of the Committee:

My name is Jodi Bjornson, General Counsel with Workforce Safety and Insurance (WSI). I am here on behalf of WSI and its Board of Directors to testify in opposition to HB 1516. This bill proposes to shift the burden of proof to WSI in appeals to a North Dakota District Court where the organization rejected a decision of an administrative law judge.

If an injured employee disagrees with a decision made by WSI, they may request an administrative hearing to have the facts of the claim reviewed and receive a recommendation on whether the hearing officer felt WSI's decision was correct. The hearing is similar to a court trial; witnesses testify under oath, and other evidence is considered by an administrative law judge who issues a written decision. WSI either accepts, rejects, or modifies the decision and issues a final order.

If the injured employee disagrees with WSI's final order, they may appeal to a North Dakota District Court. In an appeal to the district court, the judge will review the evidence submitted to the administrative law judge and determine whether WSI's factual findings are supported by the evidence or are in accordance with the law. The district court does not receive new evidence or listen to testimony of witnesses.

If the district court upholds a WSI final order, the next step for an injured worker is to appeal to the North Dakota Supreme Court. Like the district court, the supreme court does not hear new evidence or listen to witness testimony. The supreme court reviews WSI's decision(s) and determines whether it is in accordance with the law or supported by the facts of the case.

If HB 1516 is enacted, the burden of proof will shift to WSI to prove by a preponderance of the evidence that the claimant is not entitled to the benefits sought. By shifting the burden to WSI to prove the claimant is not entitled to the benefits sought --a trial court issue-- the district court will be transformed into a trial court in administrative agency appeals. An evidentiary trial and significant supplementation of the record will likely be necessary. This burden shift will confuse and delay the process, as well as increase litigation costs in those cases that WSI determines a reversal is appropriate and necessary; neither of which is beneficial to any of the parties.

It is important to note, that as a result of working with injured worker stakeholders, WSI modified the attorney fees provision under 92-01-02-11.1 of the NDAC to accommodate injured workers by providing additional attorney fees in those few instances where WSI wholly rejects a recommended decision. Currently, WSI will award an additional twenty-five percent in attorney fees to claimants when a recommended decision is reversed by WSI and the claimant ultimately prevails.

It should be noted that disputed claims represent a small percentage of the total claims filed with WSI each year. Of the approximately 20,000 claims filed each year, only about one percent (200) of the claims request an administrative hearing. Of those 200 requests, an administrative hearing is held in approximately one-half (100) of the requests filed. Of those 100, 20 advance to either the district or supreme court. So when reviewed in totality, only one-tenth-of-one percent of all claims filed each year are appealed to the district or supreme court. Additionally, since 2004, WSI has only rejected the administrative law judge's recommended decision about three percent of the time.

WSI data shows that since 2004 the organization requested 12 reversals for an average of four reversals per year. This data clearly shows that WSI regularly defers to the administrative law judge's factual and legal determinations. On the occasions where WSI reverses a recommended decision, it is usually done because of a concern over the misapplication of a statute and not because of a factual disagreement. More importantly, if WSI reverses a recommended decision, an added burden already exists under the law where WSI must adequately explain its reasons for rejecting the evidence favorable to the injured employee.

Due to the presented reasons, WSI asserts that the changes proposed under HB 1516 are not necessary. I would be happy to answer any questions you may have at this time.