

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2/23

2007 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2123

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2123**

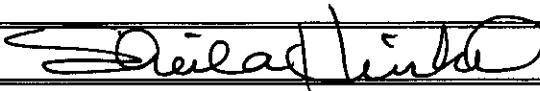
Senate Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: **January 16, 2007**

Recorder Job Number: **1221 [m 14:23]**

Committee Clerk Signature



Minutes:

**Anne Jorgenson Green – Staff Council with WFS**

### **TESTIMONY #1**

Proposes several changes. Covers testimony.

1221 tape ends, continues on 1222

**S Klein:** See we've had a lot of discussion on the newspaper issue. How do you intend to rate these folks? If we bring them under WSI, we need to know what kind of risk they are. Are we looking that we may be a percentage rate too high?

**A Green:** Currently there is a composite rate: 43:10 entitled "Printing and Publishing" that rate classification includes a number of risks. There is a rate classification. Some industries that are combined for rate classification and rate making. Printing and publishing is one of those. Under that classification, [lists classifications 4:30] Current rate \$1.28 per \$100 of reportable payroll.

**S Hacker:** Clarification purposes, when you take out the max rate, there will only be a minimum rate now.

**A Green:** Yes, that's correct.

**S Hacker:** How would this real-life affect...[example of newspaper girl m 5:43] Would they all become employees then of the newspaper?

**A Green:** That ultimately is the decision of the owner of the newspaper, the newspaper publisher. Those folks in management would make the decision who are the employees of the newspaper route. Who is it who they have hired to deliver those newspaper.

**S Hacker:** So then someone who delivers a newspaper has to be an employee? Or can they just be a sub-contractor?

**A Green:** Under current law there is an exception. Newspaper carriers are not employees. Proposed legislation acknowledges that that relationship between newspaper delivery and publisher is integral of the business of a newspaper owner. Delivery people are an intergral for newspapers, if they didn't have them, readership would decline. Integration is one of the factors that is considered critical in the determination of employer/employee relationship.

**S Klein:** Aren't they independent contractors?

**A Green:** ND Work Comp law presumes employment unless there is the ability to prove that an individual is an independent contractor. It's difficult to "parse out" whether an individual delivers two papers.

**S Andrist:** Newspaper deliveries are independent contractors, sometimes it's a family operation. What responsibility does the publisher got for paying premiums if there are several people involved in a route? What happens when "Mom" is going to be employee and then Billy falls off his bike on Saturday? Does he get coverage? How are you going to convert this to employee status when it's very obvious they are independent contractors.

**A Green:** Responsibility of Newspaper publisher is exactly the same, as it is to UPS driver and UPS distribution. Same as person driving an 18 wheeler and the person directling a certain route to a certain place. Same as person at a pizzeria and delivers it to your home. Johnny falls off his bike while delivering paper, or Mom slips on ice, mom might have benefit of a medical coverage which might or might not go along with an independent contractor

relationship, but Mom wouldn't have the benefits of Work comp law, i.e. disability benefits that would go along with that relationship.

[m 9:49 Examples, explaining]

Coverage under the work com, disability, wage loss....

**S Andrist:** I understand this, but if you have a family newspaper out there, the newspaper publisher makes a contract with Mom, so the publisher pays the premium, and Billy falls off his bike while delivering papers. Does he have any coverage?

**A Green:** that would be a decision that would have to be made on the facts of the case. If he was an employee....

**S Andrist:** ....but he's a substitute....

**A Green:** If he is an employee of the newspaper, coverage would flow.

**S Behm:** This is an extra burden on our papers. Each paper has their own operation, it is unfair to weekly papers. Why would he need to be covered by Workmen's Comp?

**A Green:** [m 13:20 – uses example] Rural ND contracts. Talks about large trucking companies. Those mail carriers are covered under rate classification 7215 is significantly higher than the \$1.28 per hundred that we're talking about.

**S Behm:** I've had numerous emails that says to defeat the bill.

**S Wanzek:** There are other parameters. "Who owns the bike?" "Who owns the auto?" Who's putting gas in it? Who's delivering the mail. UPS owns their own trucks.

**A Green:** True. There are factors determining independent contractors and who is an employee varies on all of those factors. Pizza delivery people get mileage. With papers, they get reimbursement. Question is how integrated are they to delivery?

**S Potter:** Watchword to never pick a fight with people who buy ink by the barrel, so after we kill your changes in section 1, is there anything else important in the rest of the bill?

**S Klein:** We will give it full and fair hearing.

**A Green:** The remainder of the bill are changes that WSI seeks.

**S Klein:** What's the maximum limit? Isn't there a cap?

**A Green:** The maximum is Plus 75% of base premium.

**Support? Opposition?**

**Bill Shalop – ND Chamber of Commerce – *In Opposition***

Opposed to several sections on independent contractors. How integrated is the work to the business, I can argue that the service that I have my office buildings come in and change lightbulbs are extremely integrated to my business. Without lights, no one in the office is going to function. They are independent contractors.

2<sup>nd</sup> Part, #4, remember the negative fund employers that this is an "insurance fund." A cap is a pooling decision. [m 20:00] Set at 75% if to be set to 100%, that is what it should be raised, rather than a cap completely, causing some problems.

**James Boberg – Circulation Director of Forum of Fgo-Mhd - *In Opposition***

**TESTIMONY #2** [M 22:00-24:21]

Newspaper carriers are independent contractors.

**S Hacker:** The insurance you brought up, is the Forum the only place that offers that or do lots of papers offer that.

**J Boberg:** No, it's commonplace It's 3<sup>rd</sup> party vendor.

**S Hacker:** You know about the cost? How would it affect the gal with 2 kids?

**S Wanzek:** As an individual, they assume full responsibility or risk?

**J Boberg:** They understand.

**S Wanzek:** So they can get their own Insurance, auto insurance.

**Barb Olson – with Fargo Forum - *In Opposition***

Adult policy is \$8.80 per month

Child policy \$2.60 per month

It is accident insurance.

**S Andrist:** Can you buy a family policy?

**B Olson:** Yes, substitutes would also be covered.

**Jack McDonald – ND Newspaper Association - *In Opposition***

**TESTIMONY # 3**

I think this is a solution looking for a problem. [m 29:03]

Eliminate Section 1 from the bill. See bottom of Page 2, takes out the section 1 from the bill.

Attached is March 2000 opinion by Administrative Law Judge on the point. Page 16 reflects the opinion, page 4 is the opinion of the court on newspaper carriers.

**Leroy Volk – [m 31:20] *In Opposition***

I have a friend who delivers papers, they come from Fargo. They delivery papers for several cities, who are they going to get paid by. I think this is a pork belly.

**More Opposition? Neutral?**

**Vern Hicks - Local #566 Steel Workers – *In Opposition***

Need to go back into records, in 1995 I testified, that's when Worker's Comp back then and that's when they put them IN as Independent Contractors.

**CLOSE 2123**

# 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2123 B**

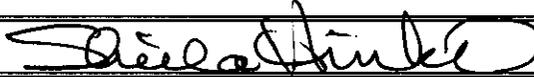
Senate Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: **January 17, 2007**

Recorder Job Number: **1325**

Committee Clerk Signature



Minutes:

**S Klein:** This bill is about the newspaper issue on WSI

**Discussion:** [General suggestion to kill the whole bill]

**S Andrist:** Move

**S Klein:** We are having amendments drafted. Strikes the language on 2 and removes lines- in reference, it strikes the whole first section of the bill. [m 10:00 explains what is removed from the bill] All of section 1. Spoke with LC and told would take out just that section.

**S Potter:** Aren't they taking out existing law?

**S Wanzek:** All we're doing is removing Section 1 which would leave the law as it is.

**S Klein:** Newspaper association came in, could see no compelling reason...

**S Heitkamp:** It's an old fight. If there was an article in the paper against WSI, now the paper carriers would have to be covered by WSI.

**Motion from Heitkamp**

**Second from Wanzek**

**For Amendment 78173.0101**

**Roll Do Pass 7-0 SB 2123**

**Do Pass as Amended**

**Motion from Wanzek**

**Second from Hacker**

**Roll – Do Pass 7-0 SB 2123**

**Carrier Andrist**

**S Klein:** \_\_\_they don't support section 1, ...

**Motion Withdrawn for a Do Not Pass**

**Now Do Pass as Amended from S Wanzek**

**Second S Hacker**

**S Potter:** One of the reasons I was suggesting a "Do Not Pass" is my annoyance with WSI at bringing in bills that are so totally unrelated in their sections, this may be a way to say "Don't do that."

**S Heitkamp:** I wasn't here, why is this a good bill?

**S Klein:** Because Dave Kemnitz did not speak against it. I'm not saying Dave was in opposition, but they were neutral, they probably could have incorporated it in another bill.

**S Heitkamp:** More reflective of whose using WSI, the benefits. Maybe the employer who provides more of a safe environment results in lower usage of WSI benefits will get more of a benefit.

**S Andrist:** I'm probably going to vote for it because most of the rest of it is mostly OK. I was inclined to vote for the "Do Not Pass" because I was offended that they presented the first section without researching how it applies without studying the issue, I think we deserve better. They couldn't answer their questions, the chief witness just blew smoke at the questions we asked her, I think we ought to expect better of the agency.

**S Behm:** I totally agree. It seemed like it come from under the table somewhere.

**S Klein: Roll for Do Pass as Amended on SB 2123**

**Roll 7-0 Do Pass**

**Carrier: Andrist**

**S Andrist:** You know how much I'm going to get ridden. This week?

[ends m 19:34)

**FISCAL NOTE**  
 Requested by Legislative Council  
 01/24/2007

Amendment to: SB 2123

**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 engrossed bill clarifies certificate of coverage language; allows WSI to reveal those employers who are in a delinquent or uninsured status; removes the 75 percent experience rate surcharge cap; and clarifies risk management program language.

**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: Engrossed SB 2123

BILL DESCRIPTION: Employer Services

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 engrossed bill clarifies language permitting WSI to indicate on a certificate of coverage that the policyholder does not have employees; allows WSI to reveal those employers who are in a delinquent or uninsured status; removes the existing 75 percent experience rate surcharge cap and establishes an effective date; and clarifies language to accommodate changes to risk management programs.

Rate Level Impact: The elimination of the 75% experience rate cap will increase premium income from employers that have generated poor experience in the past. Although not material, future statewide rate levels will be established with an offset to reflect this additional income.

DATE: January 24, 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.

<b>Name:</b>	John Halvorson	<b>Agency:</b>	WSI
<b>Phone Number:</b>	328-3760	<b>Date Prepared:</b>	01/24/2007

**FISCAL NOTE**  
**Requested by Legislative Council**  
01/02/2007

Bill/Resolution No.: SB 2123

**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
<b>Revenues</b>						
<b>Expenditures</b>						
<b>Appropriations</b>						

**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 legislation requires coverage for newspaper carriers; clarifies certificate of coverage language; allows WSI to reveal those employers who are in a delinquent or uninsured status; removes the 75 percent experience rate surcharge cap; and clarifies risk management program language.

**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: SB 2123

BILL DESCRIPTION: Employer Services

**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 removes the exemption from coverage for newspaper delivery personnel; clarifies language permitting WSI to indicate on a certificate of coverage that the policyholder does not have employees; allows WSI to reveal those employers who are in a delinquent or uninsured status; removes the existing 75 percent experience rate surcharge cap and establishes an effective date; and clarifies language to accommodate changes to risk management programs.

**Rate Level Impact:** Requiring coverage for newspaper delivery personnel should not have an impact on statewide premium levels as premiums will be charged to cover the anticipated losses. The elimination of the 75% experience rate cap will increase premium income from employers that have generated poor experience in the past. Although not material, future statewide rate levels will be established with an offset to reflect this additional income.

DATE: January 12, 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.

<b>Name:</b>	John Halvorson	<b>Agency:</b>	WSI
<b>Phone Number:</b>	328-3760	<b>Date Prepared:</b>	01/12/2007

*JB*  
*1-18-07*

PROPOSED AMENDMENTS TO SENATE BILL NO. 2123

Page 1, line 1, remove "subdivision b of subsection 16 of section 65-01-02 and"

Page 1, line 3, remove "the definition of employment,"

Page 1, remove lines 8 through 24

Page 2, remove lines 1 through 17

Page 6, line 11, replace "4" with "3"

Renumber accordingly



Date: 1-17-07

Roll Call Vote: 2

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2123

Senate INDUSTRY BUSINESS & LABOR Committee

Check here for Conference Committee

Legislative Council Amendment Number ~~DO NOT PASS~~ DO PASS

Action Taken WANZEK AS AMM.

Motion Made By POTTER Seconded By ARTHUR BEHM HACKER

Senators	Yes	No	Senators	Yes	No
Chairman Klein, Jerry	✓		Senator Behm, Arthur	✓	
Senator Hacker, Nick VC	✓		Senator Heitkamp, Joel	✓	
Senator Andrist, John	✓		Senator Potter, Tracy	✓	
Senator Wanzek, Terry	✓				

Total Yes 7-0. No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment ANDRIST.

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

**REPORT OF STANDING COMMITTEE**

**SB 2123: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2123 was placed on the Sixth order on the calendar.**

Page 1, line 1, remove "subdivision b of subsection 16 of section 65-01-02 and"

Page 1, line 3, remove "the definition of employment,"

Page 1, remove lines 8 through 24

Page 2, remove lines 1 through 17

Page 6, line 11, replace "4" with "3"

Renumber accordingly

2007 HOUSE HUMAN SERVICES

SB 2123

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2123

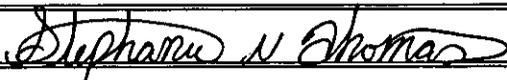
House Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: February 27, 2007

Recorder Job Number: 3934

Committee Clerk Signature



Minutes:

**Chair Keiser** opened the hearing on SB 2123.

**Anne Jorgenson Green, WSI:** See written testimony #1.

**Rep. Amerman:** In section 1 where the proposed language permits the organization print a certificate, identify the account, one which has no employees. If I have a business, and I have no employees, what do I pay a month?

**Anne:** Typically, coverage is mandatory if you have employees, but if you maintain optional coverage on yourself, you would still be issued a certificate of premium payment that you as the business owner choose to cover yourself.

**Rep. Keiser:** What happens to the employer, the owner? Do they automatically have coverage, or do they have to take the actual coverage?

**Anne:** Coverage for an owner is optional. That's not mandatory coverage. If I own my own business, I don't have to ensure myself, or my officers, or my spouse, or in some cases my children with workers compensation coverage.

**Rep. Nottestad:** In section 2, on disclosing confidential information, how do they find out now that this be the case?

**Anne:** A contractor could currently call WSI and require into the status of a contractor, or a subcontractor. This proposed change would permit us to release that information in the aggregate, in other words more than one contractor, or subcontractor.

**Rep. Nottestad:** In other words you are saying that could be sent out in a memo to all concrete contractors that these small ones are not in compliance, or what means of distributed do you have in mind?

**Anne:** Arguably yes, it could be disseminated in that respect. The purpose behind this particular amendment is contemplate the program that is being worked on within WSI to permit a contractor to go online and look up a particular subcontractor, to look up a particular employer, and find out if that particular subcontractor is insured in the state of ND.

**Rep. Nottestad:** Is this type of system, or method used in other states, or is this something that you people here are using as a trial to lute on so to speak?

**Anne:** I can't speak to all jurisdictions, but I do know that Brick Street Mutual which is the insurer in West Virginia has a program very similar to that.

**Rep. Dosch:** On section 3, can you give me some examples, or data on the affect that this would have on a various size employers in the state?

**Anne:** I don't have the appropriate answer for you right now, but I can get that to you.

**Rep. Dosch:** On section 4, dealing with your premium discounts for your written management program, that program has already been changed, hasn't it?

**Anne:** Yes.

**Rep. Dosch:** What are we changing here?

**Anne:** We're changing the language on the Risk Management Program. We're taking out the requirement that certain employers be involved, or be enrolled in the Risk Management Program.

**Rep. Dosch:** Do you have information or data on the success of this program since it has been changed not only from the major problem accounts, but the impact on small and medium employers, the majority of those which have now lost their premium, their discount?

**Anne:** Those numbers are just beginning to role in those programs, the RMP Plus, the Risk Management Plus, and the SOP, the States Outreach Program. As those two programs begin to work through their first full year of premium, we're beginning to see those numbers. My understanding is that the vast majority of employer accounts, when they are renewed are achieving that discount as we move into their second year of participation in that program.

**Rep. Dosch:** When those numbers become available, I think it's important that this committee receive them, because just from my own standpoint, and talking to similar employers such as myself that the majority of those are losing this discount, because they've been good in the past, and because they aren't getting better that now all of a sudden they drop. You're simply looking at the results based, and I think that is a serious flaw with that program strictly looking at results based, and not the preventative side like you were doing in the past.

**Anne:** I'll see that you get those numbers.

**Sandy Blunt, WSI:** We're about the 1<sup>st</sup> 7 months data. I really want to talk about why this program is placed, and I will tell you the program has been tremendously successful. Before we had a program where we would have 3,000 or less employees, and we would collect \$5 million in premium from all employers to give to 3,000. Now what we're talking about is we do not collect premiums from everybody, we use it for the reserves out of part of our investment. Out of that we expect to get up to \$25 million; in fact we had doubled, and maybe even tripled the \$5 million in dividend credits for performance. Before this program, we were seeing a tread upward consistently upon claims. We have now seen it peak out, and is possibly dipping. The ratio that we see of the most severe claims per 100 is continuing to go down.

What this program says is instead of just collecting \$5 million and giving it to 3,000 people, every employer in the state that is above minimum is now automatically enrolled in the program, and we will partner with you. If you do these things, they work. If you continue to have claims in frequency, or severity lost days off, we're not going to keep giving you a discount, because you filled out 10 steps on paper. What we were doing was giving discounts to people. It was a phenomenal program, it was a great start, and it's the work of the legislature from something we didn't have. The difficulty is human nature, just like when you work, you chop wood, you start chopping wood and your hands hurt something fierce, then you eventually get a callus, and you don't even notice it. The same things happen behaviorally. Every 5 to 7 years you have to take programs, because they become a complacent pattern for people, and you have to hang that ball. What we say is if you have a reduction in frequency, meaning number of claims by 10%, we'll give you a discount. Small and large, we're giving out more money than we ever have for people remaining, and we're actually seeing the larger companies, and people who are having more severe injuries that are dropping, and they're coming in and telling us I would have never done this had you not held me accountable. I didn't like you, I don't like it, but it works.

**Rep. Keiser:** Are you still allowing mulligan?

**Sandy:** Those are concerns that you and Rep. Dosch had, and both came in and said look I like the concept, but it's unfair for those people that might have an injury or two. We've created a test; it's called a second test. What we do is we look at those industry classifications, and we're reporting them to unemployment right now. What it says is its grouping you already by what type of industry you are. We load that data, and then what we find out is per million dollars in payroll, how many injuries are in trucking, healthcare, and then whatever industry you're in, if you're in the top 1/3 of that, and even if you do have claims, but

your injury is per million dollars of payroll are lower than that number even while you're adding some in the frequency, you automatically are going to get that. That is a direct result of Chairman Keiser and Rep. Dosch coming to the table after the bill and saying look, this is an unintended consequence, we didn't mean it, and people have been passing that second test.

**Rep. Keiser:** Then with groups that had 0 injuries, or 1-2 injuries, how do you deal with that?

**Sandy:** In your first year when you're looking at that comparatively, most of them are automatically qualifying.

**Rep. Keiser:** In the bill, we're taking Roughrider off the requirement to do the safety program as I read this.

**Anne:** Roughrider will continue to be an automatic participating RMP plus. The governments that Sandy referenced, they will continue to participate as all other employers in the state. We took out that reference to risk management for them.

**Rep. Keiser:** When we eliminate the maximum rate cap, do we provide enough for employers to buy their way down? Do they have an opportunity to come back to WSI and say look at my experience rating, I want to self insure a little bit, and I want to pay a deductible, do you allow that?

**Anne:** Currently, it's not my understanding that we currently are looking at that possibility. Statutory ability exists within a section of 55.04 that would permit the exploration of that kind of a program.

**Rep. Nottestad:** Why was Roughrider Industries excluded from the risk management?

**Anne:** Roughrider Industry has not been excluded from the risk management program. That language has been struck from that particular section, but as with all employers in the state, the risk management programs that existed a year ago have been replaced with RMP Plus, and SOP. This particular section was inadvertently not excluded last session.

**Rep. Keiser:** Roughrider attempted to get into WSI coverage for about 3 or 4 sessions. We had a real concern about the exposure to the sole fund, and when we did allow Roughrider in, it was under two conditions. One, that they had to belong to the safety program, it wasn't optional as it was for all other industries. Two, they basically had to have somewhat of a separate account with risk management from the state involved in participation in this account. So, this is based on the new approach, and based on their amazingly successful performance out there. It is appropriate to take that requirement out at this time, I would say.

**Bill Shalhoob, ND Chamber of Commerce:** Support SB 2123. See written testimony #2.

**Rep. Ruby:** I don't know if you talked to some of your members to find out how many of them are affected by this? Do you have any idea how many employers in the state get this cap?

**Bill:** There are approximately 40 employers in the state that are at this level is what I was told. The reason that we supported moving the cap is that some of them are so far over there is no incentive for them to do anything, and so unless you start to raise the rate, all they're going to do is keep dragging down the other 20 some thousand members in there. The chambers position has been that positive employers should be rewarded and negative balance employers, to the extent that understanding this is an insurance pool, and we know how an insurance pool works, but on unemployment and this we feel we should achieve balance within this. Balance means having negative employers pay more, and that's what this would do, instead advising them to actually move forward to becoming more positive.

Hearing closed.

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2123

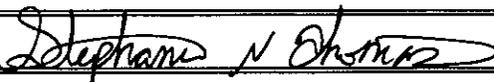
House Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: March 7, 2007

Recorder Job Number: 4535

Committee Clerk Signature



Minutes:

**Chair Keiser** opened the discussion on SB 2123. This bill is when an employer is uninsured, starting benchmarks for the safety program, the employer may select a preferred provider, it also eliminates the statutory formula for maximum rate, it eliminates the experience rating, and takes Roughrider out, which is just housekeeping.

**Rep. Dosch:** I waited on some additional information on some numbers based on removing of the 75% tax cap. The numbers indicted that removing that probably wouldn't be as detrimental as I thought. Personally, I just don't like the bill, I don't like the cap provision, and I don't like the new safety program. It does take care if they did have a major problem where the majority of the losses are occurring, and they're addressing that, and that's a very good thing. I think on the other side the small, medium size companies, I think we are going to hear from people whose premiums are renewing this year, and we are going to find out if they're not getting the safety discount anymore. I don't plan on supporting the bill.

**Rep. Ruby:** I move a do pass.

**Rep. Johnson:** Second.

**Rep. Keiser:** I strongly support that WSI could be allowed to make public that an employer is uninsured or delinquent. The safety program is in some large part a result of conversations

that I have had with WSI and others probably as well, that we had from my perspective, an invalid safety program. All I had to do in my company to get the safety discount is appoint somebody as the head of our safety program, which I did, and then to have a periodic meeting with our employees to talk about safety. It did have some benefits, but it had no relationship with the number of injuries we had. We have to really enforce safety; we're concerned constantly about safety, so we improve our safety as a result of having a committee. We did have some bad apples out there that were not safety conscience at all that were accounting for the major proportion of claims, and dollars being spent out of the fund that were getting the discount, because they met the requirements. I wanted based in outcome. Now, they've come up with a program, and have implemented two things which I strongly support. One is the mulligan program, and I believe you can have up to three injuries per year that won't go against you. In addition to that the second part of their new safety program, the current safety program says if you show this much improvement in reduction of claims, then you qualify for the safety program, it's outcome based. If you're bad, and you improve 10%, you get a reduction. It was a year and a half ago when they first started talking about it, came forward, and Rep. Dosch and I met with them and said what about our mulligan? Our company had a perfect record, and has one claim, and they get a huge hit, that's not fair, and they agreed. The other side of the coin is initially the way you qualify for the discount was to show improvement. How can you improve when you've had zero claims? You have no where to go, what if you have one claim, there's nowhere to go. So, the second part of their safety program is if within your industry if your companies experience rating is in the top cortile, even if I've had two accidents this year, I get the discount. That seems reasonable to me, because we had to protect the people who are doing a great job, and they had no chance to get it. So, that

I support. They had eliminated the statutory formula for the max rate, and I support that. The experience rating, and even the Roughrider I don't oppose to just a technical thing.

**Rep. Zaiser:** Are all those benefits, in terms of the ratings based on the types of business?

**Rep. Keiser:** Yes.

**Rep. Johnson:** I sit on our board of directors for our company, and we were in the manufacturing within the construction, and because of the new system we're not in that top cortile in our industry. So, we have said as a board and as a business, we now have a full time safety person whose job is to work on safety programs, and educating people, and because of this change in workers safety, we have made a stronger commitment for safety in our division.

**Rep. Keiser:** Once you set an arbitrary the top cortile gets it, and everybody's fighting to get into it. It gives us a goal.

**Roll call vote was taken. 10 Yeas, 2 Nays, 2 Absent, Carrier: Rep. Nottestad**

Hearing closed.

Date: 3-7-07  
Roll Call Vote #: \_\_\_\_\_

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2123

House Industry Business & Labor Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass

Motion Made By Rep. Ruby Seconded By Rep. Johnson

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep. Amerman		
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 10 No 2

Absent 2

Floor Assignment Rep. Nottestad

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

**REPORT OF STANDING COMMITTEE (410)**  
March 7, 2007 12:35 p.m.

**Module No: HR-43-4635**  
**Carrier: Nottestad**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2123, as engrossed: Industry, Business and Labor Committee (Rep. Kelsner, Chairman) recommends DO PASS (10 YEAS, 2 NAYS, 2 ABSENT AND NOT VOTING). Engrossed SB 2123 was placed on the Fourteenth order on the calendar.**

2007 TESTIMONY

SB 2123

**2007 Senate Bill No. 2123**  
**Testimony before the Senate Industry, Business, and Labor Committee**  
**Anne Jorgenson Green, Staff Counsel**  
**Workforce Safety and Insurance**  
**January 16, 2007**

Mr. Chairman, Members of the Committee:

Good Morning. My name is Anne Jorgenson Green and I am staff counsel for Workforce Safety and Insurance (WSI). I am here today to testify in support of SB 2123. This bill proposes changes to several statutes regarding employer services. The WSI Board of Directors supports this bill.

The bill before you is divided into eight subsections. Each of these subsections addresses a different area of workers' compensation law. I will address each in order.

**Section 1.** This section removes the exemption of newspaper and shopping news delivery personnel from the definition of employee. This proposed change requires coverage for individuals who provide newspaper or shopping news delivery services. The necessity of these individuals in the distribution process makes their work a fully integrated and indispensable facet of the newspaper business. The delivery model for newspapers has changed significantly from pre-teens on bikes with small routes to adults in motor vehicles with large spread-out routes.

**Section 2.** This section clarifies what information may be printed on an employer's Certificate of Premium Payment. Specifically, the proposed language permits the Organization to print a Certificate which identifies an account as one which has no employees.

**Section 3.** This section permits the Organization to disclose otherwise confidential information when it pertains to an employer who is delinquent or uninsured. This tool is invaluable for contractors confirming the status of subcontractors as it permits the aggregate disclosure of delinquent or uninsured employer information.

**Section 4.** This section proposes to eliminate the experience rating surcharge cap. North Dakota employers eligible for experience rating are assigned either a credit or a surcharge to their premium based on their historical claims experience. An employer with a favorable loss history receives an experience rate credit to their premium. An employer with an unfavorable loss history receives an experience rate surcharge to their premium.

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Page 1  
2123

Experience rate credits and surcharges are currently capped at plus or minus seventy-five percent of base premium. This proposed change removes the maximum rate chargeable to an employer. As a result, those employers generating significant losses will be assessed premiums that are more reflective of their actual claims experience. The proposed change is reinforced in WSI's 2006 Performance Evaluation conducted by Octagon Risk Services which recommended elimination of the surcharge cap as caps don't typically exist within the industry.

**Sections 5, 6 and 7.** These sections clarify and cleanup language within various statutes to accommodate the Organization's move from documentation-based to results-based safety incentive programs.

**Section 8.** In order to more appropriately implement the newspaper delivery changes, WSI is proposing an amendment to this bill that has been handed out with my testimony. The amendment would set the effective date of this change to be for account renewals on or after July 1, 2007. Consequently, WSI is requesting that this amendment be accepted along with this bill. Section 8 also proposes that the changes in section four (experience rating surcharge cap) would apply to employer accounts renewing or incepting after July 1, 2008.

WSI requests your favorable consideration of SB 2123. I would be happy to answer any questions you may have at this time.

#1

Page 2

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**PROPOSED AMENDMENT TO SENATE BILL NO. 2123**

Page 6, line 11, after "APPLICATION" insert:

Section 1 of this bill applies to Workforce Safety and Insurance employer accounts on their next annual renewal date on or after July 1, 2007.

Renumber accordingly

#1  
Page 3

2123

FORUM COMMUNICATIONS COMPANY  
BOX 2020  
FARGO, ND 58107  
PHONE (701) 235-7311

## Newspaper Carriers are Independent Contractors

Newspaper carriers are independent contractors that are motivated, entrepreneurial types who like flexibility and challenge. Independent contractors are "their own boss". They provide a service and may direct their hours and means to accomplish the service as they see fit.

Many of our independent contractors are mothers and fathers working with their children in a "family business". Contracts are made in mothers, fathers and children's names. The family makes the decisions on how delivery will be handled. They do not have the constraints of an employer-based relationship. They get to decide how they are going to meet the service they are contracted for. They can sub-contract out to other individuals. They are free to make their decisions. Independence is the key for many of the individuals and families that contract with The Forum. Contracted areas have remained in families for well over 20 years.

At the present time, The Forum has contracts on 450 routes total. 210 routes outside of the Fargo-Moorhead city zone area and 240 routes within the Fargo, Moorhead, West Fargo and Dilworth City zone area. We have 88 contracts for truck delivery of the newspapers to areas outside of the city. Independent contractors at The Forum are 68% adult and 32% youth. Independent contractors contracted to deliver to residences are 61% adult and 39% youth.

In Fargo, The Forum has two Distribution Centers (669 4<sup>th</sup> Avenue North and 3125 41<sup>st</sup> Street South) where the independent contractor picks up the newspaper. The contractors can prepare the paper for distribution as they see fit at these centers. There are no set times when they have to arrive. Outside of the city area, we contract to have the newspaper bundles dropped for independent contractors to pick up.

When the contractor arrives, they will pick up any changes to the area or route they have contracted to deliver by the means of a bundle label that The Forum provides. Bundle labels will alert the contractor to a newspaper subscriber starting, stopping or having delivery service temporarily suspended in the route area.

Payment for the newspaper is done in advance, contrary to the days when a carrier would go door-to-door to collect payment for the local newspaper. A *paid in advance* situation helps assure that the independent contractor receives the monies owed to them for the service provided. Years ago, the independent contractor would be left compensating for persons that would not pay or would leave on short notice. The newspaper now collects the money in advance and compensates the carrier on the number of papers delivered in a set time period. Payment is negotiated with the contractor on a per piece basis for daily delivery and Sunday delivery.

We offer accident-only insurance through a third-party vendor for our contractors. By offering, we make the independent contractor aware that this insurance is available and provide them contact information.

This short synopsis regarding independent contractors is respectfully submitted for your review.

  
James O. Boberg  
Circulation Director  
The Forum of Fargo-Moorhead

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2123

January 16, 2007

SENATE INDUSTRY, BUSINESS & LABOR COMMITTEE  
SB 2123

SENATOR KLEIN AND MEMBERS OF THE COMMITTEE:

My name is Jack McDonald. I am appearing today on behalf of the North Dakota Newspaper Association. We object to Section 1 of the bill that would make newspaper carriers employees of the newspaper and subject to WSI premiums and ask that you delete this from the bill. A proposed amendment to do this is at the end of this testimony.

This is truly a solution looking for a problem. To my knowledge, there have been no claims made by newspaper carriers. They are truly independent contractors. Most of the youth have school or other jobs, and nearly all of the adults do.

Below is a quick survey of the use of newspaper carriers in North Dakota. This is not 100% accurate since some papers, most notably The Williston Herald, were not able to respond in our time frame. Most did not list the carriers they use for their shopper. And a few included their bundle haulers along with their carrier. The figures below show there are at least 1,298 carriers, and that 39% of them are youth.

NEWSPAPER	YOUTH CARRIERS	ADULT CARRIERS
The Fargo Forum and West Fargo Pioneer	174	276
The Jamestown Sun	17	25
The Dickinson Press	67	41
The Grand Forks Herald	82	141
The Valley City Times Record	10	20
The Wahpeton Daily News	18	6
The Bismarck Tribune	51	127
The Minot Daily News	40	160
The Devils Lake Journal	21	1
The Devils Lake Country Peddler	15	3
The Hillsboro Banner	3	0
TOTALS	498	780

Attached to my testimony is a March 2000 opinion by Administrative Law Judge Allen C. Hoberg dealing with a claim by Job Service North Dakota that The Bismarck Tribune's newspaper carriers, bundle haulers and motor route delivery carriers are independent contractors and therefore not subject to Job Service unemployment insurance taxation.

This opinion went through the standard tests for independent contractor status in great detail. The court's order that The Tribune's carriers are not independent contractors and therefore are not subject to Job Service taxation is found at page 22. found on page 22.

[OVER]

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2123

Another problem with this legislation, from the newspapers' standpoint, is pointed out on page 4 of the court's decision. There are other independent contracts involved than just newspaper carriers. There are also what are called bundle haulers and motor route delivery carriers. If the newspaper carriers are made employees, then the same reasoning would apply to these other workers as well.

This will put a considerable financial burden on the newspapers. Many of the state's weekly newspapers, while not using carriers, do use contract haulers. If the newspapers have to pay WSI premiums, then Job Service premiums are probably next. This will likely mean less income for the newspaper carriers.

Making these individuals employees also brings into play all of the traditional employer-employee issues, such as unfair discharge, discrimination claims, overtime and work hour issues, work conditions, work environment, etc.

Many newspapers offer these carriers insurance if they wish. Few take advantage of this since most are either covered through their parents' policies or by policies at their regular jobs.

Finally, there is the very practical issue that the newspaper never really knows for sure who is actually delivering the paper. It may hire an independent contractor, but this often becomes a family affair, with Mom, Dad, and brothers, sisters and friends involved in the actual delivery. Who gets the coverage? How many premiums need to be paid for the 4 or 5 family members that take charge of the delivery?

If you have any questions, I will be happy to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2123

Page 1, line 1, remove "subdivision b of subsection 16 of section 65-01-02 and"

Page 1, line 3, remove "the definition of employment,"

Page 1, remove lines 8 through 24

Page 2, remove lines 1 through 17

Renumber accordingly

STATE OF NORTH DAKOTA  
JOB SERVICE NORTH DAKOTA

IN THE MATTER OF: )  
 )  
Lee Enterprises, Inc. )  
 )  
Determination of Unemployment )  
Compensation Fund Liability )  
 )

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

.....

On November 5, 1999, Bob Arnold, an Unemployment Compensation Field Representative for Job Service North Dakota ("Job Service") issued a determination ("the determination") for the Unemployment Insurance Division of Job Service ("Job Service - UID") that certain carriers and bundle-haulers of *The Finder* and the *Bismarck Tribune* for Lee Enterprises, Inc. ("Lee") were employees for the purpose of state unemployment insurance taxation. Lee appealed the determination and requested a hearing.

On January 12, 2000, a hearing was held on Lee's appeal by Job Service Hearing Examiner Dave Schnase. The parties (Job Service - UID and Lee) gave evidence at the hearing and filed closing written argument, *i.e.*, briefs. After the filing of briefs but before he issued a decision on Lee's appeal, Hearing Examiner Schnase determined that he had a conflict that would prevent him from issuing a decision. On February 29, 2000, Job Service requested the designation of an administrative law judge ("ALJ") from the Office of Administrative Hearings to issue a final order in regard to this matter based upon the record from Lee's appeal. Request for Administrative Law Judge - Appeal, Application, or Petition received by OAH on March 1, 2000. On March 1, 2000, Allen C. Hoberg was designated.

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2123

At the hearing Job Service - UID was represented by Mr. Arnold. Lee was represented by attorney James M. Patterson, Jr., Nashville, Tennessee. Mr. Arnold presented Job Service-UID's case. He testified and offered six exhibits (exhibits 1-6). He also called one other witness to testify. Mr. Patterson cross-examined Mr. Arnold and his other witness. Mr. Patterson presented seven witnesses and offered 32 exhibits (exhibits 7-38) on behalf of Lee. Mr. Arnold cross-examined six of Lee's seven witnesses. Hearing Examiner Schnase asked questions of witnesses.

Following the close of the evidentiary portion of the hearing, the parties filed briefs. Both the brief of Job Service - UID and the Brief on Behalf of Lee Enterprises, Inc. ("Lee's Brief") were filed February 11, 2000.

Job Service made both the tapes of the hearing and the transcript of the hearing prepared by a court reporter available to the ALJ for review. The ALJ had the entire record for review, then, since it was received by OAH on March 1, 2000.

The issue in this matter is whether some or all of the workers claimed by Lee to be independent contractors are independent contractors or employees under N.D.C.C. § 52-01-01, for purposes of paying unemployment compensation fund contributions (insurance) under N.D.C.C. title 52.

Lee states in its brief that there is another issue, "[w]hether the 'Employee' determination of Job Service ... was arbitrary, capricious, and a denial of due process within the meaning of the Fourteenth Amendment to the United States Constitution and Article 1, Section 9 of the North Dakota Constitution?" Lee's Brief, at 15. For reasons set forth in COL No. 15, below, the ALJ will not address that issue.

The burden of proof in matters such as this one is that Job Service bears the initial burden of showing the work is performed for wages or under a contract of hire. Then, the employer

bears the burden of showing the worker is an independent contractor. *BKU Enterprises v. Job Service*, 513 N.W.2d 382, 384 (N.D. 1994).

Based on the evidence presented at the hearing and the briefs of the parties, the administrative law judge makes the following findings of fact and conclusions of law.

### FINDINGS OF FACT

1. After receiving an anonymous telephone call from a person concerned about whether the *Bismarck Tribune* was delivered by an independent contractor or an employee, Mr. Arnold investigated the operations of all Lee publications in North Dakota. On November 5, 1999, Arnold informed Lee of his determination, that 312 workers 18 years of age and older were Lee employees. Exhibit 1. Arnold's letter also notified Lee of its right to a hearing before a final Job Service determination.

2. Lee is a publisher of several separate products in North Dakota: the *Bismarck Tribune*, a daily newspaper distributed or delivered by home delivery contractors, bundle-hauler contractors, and single copy contractors; *Pennysaver*, a weekly shopper distributed or delivered by alternate product contractors; the *Finder*, also a weekly shopper distributed or delivered by alternate product contractors; *Extra*, a weekly paper distributed or delivered by alternate product contractors; and *Farm & Ranch Guide*, a biweekly agricultural publication mailed to subscribers. Lee enters into contractual agreements with independent contractors to accomplish the distribution or delivery of these papers. (Hereinafter the ALJ will also use the term "Company" to refer to all or a part of Lee, because Lee maintains these separate entities.)

3. Although Lee is in the business of manufacturing newspapers and other papers, *i.e.*, producing papers not distributing or delivering them, it is clearly in Lee's interests that the papers be distributed and delivered, or somehow reach the hands of subscribers and other purchasers. However, Lee contracts with independent contractors (hereinafter referred to as

"IKs") to effect distribution and delivery of its papers to subscribers and others who receive them, and distribution and delivery to other locations where people may purchase them or receive them. In other words, all distribution and delivery functions are contracted out, except the distribution or delivery function related to the *Farm & Ranch Guide*. Job Service – UID contends that the success of Lee, *i.e.*, having its papers reach the hands of subscribers and other purchasers in desirable numbers depends upon the services provided by Lee's IKs. It contends that if Lee's carriers and other IKs did not enable the delivery of papers door-to-door, the Company's circulation would suffer and the number of the Company's advertising customers would be greatly reduced. This may or may not be true. There was no evidence presented on the effects of using alternative methods of distribution and delivery.

4. There are three separate types of IKs at issue in this matter: home delivery contractors (both foot and motor routes), bundle-hauler contractors, and alternate product contractors.<sup>1</sup> Hereinafter the designation "HD" will refer to both foot and motor route contractors of the *Bismarck Tribune*. "BH" will refer to bundle-hauler contractors for the *Bismarck Tribune*. "AP" will refer to alternate product contractors, *i.e.*, those contractors delivering alternate products (*e.g.*, the *Pennysaver*, the *Finder*, and the *Extra*).<sup>2</sup>

5. All of these types of IKs, whether HDs, BHs, or APs, perform work for Lee or one of its product entities for wages under a contract of hire.

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<sup>1</sup> Job Service referred to four types of workers. *See e.g.*, exhibit 1. Also in exhibits 2-5, Job Service prepared a Worker Relationship Worksheet for four different types of workers: Motor Route Delivery Carrier, Paper Carrier, Newspaper Carrier (*Bismarck Tribune*), and Bundle Haulers. However, the evidence shows that the titles given to the three separate groups of independent contractors by Lee are reasonably descriptive titles.

<sup>2</sup> Under these designations Job Service's designations also roughly fit: Newspaper Carrier (*Bismarck Tribune*) is a HD; Motor Route Delivery Carrier is a HD; Paper Carrier is an AP; and Bundle Hauler is a BH. There may be some overlap with the two parties using different designations. Job Service tended to focus on job description regardless of the type of product; *e.g.*, Job Service would probably call a bundle hauler of the *Finder* a bundle hauler. Lee would probably call that person an AP. Generally, carriers purchase papers from the Company but bundle haulers take out bundles to locations for a negotiated flat rate.

6. The practice by Lee in regard to a HD, BH or AP is essentially the same, although there are some practical differences, because of the type of paper being distributed or delivered. Each IK negotiates and enters into a contractual agreement (a signed agreement) with the Company that establishes the rights and obligations of the parties in regard to the IK relationship. These rights and obligations are explained to every IK. Every agreement expressly indicates the intent to create an IK relationship. See, e.g., exhibits 11, 16, 18, 19, 20, and 21.

7. Furthermore, the IKs are treated in a manner consistent with those agreements on a day-to-day basis:

a. Lee's IKs receive few instructions from the Company; rather, the obligations of the IK govern the relationship.<sup>3</sup> IKs do not receive and are not expected to follow any employee handbook. In fact, IKs are basically given a few written instructions and are not expected to follow Company rules or policies. IK responsibilities and written instructions are basically outlined in their contracts. The methods chosen by IKs to accomplish those responsibilities and fulfill instructions are the choice of the IK. IKs are not required to have daily contact with any Company manager.

b. Lee does not train its IKs. Any training IKs receive is obtained from a prior IK and only should the new IK choose to ask and the old IK agree to provide training. Lee does not require training from or by a previous IK. The Company will give a new IK the name

<sup>3</sup> Because of practicalities and being desirous of efficient business operations, the Company does give some instructions and suggestions to its IKs. The Company does have routes for HD, see exhibits 4, 18, and 19. APs deliver to all households unless a household complains to the Company in which case the Company will instruct the IK not to deliver to the household. Generally, alternate product recipients call the Company to complain. Also there are instructions or suggestions about time of delivery. BHs are to pick up papers each day and deliver them as soon as practicable, see exhibits 5, 20, and 21. The Company requires the HDs to deliver the paper by 6:30 a.m. Monday through Saturday and by 7:30 a.m. on Sundays, see exhibits 2, 4, 18, and 19. Although not in the contract, the Company does tell the Finder APs to deliver by 8:00 p.m. each Wednesday. Although not in the contract, BHs are told to pick up papers at the Company by 1:00 a.m., load them into their vehicle and deliver them to carriers or elsewhere before 6:00 a.m. HDs are given a list by the Company for deliveries and the HD agrees to update the list and provide it to the Company, see exhibits 18 and 19. For APs, the Company gives them a map of areas of delivery. The Company also provides a list to BHs for deliveries and states the locations for bundle drops. BHs are told to report to the Company if they need more or fewer papers.

of the previous IK. Company employees will give advice to IKs who call and ask for it. Again, the Company does provide a route list and sometimes a map to the IK when they start delivering.

c. The delivery services performed by the IKs are not integral to the primary business of the Company. Numerous other distribution methods exist besides home delivery, such as rack locations, grocery stores, convenience stores, and post offices. However, the papers must be distributed or delivered to locations for alternative distribution, too. Regardless of how the papers are distributed, there must be some form of transportation to a location, either to the ultimate place of purchase or receipt, or to a place from which further distribution or delivery will occur. Even if rack locations, grocery stores, convenience stores, and post offices were exclusively used (in some combination), Lee IKs or employees would still have to be involved in limited distribution or delivery. Again, however, there was no evidence comparing the successes or failure of the present method of distribution and delivery to any other method.

d. Lee IKs are permitted by contract to retain substitutes to perform their delivery duties and, in fact, most contractors do use substitutes.

e. IKs are free to use assistants, typically also referred to as substitutes. They are not required to obtain Company permission to use substitutes. In fact, the Company has no ability at all to veto an IK's choice of a substitute. Substitutes are paid by the IK retaining their services at a rate determined by the IK. Further, the IK is responsible for any taxes and workers compensation benefits that may be due a substitute. The IK supervises the work done by substitutes. The Company provides no assistance to the IK in the performance of delivery functions. However, if an IK fails to perform personally or there is a mistake in delivery and the IK does not obtain a substitute to deliver or does not redeliver, the Company will temporarily deliver (cover) by obtaining another IK or using a Company employee to deliver or by

redelivering with a Company Employee.<sup>4</sup> In situations of failure to deliver or redeliver, the Company has the right to take the costs of not doing so (cover) out of the IK's account.

f. The IK contract permits an IK to retain a route until the contract is terminated by either party. The relationship typically changes when the parties attempt to renegotiate the rates. APs negotiate the duration of their contracts, which typically only continue one year. Job Service – UID maintains that there is a continuing relationship between the IKs and the Company. In some cases, IKs remain with the Company for relatively long periods of time (several years), but other IKs do not maintain relationships very long. There was no evidence to show the extent or percentage of long-term relationships amongst IKs.

g. Lee's IKs have no set hours of work and are not required to track the number of hours spent performing their contractual duties. Basically, IKs are not given preset times to start work. However, again, there are some time limits imposed by contract or suggested. Company products are time-sensitive products, so it is in a Company's interests to have IKs deliver the papers with that time sensitivity in mind. Therefore, while the HD contract does not specify a time when the paper must be delivered (and, thus, the HD person has some leeway about when to deliver), it does require that all papers be delivered by the IK no later than a specified time. *See, e.g.* exhibit 10. Other contracts do not specify a deadline. *See, e.g.* exhibit 11 for APs. Because all papers are a time-sensitive or time-dated product, all carriers (HD and AP) and bundle-haulers are encouraged to get the papers delivered at a reasonable time. Lee does not advertise to subscribers that papers will be delivered by a certain time.

h. The contractual responsibilities of Lee's IKs do not require them to work full-time. In fact, some IKs deliver the products of other companies under contract in addition to

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<sup>4</sup> This shows that it is indeed in the Company's interest to effect delivery.

#3  
2/23

those of Lee. Some IKs have other businesses or work other jobs. An IK may advertise their distribution services.<sup>5</sup> The crux of the Job Service - UID argument is that none of the IKs are established in his own trade, occupation, profession or business, and, therefore, each must be an employee. However, the *Bismarck Tribune* is the only company that provides a home delivery newspaper service for Bismarck and Mandan. Also, Lee may be the only company that provides the other product types of its business (*Finder, Farm & Ranch Guide, etc.*). It is possible for an IK to have contracts with Lee to haul or deliver all of Lee's products. In other words, an IK can be a BH, a HD, and an AP. An IK can be in the business of distribution and delivery of Lee's products. However, although there was little or no evidence on this, probably most IKs (18 and older) are in business for themselves with Lee part-time. They likely do not have a separate delivery service business maintaining other contracts for delivery with other entities, too, but they do have other trade, occupations, professions, or businesses. They may have a contract with Lee and any combination of other occupations, trades, professions, or businesses, or be students and have a contract with Lee. While it is true that Lee's IKs are mostly dependent on Lee for being involved in the newspaper business or for delivering alternate products, they are not mostly dependent on Lee for being otherwise gainfully employed in other trades, occupations, professions, or businesses. At least, there was no evidence to that effect. In fact, there was evidence that IKs are also otherwise gainfully employed.

i. IKs do not perform any of their contract services on Company premises, although some IKs may voluntarily spend short lengths of time on Company premises, usually while waiting for product to deliver.

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<sup>5</sup> There was no evidence, however, about how common a practice this is; in fact, it appears that few, if any, IKs do advertise.

j. Each IK determines the sequence of delivery or order of delivery for the product. The IK can alter the sequence at his discretion. Also, each IK determines how the product will be delivered. Of course, with some deliveries, there may be practical considerations that limit the options.

k. The IKs are not required to submit any type of report to the Company, either written or oral. The Company never monitors the IKs in the performance of their contractual duties. The company does not evaluate the performance of IKs.

l. HDs purchase papers at a negotiated wholesale rate and then resell them at a retail rate. Their compensation or profit is derived from the difference between the two rates. Before an agreement is signed and any negotiations take place, the Company usually offers a standard wholesale rate but will vary it, usually for a more difficult route. HDs often collect their payments directly from the subscribers. However, many subscribers pay periodically, directly to the Company which then forwards money to the IK's account and remits the IK's profits to him. The Company does not forward a specific check to the IK. Checks are made out to the Company which acts as a clearinghouse. The Company produces a billing printout for each IK that includes every customer. Exhibit 22. The Company will also tell potential subscribers to the newspaper what the price of the paper will likely be. IKs may charge a subscriber extra for special delivery services, such as porch delivery, however. IKs are ultimately free to sell the newspaper at a retail rate or price of their own choosing, but are likely, in reality, limited by market circumstances. The IK receives an invoice from Lee reflecting the amount of newspapers they purchase. BHs receive a negotiated rate for their delivery services, related to the number of bundles (papers) hauled by them to carriers or elsewhere. BHs are

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2123

usually paid on a two-week basis. APs are paid a negotiated per-piece rate.<sup>6</sup> APs do not pay for their papers. The papers are free. All IKs can renegotiate their rate at any time while under contract. The IK's profit can fluctuate depending upon his expenses. All IKs have contract compensation based either on sales or output, not on hours worked.

m. Lee does not reimburse its IKs for expenses incurred in the performance of their contractual duties. Lee does not reimburse IKs for any licenses which may be necessary to perform their work. Some IKs may have significant expenses, others may not.

n. IKs are furnished no materials or equipment by the Company; rather, they are responsible for purchasing or otherwise obtaining their own materials or equipment. IKs must provide their own vehicle, maintain that vehicle, supply oil and gas, and provide insurance for it, make repairs, *etc.* Generally, IKs are responsible for purchasing newspaper bags, as well as rubber bands and plastic sleeves (to protect the newspaper from the elements).<sup>7</sup> They are not required to purchase these rubber bands and plastic sleeves from the Company, but the Company does sell them to the IKs. There was some evidence that sometimes in the past some IKs may have obtained a bag or some rubber bands and plastic sleeves from the Company without being charged, however, there was no evidence that such instances were of widespread occurrence. IKs are not told if or when papers should be bagged to protect them from the elements. Of course, not all IKs have significant investment in materials (*e.g.*, a vehicle). An IK is free to choose the method of distribution or delivery. Of course, many IKs (*e.g.*, BHs) must have some sort of vehicle to deliver the papers but the Company does not dictate that they have a motor

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<sup>6</sup> For example, Finder carriers are paid on a piece-rate basis of from 4 to 6 cents. However, item No. 4 on the Finder contract does not sound as though the rate is negotiable. It says, "Publisher will give Carrier reasonable notice before changing the piece rates to be paid to Carrier. Exhibit 16.

<sup>7</sup> APs who deliver the Finder may have to pay for their plastic covers and rubber bands if the Company receives a predetermined number of complaints against the carrier. However, if the complaints are low enough, the Company provides the plastic covers and rubber bands free of charge. See exhibits 3 and 16. However, the contractual relationship between the APs and the Company is different than the contractual relationship between the HDs and the Company.

vehicle or what type of motor vehicle they must have. *See, e.g.*, exhibits 20 and 21. Other IKs may benefit from using a vehicle or they may not, but the Company does not dictate whether the IK use one. Thus, an IK may be able to find alternative ways to minimize or eliminate some of his expenses.

o. If a Lee IK needs or wants a vehicle, the IK is individually responsible for securing a vehicle with which to deliver. This constitutes a significant investment in terms of vehicle cost and upkeep. However, not all IK workers require a vehicle. While there were no numbers given about the number of HD people that use vehicles to deliver and those that either walk or use alternative transportation (*e.g.*, a bicycle or motorbike), it appears that some number of HDs still walk to deliver their papers and, thus, do not require any or little investment in materials. Lee provides no IK with start-up capital.

p. Lee's IKs undertake some entrepreneurial risk in their contractual duties. Independent contractors purchase papers at a wholesale rate and then resell them at a retail rate. Their compensation is derived from the difference between the two rates. IKs can both gain and lose subscribers or purchases due to the performance of their work and their efforts put forth to expand their businesses. The IK can choose to solicit new subscribers or not. The IK can choose to participate in delivery for special promotional brochures or not. The ability of the IK to sell all of the papers he purchases determines the amount of profit or loss the IK will incur. However, the IK calls the Company each day to order the correct number of papers or bundles. Due to the fact that the IK is responsible for his own expenses, the ability of the IK to efficiently perform the work further impacts the ability of the IK to make a profit. Further, IKs are generally responsible for papers at all times after they leave the Company's premises, thereby assuming the risk of stolen or lost papers. There was some evidence that sometimes an IK may not have to pay for some damaged papers, but the evidence seemed to indicate that it was in

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situations where the damage may have been the fault of the Company. The HD contractor has the right to cancel a subscription for nonpayment by the subscriber.

q. No employment relationship exists. The Company does not have the right to discharge or even discipline its IKs. Parties have only the right to terminate the contractual relationship. The contract specifically describes the conditions and the process for termination. *See, e.g.*, exhibits 11, 16, 18, 19, 20, and 21.

r. An IK has the right to negotiate the terms of his contract. In particular, the IK may negotiate the areas in which they will deliver, the drop-off points, the length of termination notice, the length of the contract, and the rates they are paid. Negotiations may occur with the Company or other IKs. In reality, it would appear that areas of delivery and drop-off points do change some depending upon negotiations and other factors, but much may depend upon the situation that exists when the original agreement is made between the Company and the IK. Of course, there must be a starting point and past circumstances dictate strongly in this regard. But negotiating possibilities do exist, if only sometimes, and on a limited basis.

s. IKs are contractually prohibited from representing themselves as Company employees. They may not display the company logo on their vehicles and cannot use Company business cards.

t. IKs receive none of the benefits received by Company employees: no health insurance, life insurance, pension benefits, vacation pay, sick leave, or workers compensation insurance.

u. Should an IK cause any damage while in the performance of his contractual duties, the IK alone is responsible for the damage.

v. Every Lee IK receives a Form 1099 for federal tax purposes at the close of each year. Lee does no withholding of amounts paid to IKs. IK Hinnergardt signed a W-9, the

IRS form used to gather information on an IK. Additionally, IK Fillion's delivery business is incorporated as a Subchapter S corporation. He files his taxes in accordance with his corporation's status. IKS take tax deductions for their business expenses.

w. IKS are not required to wear uniforms or to follow a dress code.

x. Delivery complaints are resolved by the IK, not the Company. However, the Company will pass along to the IK complaints that are called in to the Company. But, IK customers can contact the IK directly, too. The Company will sometimes help out an IK with customer disagreements, *i.e.*, give the IK advice.<sup>8</sup> Also, subscribers and others who receive papers can call the Company to cancel and the Company passes that information along to the IK.

y. HDs may be required to furnish a bond securing their purchase of the newspapers. The HD must pay the premium on the bond.

z. Lee places newspaper advertisements to recruit new IKS in the "Business Opportunities" section, not in the "Help Wanted" section.

8. All daily newspaper companies in North Dakota use IKS to deliver their daily newspapers. Eighty-five percent of single copy newspaper companies in North Dakota use IKS to deliver their newspapers. The use of IKS in the newspaper business is a historically, time-honored practice in North Dakota. Further, 96 % of newspaper companies nationwide use IKS to make home deliveries of their newspapers.

### CONCLUSIONS OF LAW

1. N.D.C.C. ch. 52-03 establishes an Unemployment Compensation Fund for the purpose of paying unemployment benefits under N.D.C.C. ch. 52-05 to eligible individuals.

<sup>8</sup> The fact that the Company does not just tell the complainant to call the IK with the complaint also indicates that the Company has an interest in delivery.

The Fund consists of many items including contributions. Fund items are listed in N.D.C.C. § 52-03-01. Employers are required by N.D.C.C. chapter 52-04 to make contributions to the Fund. Contributions payable by employers are based upon wages payable with respect to employment, *i.e.*, with respect to employer-employee relationships. N.D.C.C. §§ 52-04-01, *et seq.*

2. N.D.C.C. § 52-01-01 (17) states, “[s]ervices performed by an individual for wages or under any contract of hire must be deemed to be employment subject to the North Dakota Unemployment Compensation Law unless it is shown that the individual is an independent contractor as determined by the ‘common law’ test.” N.D.C.C. § 52-01-01 (17)(e).

3. Exercising its duty to enforce the North Dakota Unemployment Compensation Law (“UCL”), Job Service has issued rules to assist in the application of N.D.C.C.

§ 52-01-01(17)(e). N.D. Admin. Code ch. 27-02-14 defines employment administratively.

4. N.D. Admin. Code § 27-02-14-01 states:

Generally, an employment relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what must be done but how it must be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so .... In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, the individual is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physician, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

N.D. Admin. Code § 27-02-14-01(5)(a).

5. The UCL is remedial in nature and must be liberally construed in favor of the employee. *Myers-Weigel Funeral Home v. Job Service*, 578 N.W.2d 125, 126 (N.D. 1998).

6. The North Dakota courts have agreed that it is the right of control that distinguishes an IK from an employee. Applying the common law test, the North Dakota Supreme Court recently held that “[t]he central question in determining whether an individual is an employee or independent contractor is: Who is in control? ... The right to control is dispositive whether or not it has been exercised.” 578 N.W.2d at 126.

7. The Administrative definition of employment offers a list of twenty factors “to be used as guidelines to determine if sufficient control is present to establish an employer-employee relationship.” *BKU Enterprises v. Job Service*, 513 N.W.2d 382, 385 (N.D. 1994) (Emphasis supplied.) These 20 factors are found at N.D. Admin. Code § 27-01-14-01(5)(b).

8. Applying the 20 factors to the facts of this matter demonstrates that Lee’s IKs are indeed IKs, not employees. The following are the general answers (“yes” or “no”) as to whether each factor tends to show an employee relationship (“yes”) or an IK relationship (“no”) (comment is added as appropriate):

a. Instructions – No. Although there are some definite instructions given (some written) and some suggestions; overall, there are not many, and one cannot say that Lee has the right to require compliance with very many, if any, of the instructions or suggestions. When and how to do something is left almost exclusively to the decision of the IK. Where to do something is by necessity limited to certain locations, but the IK has discretion in how to get to the location and has decisionmaking capability about whether to accept the contract for certain locations and whether and where to add locations to the contract. In other words, obligations are mostly pursuant to contract and the IKs have considerable discretion about means and methods.

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b. Training – No. No training is required. No meetings are required. This further indicates that the IK is in control of means and method. The IK can, and often does get training from previous IKs, but it is not required. The Company does not train.

c. Integration – No. Although there is some integration of a person's services into the business operations, and the success or continuation of Lee's business depends to a degree upon the performance of the services of the IKs, there was no evidence as to what degree Lee's business depends upon the performance of the services of the IKs. Further, there are other alternatives for Lee for distribution of papers. Lee testified that these alternatives were feasible and viable. There is no evidence as to what extent the other alternatives are not feasible or viable. Therefore, they must be considered to be feasible or viable.

d. Services rendered personally – No. IKs can and do use substitutes and assistants and Lee has no control over whom they use and when and how they use them.

e. Hiring, supervising, and paying assistants – No. Again, IKs can and do use substitutes and assistants and Lee has no control over whom they use and when and how they use them. IKs must pay substitutes and assistants.

f. Continuing relationship – No. Although some IKs have long-term relationships with a Company that may tend to indicate something other than a contractual relationship, some do not. There is no evidence about the number of long-term and short-term relationships.

g. Set hours of work – No. There are no set hours of work. Suggestions and some instructions about when and where to start exist (*see* COL 8a, above) but there are no set hours.

h. Full-time required – No. None of the IKs are required to work full-time or substantially full-time and few, if any, do. Many have other businesses, occupations, trades, or professions.

i. Work on employer's premises – No. No work is done on Lee premises.

j. Order or sequence of work – No. Lee does not retain the right to indicate the order or sequence of the work. Each IK determines the order and sequence of his work and can alter it at any time.

k. Reporting not required – No. IKs are not required to report in writing or orally. Lee does not monitor their work. (Interestingly, the rule in regard to this factor allows parties to agree to perform work by certain dates. Presumably, parties can agree to perform work by a certain time, too, which is what occurs to some extent in regard to newspaper delivery. The rule even allows reports to be filed to show completion and to coordinate other contracts. See N.D. Admin. Code § 27-02-14-01 (5)(b)(11). To some extent, Lee attempts to coordinate contracts and facilitate completion of contracts, in regard to time requirements and suggestions, but it does not require reports from IKs.)

l. Method of payment – No. HDs get paid based on a negotiated rate, the difference between a wholesale and retail rate. IK compensation for HDs is a profit. BHs get paid based on a negotiated rate for delivery services, usually a biweekly rate. APs get paid based on a negotiated single-piece rate for delivery services. Although payment to any IK may occur weekly or biweekly or monthly, no IK is paid an hourly wage, or a weekly or monthly salary or wage, for certain hours of work. Lee's IKs can renegotiate at any time, although being able to obtain a different rate may, in reality, be somewhat limited (market factors).

m. Payment of expenses – No. Lee does not reimburse any of its IKs for expenses. On occasion, Lee may not require some IKs to pay for certain smaller expenses such

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as rubber bands, plastic sleeves, and delivery bags, but Lee has the right to require that its IKs reimburse them for these expenses.

n. Furnishing of materials – No. Lee does not furnish any materials or equipment (with some exceptions – see COL 8m, above). IKs must furnish whatever vehicle (motorized or otherwise) that they use, as well as all other necessary materials or equipment.

o. Significant investment – No. Although not all IKs have a significant investment in their contract, some do. Furthermore, it is up to the IK whether to significantly invest or not. For example, an IK may purchase a new car to make deliveries as a BH, HD, and AP, but he isn't required to make the purchase. He may purchase a very cheap used car. Another IK may not invest significantly at all. She may walk to deliver all her papers.

p. Risk of profit or loss – Yes. Although Lee IKs certainly take some risk of profit or loss, it seems for the most part a fiction that this is a risk taking business. To some extent an IK may risk profits by spending too much on expenses, by not providing good service, and by not making efforts to expand the business (*e.g.*, to obtain new subscribers). However, any HD, BH, or AP who makes reasonable work effort and is reasonably prudent about expenses runs little or no risks. In fact, many IKs (*esp.* HDs) have very little or no risk because they have no investment and few expenses.

q. Working for more than one firm at a time – No. While it is difficult for very many Lee IKs to work for more than one newspaper firm at one time, all IKs retain the right to work in other trades, occupations, professions, and businesses at any time if they wish. Apparently, many do (but likely not very many do for other newspapers), though there was no evidence indicating the extent this happens, and little evidence about the other trades, occupations, professions, and businesses in which they may engage.

r. Making services available to the general public – No. Although few Lee IKs make their newspaper delivery service available to the general public and none indicated that they advertise a delivery service, all IKs are free to contract elsewhere and to advertise if they wish. Again, IKs may work in other trades, occupations, professions, and businesses.

s. Right to discharge – No. No employment relationship exists. Lee and the IKs have only the right to terminate as described in COL 8t below. Lee has no right to discharge or even to discipline an IK.

t. Right to terminate – No. Either party can terminate the contract provided adequate notice is given. For HDs the notice required is 28 days. For BHs and APs 30 days is required. A contract can also be terminated by either party for breach of conditions. Failure to give the proper notice submits the other party to the possibility of having to pay a penalty (e.g., costs for the other party having to cover).

9. Additionally, there are other factors not part of the administrative rules that help demonstrate that Lee's IKs are indeed IKs (*see* pgs 31-35 of Lee's Brief). They are, briefly as follows: IKs have the right to negotiate contract terms; IKs are contractually prohibited from representing themselves as Company employees; IKs receive no employee benefits; IKs are responsible for any damage they may cause in the performance of contract duties; every IK receives a Form 1099 for federal tax purposes; IKs need not wear uniforms; there is no dress code for IKs; IKs agree in the contract that they are IKs; IKs are not required to have any daily contact with Company managers; IKs are not required to participate in Company promotions; IKs are not told when and if papers should be bagged (plastic sleeves); complaints are ultimately resolved by the IK not the Company, although Company personnel may assist in that regard; except sometimes in cases of failure to deliver or redeliver, the Company provides no assistance

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to IKs in the performance of their delivery functions; HDs have the right to cancel a subscription for nonpayment; Lee provides IKs with no start-up capital.

10. Although Job Service – UID places great emphasis on the fact that Lee’s IKs are not engaged in an independently established trade, occupation, profession or business, the law makes no such requirement. N.D. Admin. Code § 27-02-14-01(5)(a) clearly states that certain specified categories of workers (e.g., “lawyers”) “engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.” However, it does not state that other categories of workers are not independent contractors or that other workers who do not engage in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are employees and not independent contractors.<sup>9</sup> But, even on those grounds, *i.e.*, requiring that the worker also be customarily engaged in an independently established trade, occupation, profession or business, the South Dakota Supreme Court recently held that workers who only delivered a “*Shoppers Guide*,” an alternative newspaper product, were customarily engaged in an independently established trade, occupation, profession or business. *Shoppers Guide v. Department of Labor*, 551 N.W.2d 584 (S.D. 1996)<sup>10</sup>

11. N.D.C.C. § 52-01-01 states that “[s]ervice performed ... [b]y an individual under the age of eighteen in delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution” is not included as employment. N.D.C.C. § 52-01-01(18)(i)(9).

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<sup>9</sup> The rule does not use the word “occupation,” a word which appears in the South Dakota case and in the Job Service brief.

<sup>10</sup> Under that stricter, two pronged standard regarding both lack of right to control and the existence of an independently established trade, occupation, profession or business, the South Dakota court ruled newspaper carriers to be independent contractors.

12. The dissent in the *Shoppers Guide* case placed much emphasis on a legal maxim, which it said is a general rule of statutory construction, "the expression of one thing is the exclusion of the other." 551 N.W.2d at 584, at 589. In other words, because N.D.C.C. § 52-01-01 makes an exception to employment for newspaper and shopping news carriers when they are under 18 years of age, older carriers of newspapers and shopping news must be employees. The majority in *Shoppers Guide* did not apply that maxim. Despite similar language in a South Dakota statute they relied on the Common Law test to determine that *Shoppers Guide* carriers were indeed independent contractors.<sup>11</sup> The South Dakota court's approach is also the appropriate approach for North Dakota. Section 52-01-01 is merely making unnecessary a factual and legal analysis in the case of 18 year olds. Such an analysis is still statutorily necessary for older workers, under the Common Law test.

13. Several other states have found that newspaper contractors are independent contractors for the purposes of unemployment insurance. See cases cited in Lee's brief at 38-39. The parties have not cited any cases that hold the contrary.

14. The Internal Revenue Service has also acknowledged the status of various newspapers' independent contractors. See Private Letter Rulings cited in Lee's Brief, at 39.

15. The evidence shows, by the greater weight of the evidence, considering N.D.C.C. § 52-01-01(17)(e) as interpreted by the North Dakota cases of *Myers-Weigel* and *BKU*, and the South Dakota case of *Shoppers Guide*, and considering the 20 factors of N.D. Admin. Code § 27-02-14-01(b), and other factors regarding control, that Lee does not have the right to control its IKs. All of Lee's IKs (the 312 workers 18 years of age and older at issue in this matter) are indeed independent contractors. The use of IKs by newspapers in North Dakota is a widespread,

<sup>11</sup> See *Hart Const. Co. v. American Family Ins.*, 514 N.W.2d 384 (N.D. 1994), refers to maxim; *Rykowsky v. Dickinson P.S.D. No. 1*, 508 N.W.2d 348 (N.D. 1993), applies maxim; *Dist. One Republican Com. v. Dist. One Democratic Com.*, 466 N.W.2d 820 (N.D. 1991), does not apply maxim because of absurd result.

common practice with a historical basis. It is a practice that is currently allowed under the law in North Dakota.

16. Lee asserts a constitutional issue which the ALJ and the agency may not address. Constitutional issues are for the courts to decide. *See First Bank of Buffalo v. Conrad*, 350 N.W.2d 580 (N.D. 1984); *Johnson v. Elkin*, 263 N.W.2d 123 (N.D. 1978).

ORDER

The greater weight of the evidence shows that the Unemployment Insurance Division of Job Service North Dakota erred in determining that Lee's independent contractors, *i.e.*, its home delivery contractors, bundle-hauler contractors, and alternate product contractors, were employees under the provisions of N.D.C.C. § 52-01-01(17) for unemployment compensation purposes. Accordingly, it is ORDERED that Job Service North Dakota determines that Lee's independent contractors are independent contractors under N.D.C.C. § 52-01-01(17) and that Lee is exempt from the payment of contributions to the Unemployment Compensation Fund with respect to the wages of these independent contractors.

Dated at Bismarck, North Dakota, this 14th day of March, 2000.

State of North Dakota  
Job Service North Dakota

By:



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Sandy Blunt  
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Wednesday, January 17, 2007

Senator Jerry Klein  
Chairman, Industry, Business and Labor  
North Dakota Senate

RE: Application Intent of Section Four of Senate Bill 2123

Dear Chairman Klein:

Workforce Safety and Insurance (WSI) would like to advise the Chairman and the members of the Senate Industry, Business and Labor Committee that it is WSI's intent to transition the removal of the experience rating surcharge cap in Section Four of Senate Bill 2123 over a four year time period with no change for the first year.

The experience rating cap will be phased in over time with the cap escalating in 25 percent increments over the next four years. The first change will occur beginning with policy renewals on or after July 1, 2008. Additionally, WSI staff will work with these accounts during the transition to enroll in the necessary safety programs to assist in reversing the unfavorable claim histories they have experienced.

Policy Year	--	Maximum Experience Modification Factor
2007-08	--	1.75 (no change)
2008-09	--	2.00
2009-10	--	2.25
2010-11	--	2.50
2011-12	--	No cap

Sandy Blunt

Executive Director/CEO  
Workforce Safety and Insurance

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**2007 Engrossed Senate Bill No. 2123**  
**Testimony before the House Industry, Business, and Labor Committee**  
**Anne Jorgenson Green, Staff Counsel**  
**Workforce Safety and Insurance**  
**February 27, 2007**

Mr. Chairman, Members of the Committee:

Good Morning. My name is Anne Jorgenson Green and I am staff counsel for Workforce Safety and Insurance (WSI). I am here today to testify in support of Engrossed SB 2123. This bill proposes changes to several statutes regarding employer services. The WSI Board of Directors supports this bill.

The bill before you is divided into seven subsections. Each of these subsections addresses a different area of workers' compensation law. I will address each in order.

**Section 1.** This section clarifies what information may be printed on an employer's Certificate of Premium Payment. Specifically, the proposed language permits the Organization to print a Certificate which identifies an account as one which has no employees.

**Section 2.** This section permits the Organization to disclose otherwise confidential information when it pertains to an employer who is delinquent or uninsured. This tool is invaluable for contractors confirming the status of subcontractors as it permits the aggregate disclosure of delinquent or uninsured employer information.

**Section 3.** This section proposes to eliminate the experience rating surcharge cap. North Dakota employers eligible for experience rating are assigned either a credit or a surcharge to their premium based on their historical claims experience. An employer with a favorable loss history receives an experience rate credit to their premium. An employer with an unfavorable loss history receives an experience rate surcharge to their premium.

Experience rate credits and surcharges are currently capped at plus or minus seventy-five percent of base premium. This proposed change removes the maximum rate chargeable to an employer. As a result, those employers generating significant losses will be assessed premiums that are more reflective of their actual claims experience. The proposed change is reinforced in WSI's 2006 Performance Evaluation conducted by Octagon Risk Services which recommended elimination of the surcharge cap as caps don't typically exist within the industry.

**Sections 4, 5 and 6.** These sections clarify and cleanup language within various statutes to accommodate the Organization's move from documentation-based to results-based safety incentive programs.

**Section 7.** This section proposes that the changes in section three regarding the experience rating surcharge cap would apply to employer accounts renewing or incepting after July 1, 2008.

WSI requests your favorable consideration of Engrossed SB 2123. I would be happy to answer any questions you may have at this time.



**Testimony of Bill Shalhoob  
North Dakota Chamber of Commerce  
SB 2123  
February 27, 2007**

Mr. Chairman and members of the committee, my name is Bill Shalhoob and I am here today representing the ND Chamber of Commerce, the principle business advocacy group in North Dakota. Our organization is an economic and geographic cross section of North Dakota's private sector and also includes state associations, local chambers of commerce, development organizations, convention and visitors bureaus and public sector organizations. For purposes of this hearing we are also specifically representing sixteen local chambers with a total membership of 7,236 and eleven employer associations. A list of the specific members was attached to my testimony on SB 2123. As a group we stand in support of SB 2123 and urge a do pass vote from the committee on this bill.

We do want to note that we have reached an understanding that the experience rating of employers referred to in section four will rise by administrative rule as outlined in the attached letter from Sandy Blunt of WSI.

Thank you for the opportunity to appear before you today in support of SB 2123. I would be happy to answer any questions.



**The following chambers are members of a coalition that support our 2007  
Legislative Policy Statements:**

- Beulah Chamber of Commerce - 107**
- Bismarck - Mandan Chamber of Commerce - 1080**
- Cando Area Chamber of Commerce - 51**
- Chamber of Commerce Fargo Moorhead - 1800**
- Crosby Area Chamber of Commerce - 50**
- Devils Lake Area Chamber of Commerce - 276**
- Dickinson Chamber of Commerce - 527**
- Greater Bottineau Area Chamber of Commerce - 153**
- Hettinger Area Chamber of Commerce - 144**
- Langdon Chamber of Commerce - 112**
- Minot Chamber of Commerce - 700**
- North Dakota Chamber of Commerce - 1058**
- Wahpeton Breckenridge Area Chamber of Commerce - 293**
- Watford City Area Chamber of Commerce - 84**
- Williston Chamber of Commerce - 401**
- West Fargo Chamber of Commerce - 400**

**Total Businesses Represented = 7236 members**

Associated General Contractors of North Dakota

Independent Community Banks of ND

Johnsen Trailer Sales Inc.

North American Coal

North Dakota Auto/Implement Dealers Association

North Dakota Bankers Association

North Dakota Healthcare Association

North Dakota Motor Carriers Association

North Dakota Petroleum Council

North Dakota Retail/Petroleum Marketers Association

Utility Shareholders of North Dakota

North Dakota Hospitality Association