2013 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2298

2013 SENATE STANDING COMMITTEE MINUTES

Senate Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

SB 2298
January 29, 2013
Job Number 17871

☐ Conference Committee

Committee Clerk Signature Ellen Liebelt

Explanation or reason for introduction of bill/resolution:

Relating to workers' compensation independent medical examinations

Minutes: Testimony Attached

Chairman Klein: Opened the hearing.

Senator Kilzer: Said that he brought the bill because he feels there is still some unfairness to the injured worker, particularly the worker who suffers a prolonged time period in his or her recovery. He said that Senator Carlisle and Dean Haas and himself, have all worked at the Workers Compensation Bureau in the past. They know that the workers' compensation system in North Dakota is the only State run plan in the country. All others are contracted out, usually to insurance companies. Even though we do have the best system in the country, the lowest rate and the highest satisfaction, in the area of independent medical examinations they feel, they could do better. He continues on explaining the problems the injured worker faces and going over the bill (2:55 to 12:05).

Senator Andrist: Asked if there is no face to face consult between the patient and the independent medical examiner.

Senator Kilzer: Said yes, that the independent medical examiner does examine the patient, usually for forty five minutes to an hour. There is face to face, that is why the injured worker has to go to Minneapolis, most of the time.

Chairman Klein: Said the injured worker is compensated for his travel.

Senator Kilzer: Said the injured worker is usually given mileage and sometimes they can't drive and then they are given an air ticket and put up overnight.

Senator Sinner: Asked about his history working with WSI.

Senator Kilzer: Said he worked with what was called the workers' compensation bureau at that time. He worked in medical services and also worked in claims and reviewed a lot of these cases and gave advice to the director of workers' compensation.

Senator Sinner: Asked since the time he had worked there if there has been a lot of changes in the process and if he is feeling that the injured worker is being treated differently today than when he was there.

Senator Kilzer: Said the IME has been used for a long time preceding him. It has been used more recently then it was years ago. There was a gradual conversion from the assessment team over to using the IME examiner and in more recent years he thinks they have had more out of state examiners.

Questions and comments continue (14:41- 19:20).

Dean J. Haas, Attorney for Larson Latham Huettl, LLP: He practices also in workers' compensation. Written Testimony Attached (1). The State of North Dakota WSI, 2008 Performance Evaluation Report (2). The Code of Federal Regulations, Evaluating opinion evidence (3). Testimony given and questions asked, (19:16 - 27:58).

Stefan Little, Attorney: He is an attorney practicing workers' compensation law. He has worked for the Legislative Council, the Attorney General's office and has been practicing workers' compensation for about 28 years. The ALJ is not an appeals process; the administrative hearing in front of the ALJ is simply the final step in the administrative adjudication of the claim before it is appealed to the district court. To give the ALJ the authority to consider the evidence at first blush, is simply, due process, it is what the Supreme Court has required. Regarding allowing injured workers to present their doctors testimony, is really what that does. He has had hundreds to thousands of hearings and maybe one or two where the doctor has actually testified and in both the cases it was because the doctor waved the fee. Injured workers can't compete with WSI in terms of experts. Allowing the injured workers doctor to testify is a matter of fairness and from the ALJ's perspective it allows both parties to present the same sort of evidence at the hearing and allows cross examination, it allows the ALJ if they have questions to ask both experts the questions. The Supreme Court has wondered on a few occasions why we have the injured doctor's evidence, simply by a letter. The answer is, that is all the injured worker can afford. This would improve the process and provide a little more fairness to the adjudication process. He doesn't disagree with either of the alternatives that Senator Kilzer suggested. WSI having medical evaluations on speed dial is not helpful to the fairness of this system.

Senator Murphy: Asked how long this practice has been going on.

Stefan: Said he has been representing the injured worker in front of WSI for 28, 29 years. He would term this a lopsided process that has accelerated since 1995.

Questions and comments, (32:58 - 39:07)

Tim Wahlin, Chief of Injury Services for Workforce Safety & Insurance: Written Testimony Attached, (4). (39:46 - 46:00)

Senator Murphy: Asked if he was saying that the previous testimony of Attorney Little, when he stated that of the hundreds perhaps thousands of cases, that he has taken for injured workers that only two doctors had a physical presence because the injured worker

couldn't afford a doctor, are you saying you actually pay for that and the workers don't know that and the attorneys don't know that?

Tim: Said both statues and administrative rules have been generated based on that statute, allow for reimbursement, not only of attorney fees for that case they will also reimburse the cost if they are filed appropriately.

Senator Murphy: Said you are saying the attorneys that are here today don't know the opportunities involved.

Tim: Said they all submit their attorney fees, they all submit their cost. They pay them when they are successful. The difference is they are asking for guaranteed payments irrespective of outcome.

Chairman Klein: Said and currently what we have is you have to win to get your attorney's fees paid for.

Tim: Said that was correct.

Senator Sinner: Asked if there were any restrictions on those fees.

Tim: Said there are a restriction on the fees, depending on the level of which the litigation has advanced has a cap. The maximum cap we will pay and to go above that cap there has to be requests and special circumstances and/or they have to go to the district court and ask for that cap to be exceeded.

Senator Murphy: Said the situation is that an injured worker can recoup the fees of having their doctor testify but only if they win, so these attorneys for injured workers know that only about one percent end up winning on these IME's.

Tim: Said that is not the numbers that they recognize.

Senator Murphy: Said so the attorneys are in error when they state that?

Tim: Said the one percent that was referred to, he doesn't know where that number comes from. He said basically they win two thirds of the hearings.

Senator Sinner: Said in the one third cases that the attorneys and clients win, WSI pays all the cost and are there cost that aren't paid?

Tim: Said the administrative rules says that they have to seek permission if they are going above the $150 cap, routinely that is granted.

Senator Sinner: Asked him to explain the 150 dollars, if it was an hour, a case, a week.

Tim: Said that it is $150 for the case for costs, not attorney fees.

Senator Sinner: Asked what costs are.

Tim: Said that cost could include everything from payment of court reporters, to payment of witnesses to those types of expenditures.

Senator Sinner: Said 150 dollars, that he gets more money than that driving back and forth to Fargo on a weekend as a legislator, which is outrageous in his opinion.

Chairman Klein: Said that the costs and the attorney fees were addressed in the last legislative session, they are tweaked from time to time.

Tim: Said the actual attorney fees and cost are established through the administrative rules process. The bill you are referencing is the state law that we would pay five hundred dollars for an attorney review, one the case was at the decision office irrespective of outcome. So yes that was changed.

Chairman Klein: Closed the hearing.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

SB 2298
January 30, 2013
Job Number 18013

☐ Conference Committee

Committee Clerk Signature Eva Lubelt

Explanation or reason for introduction of bill/resolution:

Relating to workers' compensation independent medical examinations

Minutes: Discussion

Discussion on the bill followed (0 - 1:15).

Senator Sinner: Said he was in favor of the bill but would entertain a motion to limit the expenses that would be paid for the employees treating physician. He feels that is a reasonable compromise for the bill. Knowing that Senator Kilzer has a long and honorable service to this agency; he felt it is incumbent upon them to research this a little further and to come up with a solution that would solve some of these issues.

Chairman Klein: Said that Senator Sinner would be working on amendments and that they will hold this over until next week. He closed the meeting.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

SB 2298
February 12, 2013
Job Number 18800

☐ Conference Committee

Committee Clerk Signature Eva Lieb

Explanation or reason for introduction of bill/resolution:

Relating to workers' compensation independent medical examinations

Minutes: Amendment and Vote

Chairman Klein: Opened the meeting.

Senator Sinner: Said he has an amendment that takes out the whole section in subsection 2, which is controversial to most in the committee and leaves in the language on page 1, section 1, and subsection 2.

Senator Sinner moved to adopt the amendment, 13.0754.01001.

Senator Sorvaag seconded the motion.

Roll Call Vote: Yes - 7 No - 0

Senator Sinner moved a do pass as amended.

Senator Sorvaag seconded the motion.

Roll Call Vote: Yes - 7 No - 0 Absent - 0

Floor Assignment: Senator Sinner

FISCAL NOTE
Requested by Legislative Council
01/22/2013

Bill/Resolution No.: SB 2298

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

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

The proposed legislation provides that an organization determination is subject to de novo review at an administrative hearing and provides for organizational payment of testifying expenses for the treating doctor at an administrative hearing.

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.*

see attached

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

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

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

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

Name: John Halvorson
Agency: WSI
Telephone: 328-6016
Date Prepared: 01/24/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: SB 2298

BILL DESCRIPTION: De Novo Review/Payment of Treating Doctor Testifying Expenses

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation provides that an organization determination is subject to de novo review at an administrative hearing and provides for organizational payment of testifying expenses for the treating doctor at an administrative hearing.

FISCAL IMPACT: Because estimated costs associated with this bill rely on an estimate of the number of injured workers utilizing this provision, and the number will likely change should this bill become law; we believe the fiscal impact is not quantifiable. However, if utilized, potentially significant costs will be generated by the provision allowing the employee's treating doctor to testify at the administrative hearing at the expense of the organization.

DATE: January 24, 2013

13.0754.01001
Title.02000

Prepared by the Legislative Council staff for
Senator Sinner
February 6, 2013

2-12-13

PROPOSED AMENDMENTS TO SENATE BILL NO. 2298

Page 1, line 1, remove "to create and enact subdivision c of subsection 3 of section 65-05-28 of the"

Page 1, remove line 2

Page 1, line 3, remove "examinations;"

Page 2, remove lines 4 through 9

Renumber accordingly

Date: 2/12/2013
Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2298

Senate Industry, Business, and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 13.0754.01001

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Sinner Seconded By Senator Sorvaag

Senators	Yes	No	Senator	Yes	No
Chariman Klein	x		Senator Murphy	x	
Vice Chairman Laffen	x		Senator Sinner	x	
Senator Andrist	x				
Senator Sorvaag	x				
Senator Unruh	x				

Total (Yes) 7 No 0

Absent 0

Floor Assignment

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

Date: 2/12/2013
Roll Call Vote #: 2

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2298

Senate Industry, Business, and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 13.0754.01001

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Sinner Seconded By Senator Sorvaag

Senators	Yes	No	Senator	Yes	No
Chariman Klein	x		Senator Murphy	x	
Vice Chairman Laffen	x		Senator Sinner	x	
Senator Andrist	x				
Senator Sorvaag	x				
Senator Unruh	x				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Senator Sinner

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

REPORT OF STANDING COMMITTEE

SB 2298: 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 2298 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "to create and enact subdivision c of subsection 3 of section 65-05-28 of the"

Page 1, remove line 2

Page 1, line 3, remove "examinations;"

Page 2, remove lines 4 through 9

Renumber accordingly

2013 HOUSE INDUSTRY, BUSINESS, AND LABOR

SB 2298

2013 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee
Peace Garden Room, State Capitol

SB 2298
March 20, 2013
Job 20217

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to workers compensation independent medical examinations

Minutes: Written testimony, attachments 1 and 2

Hearing opened.

Tim Wahlin, chief of injury services at WSI: Refer to written testimony, **attachment 1**.

4:19 **Chairman Keiser:** Why do we want the court to determine a policy?

4:27 **Tim Wahlin:** Ultimately, the legislative body is charged with writing the law. If there is a quarrel about how the law it to be applied, or what the interpretation of that law may be, the court is the deciding factor in that area. When we interpret statutes, we look at the words within the statute and try to apply those words with the knowledge of what went on in these hearings.

4:57 **Chairman Keiser:** If we failed at writing the statute in a way that the court could appreciate and understand it, why are we not rewriting the statute in a way that reflects the policy position of the legislature versus the supreme court?

5:21 **Tim Wahlin:** We do not have an answer yet from the supreme court.

5:25 **Chairman Keiser:** I understand that. Whatever they rule would take effect. But whatever the legislature does would become the law on August 1.

Tim Wahlin: That is correct.

5:45 **Chairman Keiser:** What is de novo review, and how is that different?

6:11 **Tim Wahlin:** It is a review of the facts from the beginning in order to make an independent determination without giving deference to the underlying determination.

6:24 **Chairman Keiser:** Previously, we had been operating that they had to find a reasonable basis to overturn the ruling of WSI.

Tim Wahlin: That is what we drafted in administrative rule to put into effect, that a reasonable mind could reasonably conclude in the manner that the agency did.

6:45 **Chairman Keiser:** That was the standard that they would use to make a determination based on WSI's decision.

Tim Wahlin: That is correct.

6:55 **Chairman Keiser:** But with this bill, we throw that away and go to a de novo review so the administrative law judges (ALJ) will start from scratch and will make a ruling regardless of previous rulings anywhere.

7:15 **Tim Wahlin:** That is correct.

7:21 **Representative Becker:** If I understand correctly, this change would nudge the potential for the final determination a bit away from WSI?

7:51 **Tim Wahlin:** It gives more autonomy to the ALJ in their determination. The ALJ is less bound by what it is that WSI had done.

8:20 **Representative Frantsvog:** Should we be doing anything until the supreme court has had their ruling?

8:32 **Tim Wahlin:** That is a fair question. I do not have an answer. This bill is not an agency bill; it was brought forward by other parties.

8:57 **Representative Frantsvog:** When your board reviewed it, was that an issue they discussed?

9:04 **Tim Wahlin:** No, it was not a consideration that I recall.

9:15 **Representative Ruby:** Is there a case that is heading there now or one that is pending for which we are waiting?

9:22 **Tim Wahlin:** There is one pending. It has already been heard.

9:29 **Representative Kreun:** What was the determining factor when the board changed its stance after the engrossment?

9:45 **Tim Wahlin:** Prior to its first engrossment, this bill also contained amendments to another statute that would require the agency to pay in all circumstances the costs of an injured working bringing a physician to testify live at trial. Currently, there is a fee rule whereby if an injured worker is successful, we will pay up to certain caps of those costs, but it requires that it is successful. The first version of this bill took that away, but that change got amended out in the Senate. It came back to the board, and the board reviewed their position. There was spirited debate

10:35 **Representative M. Nelson:** How would this mesh with the preferred provider program?

10:40 **Tim Wahlin:** There would not be an impact between the two. Reviewed concept of preferred provider program.

11:45 **Representative M. Nelson:** Clarified what he meant by preferred provider program.

12:04 **Tim Wahlin:** There may be some interaction between the two. Elaborated.

12:28 **Representative Kasper:** What is the name of the pending court case which addresses this issue?

Tim Wahlin: Albright.

12:40 **Representative Kasper:** If the court rules in favor of the injured worker, what would be the impact to WSI without any legislation this session?

12:53 **Tim Wahlin:** If Albright was successful, they would read the underlying statute to create a presumption in favor of a treating physician that has to be rebutted by further testimony. At this point in time, the agency is able to select from the most persuasive opinion. There was never a presumption in place. Basically, it will shift the burden of proof to presume that what a treating physician says is correct unless we can prove otherwise.

13:54 **Representative Kasper:** If that occurs, what do you see as the impact to WSI rates or the fund in the future?

14:05 **Tim Wahlin:** It will make it more likely for an injured worker to have a successful claim. To the extent there are more successful claims that are currently not successful, obviously it would raise those, but we have not done any pricing on that.

14:36 **Chairman Keiser:** Drew attention to statement on fiscal note that they are unable to quantify the proposed change.

15:04 **Representative Ruby:** If the court case rules on the side of Albright, would we need to come back and put this language in, or it would be part of the interpretation of the courts and existing language would be fine?

15:30 **Tim Wahlin:** I do not see the language that is being proposed in this bill affecting any determination that Albright may or may not make. It is additional language added to a statute, and the entire interpretation of the statute. This is not going to alter anything that is being argued right now at Albright.

16:00 **Representative Amerman:** For an ALJ decision, you said that potentially it would give injured workers a better chance to win their cases at that level. In actuality, you do not have to accept the ruling, do you? It would be up to the injured worker to go to the next level, right?

16:42 **Tim Wahlin:** To the extent the agency finds a claim not compensable, the injured worker has the ability to appeal. That has changed. If the injured worker goes to the administrative law judge level and the administrative law judge rules against WSI in favor of the injured worker, we have the ability to appeal if we do not think it is a compensable claim.

Support:

17:45 **Allen Hoberg, director of the Office of Administrative Hearings:** Distributed written testimony, **attachment 2**. Provided explanation of de novo review in the context of WSI determinations. It is important to have this stated that it should be de novo review rather than WSI's rule based on a reasonable standard. That is a standard used by the courts on judicial review. Reasonableness on what WSI decided based on the information they had is a big difference from having all of the information on a de novo review.

19:30 **Chairman Keiser:** If you use the current standard, the reasonableness standard, doesn't the judge get all of the file? Can't they review the entire file? It's just that they have to find a reasonable basis based on what's in the file to overturn WSI? You get to see the doctor's opinion and everything else, don't you?

19:58 **Allen Hoberg:** The reasonableness standard goes just to this issue of the treating doctor's opinion. There may be other evidence that comes in at the hearing besides what WSI had. You get to see everything that WSI saw. So as to judging what they did, we would judge it only on a reasonableness standard as to what they did, without having any further evidence. De novo review means that you take additional evidence; you may have additional evidence and testimony at the hearing.

20:32 **Chairman Keiser:** For clarification, gave an analogy of the supreme court examining the procedure used by a lower court. In a sense, that is where you are without this bill. The supreme court does not go back and retry the case. But this bill would allow the court to go back and start de novo, look at everything, and make a ruling. Does that analogy hold?

21:33 **Allen Hoberg:** When the supreme court looks at the case, they do not look at the district court case; they go back to the administrative hearing level and look at that. They do not review it de novo there; they review it under a reasonable mind standard. When we look at it at the administrative hearing level, we look at it de novo. Unless there is a statute otherwise, all administrative hearings would be de novo hearings. Provided more details about hearings in the court system.

Opposition:

Neutral:

Hearing closed.

Chairman Keiser: Request that we hold this bill.

2013 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee
Peace Garden Room, State Capitol

SB 2298
March 26, 2013
Job 20475

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to workers compensation independent medical examinations

Minutes:

Handouts, attachment 1-3
Proposed amendment, attachment 4

Committee called to order. Roll call taken.

Chairman Keiser: Updated committee members on his recent appearance at the appropriations committee.

1:37 **Chairman Keiser:** Reminded committee members of content of SB 2298. Spoke of articles in the Fargo *Forum*. Distributed handouts 1 and 2, articles from the Forum. Spoke of pain bill currently in the Senate. Distributed handout 3, known as the Mickelson case. Directed committee members to page 13, paragraph 30. If we do not state the policy, the court will infer it. Read opinion of Chief Justice VandeWalle. Distributed proposed amendment 13.0754.02001, attachment 4. Reviewed current WSI policy and court decisions relative to de novo. Summarized current policy as it related to the administrative law judge, including the position of the independent medical expert. The legislation as proposed would have the administrative law judge start from scratch. There is court history which supports what WSI is now doing.

8:10 **Chairman Keiser:** One possibility would be to kill this bill if you do not want de novo. That does not quite work because there currently is a case before the Supreme Court. If you read the Mickelson case, if we have not defined it, they could say that de novo is the correct approach. Because the Court has not ruled, the question is if the legislature wants to rule and make it de novo. The amendment I have handed out reverses the de novo, puts into the language of the statute clear and precise wording to say that what we are doing is what the policy is. Tim, how does the amendment take us back to what we're currently doing?

9:12 **Tim Wahlin, Workforce Safety and Insurance:** Provided background on statute we are addressing. It was intended to codify what was in the case law established in the Bromley case in 1981, which is that we are not going to give a presumption of correctness to a treating physician's option. But WSI cannot ignore it. If WSI is going to find differently

than what the treating physician has said, WSI must explain the reasons why and must point to medical evidence supporting that.

10:14 **Chairman Keiser:** It has to be fifty-one percent, right?

10:17 **Tim Wahlin:** That is correct. The standard is more likely a preponderance of the evidence, which is essentially fifty-one percent. This was intended to codify it. Because the first sentence talks about the treating doctor's opinion controlling weight, that has now gone to the Supreme Court in the Albright case. The case has been argued and briefed, and we are waiting for a decision. It has been argued and briefed that *controlling weight* has now created a presumption in favor of the treating physician, which WSI has to rebut. We do not know the level at which we'd have to rebut it. The first amendment before us specifically states that a presumption may not be established in favor of. So that would put us back to our current measure and current system. A number of the others talk about resolving that conflict. The bulk of the amendment, page 1, line 21, is going to address that the at hearing and judicial review, the standard is going to be reasonable mind. They will be reviewing our decision to determine if our decision is correct, rather than reviewing the records as a whole and making their own decision.

12:24 **Chairman Keiser:** We have two options. All WSI bills need fiscal notes. If you adopt the amendment, It will request a new fiscal note, which is just a technicality. If we pass the bill as structured, we have the fiscal note. It says it is indeterminate.

13:04 **Tim Wahlin:** Yes, I believe they think it wouldn't have any significant impact on the fund.

Chairman Keiser: It says, "We are unable to quantify that proposed changed." So it's not that there would be no impact; it is unable to be quantified. What does that mean?

13:42 **Tim Wahlin:** When we have that language from our actuaries, it means that they do not possess enough information regarding the effects so that they can reasonably price it.

Chairman Keiser: So it could be it zero, or it could be a lot; they just cannot answer it.

14:14 **Representative M. Nelson:** WSI can bring in independent medical experts. Does the worker also have the opportunity to pick physicians to get supporting evidence?

14:32 **Tim Wahlin:** They do, but they would have to expend the funds to gather additional information.

15:02 **Representative M. Nelson:** So there are funds available for WSI to get independent medical experts, but there are not funds for workers to higher independent medical experts?

Tim Wahlin: That is correct. Should that injured worker be successful, they may turn in those costs for reimbursement, and the organization would reimburse those costs. But someone would need to cover those costs up front.

15:31 **Representative M. Nelson:** It sounds like WSI gets to keep swinging until they hit the ball, but the other guy doesn't get at an bat.

15:43 **Tim Wahlin:** I guess you can say that. WSI will only do an independent medical examination in a case where we have conflicting medical evidence and we don't know the answer. Out of 25,000 claims, about 80 of them will be set for some sort of review. You're right that it could be an abusive process, it could be overused, and it could be unfair if it were used that way.

16:30 **Representative M. Nelson:** Is de novo review really a problem if the organization did things in a reasonable way starting with a de novo review?

16:43 **Tim Wahlin:** I would hope not. You are sending it out to another reviewer who can bring their own views and biases to the case, which may make it more or less likely. That would be the difference.

17:06 **Representative M. Nelson:** Regarding a preponderance of the evidence, we have medical evidence and things that are not subject to scans and things like that. Does the process end up favoring a doctor who cannot find anything wrong with the patient? Presented scenario of difficulty determining an injury after time has gone by. When you are weighting, what do you give the weight to? Is the opinion of the initial doctor given a lot of weight, or is the doctor who came in years later given equal weight?

18:27 **Tim Wahlin:** That is a good question because you will have injuries that appear to resolve. When we get in that position, the initial physicians who saw or treated--that's an accepted claim which may or may not change over time. If a physician says the injured worker is not getting better, we try to explore on what basis they make that determination. Every single case is reviewed and probed to try to make that determination.

19:24 **Representative M. Nelson:** Do you use pain in weighting this? Even though it is only a symptom?

Tim Wahlin: Absolutely. Our physicians are looking at the symptoms to support or deny the underlying condition or disease. I think pain is a symptom.

19:57 **Chairman Keiser:** When I read this, it is the treating doctor who would be dealt with in a de novo review. There could be more than one treating doctor.

20:12 **Tim Wahlin:** In our complex cases, there are generally a number of treating physicians.

Chairman Keiser: I do know that especially on the pain management side, where extensive opioid use is maybe indicated, maybe at one time we had two or three physicians in our state who were the treating doctors, and they had about seventy percent about the cases in that arena. Is that still true?

20:55 **Tim Wahlin:** Last numbers, it is true and maybe has gotten a little worse.

21:00 **Chairman Keiser:** Or stronger, not necessarily worse. That is one of my concerns with the de novo. Summarized conversation he had with physicians regarding patients addicted to high levels of opioids being referred to one specific physician. The other physicians were not comfortable prescribing that level of opioid use. If that one physician becomes the treating physician for de novo claims for eighty or ninety percent of the cases, that is the counterargument to the issue. I support what Representative M. Nelson was saying that if you're doing a good job, de novo should not be a problem. But how do we get a balance? It is a challenge we have from a policy standpoint as a state. Summarized options before the committee.

24:08 **Representative Louser:** (faint audio) If there is a case before the Supreme Court currently and we pass a law subsequent to their having the case, how do we make a determination based on us passing the law?

24:27 **Chairman Keiser:** Gave two scenarios. If you put the emergency clause on this and pass it, the Senate passes it, and the governor signs it, the Supreme Court decision is irrelevant. If the Supreme Court rules in favor of de novo and after their ruling we pass this law, we supersede the Supreme Court. The law that we pass is the law. If we adopt the bill as presented to us, we are putting it into statute, and even if the Supreme Court could say it's not de novo, it would not matter: we passed a de novo bill and have a de novo statute. In that situation, we would be in control. But if we kill the bill, the Supreme Court would be in control.

25:21 **Representative Frantsvog:** Would you please redefine de novo?

25:26 **Chairman Keiser:** De novo means that when the ALJ takes the case, they go back to the treating physician and begin there; they give weight to the treating physician. Then it is WSI that has in effect to refute all of what the treating physician says going forward. The current practice is they still have to have a preponderance of evidence to go against it, but once they declare that they have a preponderance of evidence to make a decision, then the ALJ starts from that point and goes forward. The ALJ will not be trying the entire case; they are going to be higher courts are supposed to be and will make sure the process used in the lower court was proper, not the outcome.

26:30 **Representative Frantsvog:** When something is being prepared to go to the administrative law judge, wouldn't it be reasonable that statements of fact are identified and agreed to by everyone, as well as opinions? It seems that would be the right procedure for the administrative law judge to begin with.

27:00 **Chairman Keiser:** Medicine is an art, and statements of fact often are opinions.

27:11 **Representative Amerman:** In the ALJ, isn't that the lowest, first court you go to? So they are not ruling on any other court's decision; they are ruling on basically your decision.

27:34 **Representative Ruby:** (audio faint) Doesn't WSI have to go through a process to make a determination that the recommendations of the treating physician are not proper?

27:56 **Chairman Keiser:** That is correct. The ALJ may disagree with the opinion of WSI. But WSI has to have a preponderance of the evidence to be in disagreement with the treating doctor's opinion.

28:18 **Representative M. Nelson:** How does the hearing with the ALJ affect the appeal to the court? If you appeal an administrative law hearing to the courts...if it is a de novo review, then it was the case and you go on from there. But if he is only able to say whether WSI was reasonable or not, then doesn't that leave the worker only able to argue whether WSI was reasonable? Aren't we effectively making WSI a court?

28:56 **Tim Wahlin:** Effectively, yes. That's the position that WSI has been in forever as administrative agency: gathering information, finding facts, issuing a determination, and defending that determination going up either way. Once we make our determination, it's our view that as an administrative agency, we defend that on appeal, irrespective of which way it goes.

29:32 **Representative M. Nelson:** So if an employer is appealing, you hire independent medical experts to support your side?

29:37 **Tim Wahlin:** There are a number of times when the independent medical examiner comes back in favor of compensability. Yes, we defend that.

29:56 Representative Ruby **moved the amendment**, 13.0754.02001. Representative Vigesaa seconded the motion.

30:21 **Representative N. Johnson:** When a teacher's contract is not renewed, a review was based on whether you gave the individual due process and the opportunity to defend himself or herself or to refute the information. I do not think that it an unusual process for the courts to look at.

Representative Ruby: (faint audio) Isn't the injured worker's avenue to appeal when the first determination is made?

31:11 **Chairman Keiser:** Walk us through the situation for an average claimant who does not agree with your process.

31:30 **Tim Wahlin:** It is statutory and laid out in the code. Anytime the agency makes any determination regarding benefits--granting, denying, altering, suspending--we issue a notice of decision. It indicates the decision, the basis of it, and the effect of it. That's where the due process starts. At that point there is an appeal mechanism. They have to appeal within thirty days or ask for a postponement of that because the evidence is not available. When that comes back to us, we re-review that decision, and then we will issue an administrative order drafted by a paralegal in the agency. That goes out. If the injured worker disagrees with that--generally that is where most of the litigation takes place--they will then go to our decision review office. The decision review office will effectively review what it is we determined, come back to us and if they have issues with that, they will point out the areas with which they have issues. Then we try to come to some sort of agreement.

32:54 **Chairman Keiser:** What percent of cases are reversed at the decision review?

33:00 **Tim Wahlin:** I think it is about twenty-five to thirty-five percent. There is some sort of alteration, whether it is an offered settlement or change to the opinion. There is some sort of error we find and correct. Then if they continue to disagree, they can go to a hearing in front of a hearing officer. The office of administrative hearings will appoint a hearing officer, the ALJ, the administrative law judge.

33:39 **Chairman Keiser:** How many of the administrative law judges reverse opinions?

33:42 **Tim Wahlin:** WSI is successful in defending their position about two thirds of the time, over fifty percent always, but two thirds to three quarters at that hearing level. Additional review goes to the district court, which employ the reasonable mind could reasonably conclude standard. If you disagree, you go to the Supreme Court. The same stands are going to be used there as well.

34:20 **Chairman Keiser:** If an injured worker goes through a decision review, what resources are available to them?

34:30 **Tim Wahlin:** The legislature said that in all cases at decision review, we will grant you $500 in attorney fees to have anyone review it, irrespective of outcome. If anyone appeals and incurs attorney fees, expert witness costs, things like that, the agency will pay those up to a capped amount in each one of those cases, depending on where it is in the chain, that the final decision was made. If you're successful, the agency basically is underwriting a majority of those costs. We are basically paying for actions against us because we were wrong.

35:24 **Representative M. Nelson:** When you currently go to an administrative hearing, have those been operating under de novo review, or have they been operating on whether or not the agency was reasonable?

35:39 **Tim Wahlin:** There was a shift there. Currently they are operating under a de novo review. That changed during the state-wide referendum which appointed them as our hearing officers. Before that, basically the agency was engaging them to do some work for us, but we had final decision-making authority over everything. That has changed statutorily. Now they are going through and issuing those de novo. That's where the change took place, and we're still trying to resolve the effects of that in this area of law.

36:23 **Representative M. Nelson:** Before de novo reviews, were you still being found not reasonable about a quarter a third of the time by the administrative law judge?

36:34 **Tim Wahlin:** Basically those numbers have not moved for a decade. They are all about the same.

36:41 **Representative M. Nelson:** So it really didn't change the percentage outcomes when they went to de novo review?

Tim Wahlin: We have not seen that.

36:58 **Representative Amerman:** You said they went to de novo because of a referendum or an initiated measure?

Tim Wahlin: Initiated measure.

Representative Amerman: So, there is de novo now because of the initiated measure. Is that what I was hearing?

Tim Wahlin: That's when the discussion about what is has really happened here has taken place. We still do not have any Supreme Court ruling on it, so we're operating however the administrative law judges choose to operate right now.

37:45 **Representative Amerman:** So if we pass the bill as amended, are we affecting initiated measures or two-thirds vote or something?

Tim Wahlin: We had that discussion with the attorneys. Our conclusion was no, this is an unsettled area that has not been addressed by that. The only instructions we had were that they were going to provide our hearing officer. How does that change the relationship and what are the ultimate effects? I don't believe that has been addressed by that measure.

Roll call vote on motion for the adoption of amendment. **Amended adopted.**
Yes = 12 **No = 3** **Absent = 0**

39:25 **Representative Vigesaa:** (faint audio) Referred to discussion about adding an emergency class.

Representative Vigesaa **moved to add an emergency clause.** Representative Sukut seconded the motion.

Voice vote on motion to add an emergency clause. Motion carried. **Amendment adopted.**

Representative M. Nelson **moved a Do Not Pass as Amended**. Seconded by Representative Amerman.

40:31 **Representative M. Nelson:** There is always tension between the three branches of government. I think it is worthwhile thing and an executive branch agency to have a true judicial review of what that executive agency is doing, instead of turning an executive agency into a judicial branch. That is why I ask for a do not pass.

41:07 **Representative Kasper:** Legislative branch sets the policy. The executive branch does not. The judicial branch interprets the policy; they should not set the policy. This bill is legislation setting the policy. So I do not support the do not pass.

Roll call vote on motion for a Do Not Pass as Amended. **Motion fails.**
Yes = 4 **No = 11** **Absent = 0**

Representative Ruby **moved a Do Pass as Amended**. Seconded by Representative Sukut.

Roll call vote on motion for a Do Pass as Amended. **Motion carries.**
Yes = 11 **No = 4** **Absent = 0**

Carrier: Representative Ruby

43:27 **Chairman Keiser:** This bill has to be held a little bit in case anything comes up and you want us to reconsider this. I can't send it out with the fiscal note. With the amendment, the fiscal note is required by law, so we'll wait for that.

2013 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee
Peace Garden Room, State Capitol

SB 2298
April 3, 2013
Job 20796

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 65-05-08.3 of the North Dakota Century Code, relating to workers' compensation consideration of treating doctor's opinions; to provide for application; and to declare an emergency.

Minutes:

Attachment 1, proposed amendment
Attachment 2, marked-up version

Committee called to order. Roll call taken.

Chairman Keiser: We've had a lot of discussion relative to the amendments to this bill which I submitted. I don't think you've seen the letter dated March 28. Representative Onstad requested an opinion from Legislative Council. Jay Buringrud did issue an opinion. It is a Legislative Council opinion, but they are our attorneys. In his opinion, his interpretation is basically in effect that although the amendments do not directly amend a statutory provision that was subject of an initiated measure approved in the last seven years. The bill does relate to how administrative hearings are conducted. A specific statute was created as the result of initiated measure #4, which was approved November 4, 2008. Read the statute.

2:50 What that means is that for the legislature to take action, we would need a two-thirds majority in each chamber to pass the legislation. There is a reasonable possibility we would have achieved that in the House; there is also a reasonable possibility we would not achieve that in the Senate. We have done a lot of research on this. We looked at the ballot title, and the ballot title in no way addresses this issue other than to say *and provide for independent administrative law judges to make final decisions*. We have gone back to our attorneys and have asked them to go through all of the record, and we cannot. If the ALJ section can demonstrate it to us, we would be happy to receive that information. But nowhere does the administrative (audio unclear) to our review make any reference to de novo. That may be their practice, but it is not in the act. Secondly, there are no administrative rules in existence from them that put it in practice. It may be something they think they are doing and properly doing, but maybe they should get the backing of administrative rules to do it. So the legislature can review that. But our attorneys could not find it. So if it exists, we would be happy to see it. But that does not change the ruling from our attorneys relative to the requirement. So we proceed.

4:47 **Representative M. Nelson:** Did the legislative council in their opinion split out that this amendment would affect it but this one wouldn't? Or did it just say the amendments?

5:00 **Chairman Keiser:** I have gone back and said if we take out this subsection in the amendment, does this change your ruling. We would be happy to get a letter from them. He said yes. He was objecting only to the part which has been removed in the amendment that has been distributed. But before we get there, we do have to take the formal action of reconsidering our actions by which we passed out the amended bill.

5:31 Representative N. Johnson **moved to reconsider our action** by which we passed out SB 2298. Seconded by Representative Ruby.

Voice vote on motion to reconsider our action. Voice vote carries.

5:58 **Representative Ruby:** Would we also have to reconsider the amendment we put on and remove that? If we're going to consider this new amendment (attachment 1), this amends the original bill, not necessarily the amended bill.

Chairman Keiser: Is this amending the original bill? (Legal intern confirms.)

Representative Ruby **moved to reconsider the amendments previously passed**. Seconded by Representative Kasper.

Roll call vote on **motion to repeal the amendments** provided at our last meeting, amendment number 13.0754.02002. **Motion to repeal the previous amendments has passed.**

Yes = 13 No = 2 Absent = 0

7:30 **Chairman Keiser:** We now have back before us the original bill. Walked committee through the most recent proposed amendments. Distributed attachment 1, proposed amendment 13.0754.02003, and marked-up version, attachment 2. If the Democrats want, they can request a letter from Legislative Council, but we have been told that these will not result in the two-thirds majority, but it would be worth getting the letter. We will hold the bill until the letter is available. What I did not mention is that we have a situation that is quite curious. WSI did adopt, through the official administrative rule process, basically what this bill does. They have been following that for a year. Administrative rules have the force of law unless challenged. What this is doing and really what the previous amendment did is put into statute what is the current administrative rule. If the administrative law judges were not following the administrative rule, were they in violation of the law? I'm not sure because that is the administrative rule. We do have and will have in the interim a significant discussion with the ALJ process from the Workers Comp committee if they have not been following the law as the administrative rule. We can change that, and we can certainly challenge it in court, but it is a concern if they have not been following it.

10:32 **Representative M. Nelson:** It's my understanding talking to Senator Mac Schneider who practices in the area of WSI law that what happens is that when the rule is brought up in hearings, the judge throws it out because it is in conflict with law. We cannot pass within seven years of an initiated measure a law that conflicts with the initiated

measure. But the rule clearly conflicts with the initiated measure. We don't know if this is a loophole which has been exposed. It would seem strange that we as a legislature cannot pass a law but an administrative agency can pass a rule that would have the force of law that would conflict with an initiated measure. In addition, I have to be against this amendment. If we look in the Century Code regarding the preferred provider program, that is very clear. Read from Century Code regarding the preferred provider program. We have had testimony in front of the committee that the majority of workers are under a preferred provider program, and you cannot even consider a separate medical opinion under the preferred provider program. Yet here, if you're not under a preferred provider program and we pass the amendment, then we say we cannot even establish a presumption in favor of the treating physician. That is a huge conflict within the WSI laws. We said we're going to study the preferred provider law in the interim. I think this is something that really should be studied, but I think it is premature at this point to put this type of amendment in place and make many of the workers in North Dakota live under completely different rules as far as the medical provider's opinion.

13:01 **Chairman Keiser:** We need a motion either to adopt or not to adopt the amendment.

Representative Sukut **moves the adoption of amendment 13.0754.02003**. Representative Ruby seconds.

13:20 **Representative Ruby:** If memory serves, wasn't it the majority of employees are not under the preferred provider? I thought it was only a few select companies that actually did it.

Chairman Keiser: They may be the larger companies and as a result be more people covered under the preferred provider program. It is an issue.

Representative Ruby: (Audio faint)

Roll call vote on motion to adopt the amendment 13.0754.02003. Motion carries.
Yes = 10 No = 4 Absent = 1

Representative Ruby **moves a Do Pass as Amended**. Representative Sukut seconds.

Roll call vote on motion for a Do Pass as Amended. Motion carries.
Yes = 10 No = 4 Absent = 1

15:57 **Representative M. Nelson:** Could we hold this until we get the letter?

Chairman Keiser: Sure, absolutely.

Representative Ruby: Does it also need another fiscal note?

Chairman Keiser: Yes. We will hold it. I'd appreciate it if you'd request the letter quite quickly, and we'll see. I've learned a lot in the last two days. The courts generally, and I believe this is true for ALJs, give substantial credit to state agencies on complex issues.

So de novo is really a misnomer in the sense that they truly go back and rehear the whole case. On complex issues, the state agencies across the board are considered to be our experts. They are given status in the ruling that is really, truly not a de novo approach. Maybe we'll have to have legislation on that, too. If they think they are out there operating in some other manner, we maybe have to clarify whether or not they give credit to the state agencies on decisions. We will be looking at policy relative to that.

FISCAL NOTE
Requested by Legislative Council
03/29/2013

Amendment to: SB 2298

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **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 amended legislation provides that a presumption may not be established in favor of a treating doctor's opinion and provides for the standard of review to be used in rehearings of administrative orders and appeals of posthearing administrative orders.

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.*

see attached

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

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

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

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

Name: John Halvorson
Agency: WSI
Telephone: 328-6016
Date Prepared: 04/01/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: Engrossed SB 2298 w/ House Amendment

BILL DESCRIPTION: Consideration of Treating Doctor's Opinions

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The amended legislation provides that a presumption may not be established in favor of a treating doctor's opinion and provides for the standard of review to be used in rehearings of administrative orders and appeals of posthearing administrative orders.

FISCAL IMPACT: No fiscal impact is anticipated as the amended bill will not result in a change to WSI's current and historical application of the statute. However, the amended bill may preclude further litigation costs resulting from alternative interpretations of the current statute.

DATE: April 1, 2013

FISCAL NOTE
Requested by Legislative Council
02/15/2013

Amendment to: SB 2298

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

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

The proposed legislation provides that an organization determination is subject to de novo review at an administrative hearing.

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.*

see attached

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

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

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

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

Name: John Halvorson
Agency: WSI
Telephone: 328-6016
Date Prepared: 02/15/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: Engrossed SB 2298

BILL DESCRIPTION: De Novo Review

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation provides that an organization determination is subject to de novo review at an administrative hearing.

FISCAL IMPACT: Our understanding is the engrossed bill changes the standard of review at the administrative hearing level. We are unable to quantify the proposed change.

DATE: February 15, 2013

FISCAL NOTE
Requested by Legislative Council
01/22/2013

Bill/Resolution No.: SB 2298

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

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

The proposed legislation provides that an organization determination is subject to de novo review at an administrative hearing and provides for organizational payment of testifying expenses for the treating doctor at an administrative hearing.

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.*

see attached

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

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

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

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

Name: John Halvorson
Agency: WSI
Telephone: 328-6016
Date Prepared: 01/24/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: SB 2298

BILL DESCRIPTION: De Novo Review/Payment of Treating Doctor Testifying Expenses

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation provides that an organization determination is subject to de novo review at an administrative hearing and provides for organizational payment of testifying expenses for the treating doctor at an administrative hearing.

FISCAL IMPACT: Because estimated costs associated with this bill rely on an estimate of the number of injured workers utilizing this provision, and the number will likely change should this bill become law; we believe the fiscal impact is not quantifiable. However, if utilized, potentially significant costs will be generated by the provision allowing the employee's treating doctor to testify at the administrative hearing at the expense of the organization.

DATE: January 24, 2013

VK
3/26/13

13.0754.02002
Title.03000

Adopted by the Industry, Business and Labor Committee

March 26, 2013

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2298

Page 1, line 2, remove "and"

Page 1, line 3, after "application" insert "; and to declare an emergency"

Page 1, line 8, overstrike "If the organization does not give" and insert immediately thereafter "A presumption may not be established in favor of"

Page 1, overstrike lines 9 through 11

Page 1, line 12, overstrike "employee's record based on one or more of" and insert immediately thereafter ". The organization shall resolve conflicting medical opinions and in doing so the organization may consider"

Page 1, line 20, remove "At an administrative hearing, the organization's determination under subsection 1 is"

Page 1, replace line 21 with "If the organization's resolution of conflicting medical opinions under subsection 1 is reviewed by a hearing officer as part of a rehearing of an administrative order or by a judge as part of an appeal of a posthearing administrative order, the hearing officer or judge shall affirm the organization's resolution if a reasoning mind could reasonably conclude that the organization's resolution is supported by the greater weight of the evidence."

Page 2, line 1, remove "administrative hearings conducted on and"

Page 2, line 2, replace "after the effective date of this Act" with "all claims, regardless of date of injury"

Page 2, after line 2, insert:

"**SECTION 3. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

YK
4/3/13

13.0754.02003
Title.04000

Prepared by the Legislative Council staff for
Representative Keiser
April 2, 2013

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2298

In lieu of the amendments as printed on page 1132 of the House Journal, Engrossed Senate Bill No. 2298 is amended as follows:

Page 1, line 8, overstrike "If the organization does not give" and insert immediately thereafter "A presumption may not be established in favor of"

Page 1, overstrike lines 9 through 11

Page 1, line 12, overstrike "employee's record based on one or more of" and insert immediately thereafter ". The organization shall resolve conflicting medical opinions and in doing so the organization may consider"

Page 1, line 20, remove "At an administrative hearing, the organization's determination under subsection 1 is"

Page 1, remove line 21

Page 1, line 22, remove "3."

Renumber accordingly

Date: 3-26-2013 ~~3-20-2013~~

Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2298

House Industry, Business, and Labor Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☑ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider ☐ Consent Calendar

Motion Made By Ruby Seconded By Vigesaa

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser	✓		Rep. Bill Amerman		✓
Vice Chairman Gary Sukut	✓		Rep. Joshua Boschee		✓
Rep. Thomas Beadle	✓		Rep. Edmund Gruchalla	✓	
Rep. Rick Becker	✓		Rep. Marvin Nelson		✓
Rep. Robert Frantsvog	✓				
Rep. Nancy Johnson	✓				
Rep. Jim Kasper	✓				
Rep. Curtiss Kreun	✓				
Rep. Scott Louser	✓				
Rep. Dan Ruby	✓				
Rep. Don Vigesaa	✓				

Total Yes 12 No 3

Absent 0

Floor Assignment _____

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

- 13.0754.02001 (attachment 4)
- removes de novo and puts into ~~Re~~ writing what WSI is currently doing

Date: 3-26-2013

Roll Call Vote #: 2

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2298

House Industry, Business, and Labor Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☑ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider ☐ Consent Calendar

Motion Made By Vigesaa Seconded By Sukut

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser			Rep. Bill Amerman		
Vice Chairman Gary Sukut			Rep. Joshua Boschee		
Rep. Thomas Beadle			Rep. Edmund Gruchalla		
Rep. Rick Becker			Rep. Marvin Nelson		
Rep. Robert Frantsvog					
Rep. Nancy Johnson					
Rep. Jim Kasper					
Rep. Curtiss Kreun					
Rep. Scott Louser					
Rep. Dan Ruby					
Rep. Don Vigesaa					

Voice Vote

Total Yes _____ No _____

Absent _____

Floor Assignment _____

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

emergency clause

Date: 3-26-2013

Roll Call Vote #: 3

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2298

House Industry, Business, and Labor Committee

Legislative Council Amendment Number 13.0754.02002

Action Taken: ☐ Do Pass ☑ Do Not Pass ☑ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider ☐ Consent Calendar

Motion Made By Nelson Seconded By Amerman

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser		✓	Rep. Bill Amerman	✓	
Vice Chairman Gary Sukut		✓	Rep. Joshua Boschee	✓	
Rep. Thomas Beadle		✓	Rep. Edmund Gruchalla	✓	
Rep. Rick Becker		✓	Rep. Marvin Nelson	✓	
Rep. Robert Frantsvog		✓			
Rep. Nancy Johnson		✓			
Rep. Jim Kasper		✓			
Rep. Curtiss Kreun		✓			
Rep. Scott Louser		✓			
Rep. Dan Ruby		✓			
Rep. Don Vigesaa		✓			

Total Yes 4 No 11

Absent 0

Floor Assignment

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

Date: 3-26-2013

Roll Call Vote #: 4

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2293

House Industry, Business, and Labor Committee

Legislative Council Amendment Number 13.0754.02002

Action Taken: ☑ Do Pass ☐ Do Not Pass ☑ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider ☐ Consent Calendar

Motion Made By Ruby Seconded By Sukut

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser	✓		Rep. Bill Amerman		✓
Vice Chairman Gary Sukut	✓		Rep. Joshua Boschee		✓
Rep. Thomas Beadle	✓		Rep. Edmund Gruchalla		✓
Rep. Rick Becker	✓		Rep. Marvin Nelson		✓
Rep. Robert Frantsvog	✓				
Rep. Nancy Johnson	✓				
Rep. Jim Kasper	✓				
Rep. Curtiss Kreun	✓				
Rep. Scott Louser	✓				
Rep. Dan Ruby	✓				
Rep. Don Vigesaa	✓				

Total (Yes) 11 No 4

Absent 0

Floor Assignment Ruby

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

Date: 4-3-2013

Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2298

House Industry, Business, and Labor Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☑ Reconsider ☐ Consent Calendar

Motion Made By Johnson Seconded By Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser			Rep. Bill Amerman		
Vice Chairman Gary Sukut			Rep. Joshua Boschee		
Rep. Thomas Beadle			Rep. Edmund Gruchalla		
Rep. Rick Becker			Rep. Marvin Nelson		
Rep. Robert Frantsvog					
Rep. Nancy Johnson					
Rep. Jim Kasper					
Rep. Curtiss Kreun					
Rep. Scott Louser					
Rep. Dan Ruby					
Rep. Don Vigesaa					

Voice Vote

Total Yes _____ No _____

Absent _____

Floor Assignment _____

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

Reconsider action by which we passed out bill

13.0754.03000
First eng. with House Amend

Date: 4-3-2013

Roll Call Vote #: 2

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2208

House Industry, Business, and Labor Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☑ Reconsider amend ☐ Consent Calendar

Motion Made By Ruby Seconded By Kasper

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser	✓		Rep. Bill Amerman	✓	
Vice Chairman Gary Sukut	✓		Rep. Joshua Boschee		✓
Rep. Thomas Beadle	✓		Rep. Edmund Gruchalla		✓
Rep. Rick Becker	✓		Rep. Marvin Nelson	✓	
Rep. Robert Frantsvog	✓				
Rep. Nancy Johnson	✓				
Rep. Jim Kasper	✓				
Rep. Curtiss Kreun	✓				
Rep. Scott Louser	✓				
Rep. Dan Ruby	✓				
Rep. Don Vigesaa	✓				

Total Yes 13 No 2

Absent _____

Floor Assignment _____

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

13.0754.02002

Repeal amendments previously adopted

Date: 4-3-2013

Roll Call Vote #: 3

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2298

House Industry, Business, and Labor Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☑ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider ☐ Consent Calendar

Motion Made By Sukut Seconded By Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser	✓		Rep. Bill Amerman		✓
Vice Chairman Gary Sukut	✓		Rep. Joshua Boschee		✓
Rep. Thomas Beadle	✓		Rep. Edmund Gruchalla		✓
Rep. Rick Becker	AB		Rep. Marvin Nelson		✓
Rep. Robert Frantsvog	✓				
Rep. Nancy Johnson	✓				
Rep. Jim Kasper	✓				
Rep. Curtiss Kreun	✓				
Rep. Scott Louser	✓				
Rep. Dan Ruby	✓				
Rep. Don Vigesaa	✓				

Total Yes 10 No 4

Absent 1

Floor Assignment _____

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

13.0754.02003

Date: 4-3-2013

Roll Call Vote #: 4

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2298

House Industry, Business, and Labor Committee

Legislative Council Amendment Number 13.0754.02003

Action Taken: ☑ Do Pass ☐ Do Not Pass ☑ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider ☐ Consent Calendar

Motion Made By Ruby Seconded By Sukut

Representatives	Yes	No	Representatives	Yes	No
Chairman George Keiser	✓		Rep. Bill Amerman		✓
Vice Chairman Gary Sukut	✓		Rep. Joshua Boschee		✓
Rep. Thomas Beadle	✓		Rep. Edmund Gruchalla		✓
Rep. Rick Becker		AB	Rep. Marvin Nelson		✓
Rep. Robert Frantsvog	✓				
Rep. Nancy Johnson	✓				
Rep. Jim Kasper	✓				
Rep. Curtiss Kreun	✓				
Rep. Scott Louser	✓				
Rep. Dan Ruby	✓				
Rep. Don Vigesaa	✓				

Total Yes 10 No 4

Absent 1

Floor Assignment

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

REPORT OF STANDING COMMITTEE

SB 2298, as engrossed: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2298 was placed on the Sixth order on the calendar.

Page 1, line 2, remove "and"

Page 1, line 3, after "application" insert "; and to declare an emergency"

Page 1, line 8, overstrike "If the organization does not give" and insert immediately thereafter "A presumption may not be established in favor of"

Page 1, overstrike lines 9 through 11

Page 1, line 12, overstrike "employee's record based on one or more of" and insert immediately thereafter ". The organization shall resolve conflicting medical opinions and in doing so the organization may consider"

Page 1, line 20, remove "At an administrative hearing, the organization's determination under subsection 1 is"

Page 1, replace line 21 with "If the organization's resolution of conflicting medical opinions under subsection 1 is reviewed by a hearing officer as part of a rehearing of an administrative order or by a judge as part of an appeal of a posthearing administrative order, the hearing officer or judge shall affirm the organization's resolution if a reasoning mind could reasonably conclude that the organization's resolution is supported by the greater weight of the evidence."

Page 2, line 1, remove "administrative hearings conducted on and"

Page 2, line 2, replace "after the effective date of this Act" with "all claims, regardless of date of injury"

Page 2, after line 2, insert:

"**SECTION 3. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2298, as engrossed: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 4 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2298 was placed on the Sixth order on the calendar.

In lieu of the amendments as printed on page 1132 of the House Journal, Engrossed Senate Bill No. 2298 is amended as follows:

Page 1, line 8, overstrike "If the organization does not give" and insert immediately thereafter "A presumption may not be established in favor of"

Page 1, overstrike lines 9 through 11

Page 1, line 12, overstrike "employee's record based on one or more of" and insert immediately thereafter ". The organization shall resolve conflicting medical opinions and in doing so the organization may consider"

Page 1, line 20, remove "At an administrative hearing, the organization's determination under subsection 1 is"

Page 1, remove line 21

Page 1, line 22, remove "3."

Renumber accordingly

2013 CONFERENCE COMMITTEE

SB 2298

2013 SENATE STANDING COMMITTEE MINUTES

Senate Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

SB 2298
April 12, 2013
Job Number 21139

☒ Conference Committee

Committee Clerk Signature Ella Liebelt

Explanation or reason for introduction of bill/resolution:

Relating to workers' compensation consideration of treating doctor's opinions

Minutes: Discussion

Chairman Klein: Called the conference committee to order on reengrossed SB 2298 and the clerk took the roll. Senator Klein, Senator Laffen, Senator Murphy, Representative Ruby, Representative Keiser and Representative Nelson were present.

Chairman Klein: Said that the bill didn't look much like what they had sent across and asked for someone from the House to explain the changes.

Representative Ruby: We removed the de novo language that was on lines 22 and 23. We wanted to make it clear that a presumption couldn't be made giving more weight to the injured employees treating doctor within the administrative hearing. That traditionally has not been the way it has been done and also traditionally it has not been de novo or looked at from the beginning.

Senator Laffen: What harm could there be in keeping the de novo language. As I understand, that language says they will look at everything.

Representative Ruby: The way the process is first of all, when WSI makes a determination and if the employee disagrees with that, they can appeal it and it is reviewed right from the beginning there. If they don't like that then it goes to decision review, where they read it again and then once it goes to the ALJ and they do look at it if new information comes. It is very similar to what the district court does; they look to make sure the process was followed. In the initial decision there is a bar that WSI must meet before they can overturn the attending physician's opinion. They already have to meet a certain level already.

Representative Keiser: There were two parts to the original bill. Part one which is the organization, which is WSI and what approach will WSI use. The language we have here addresses what WSI will do. This is not de novo. This first section is not taking out de novo or putting it in. It is just stating the policy of WSI, when reviewing a case, that they will not give the treating physician opinion any more weight than any other opinion. That's what this

change in language does. The Second we removed, the fact that it was being put into code means that it wasn't in code. So they were adding the de novo requirement. (3:30-8:35)

Representative Ruby: We also tried to put in some language that reaffirmed some of the administrative code dealing with," a reasoning mind would reasonably have decided." We were told that trying to put that into code that it would potentially be in conflict with the initiated measure from four of five years ago. (8:40-10:26)

Senator Murphy: With the de novo review, what we are going to be doing is endorsing current practices. I think it works a lot better than what your side is proposing.

Chairman Klein: What we have here is a clarification again. Are we more clearly stating, under the treating doctors opinion, what we can use and what we can't?

Representative Ruby: Yes, since the bar was already set for the agency to overturn the decision earlier on, if they met that, then this is a possible ability for them to look back but there has to be certain conditions met.

Senator Murphy: The reasonable line standard is egregiously low. All you have to do is fine one person to say it is reasonable and you are done. I don't think that is fair to the workers at all.

Representative M. Nelson: Talked about the conflicts and this being a step back in time from the creation of the administrative law agency. He is in favor of the de novo review and believes it is a critical part to the entire thing. If we have a problem with the Senate version than the thing to do would be to defeat the bill. (12:10-18:15)

Representative Ruby: With the preferred provider program there are two opportunities for an employee not to participate in the employers preferred provider. This simply does not give the injured workers' treating physician the most weight in this process and it wasn't supposed to be that way and this is just clarifying that. (18:25-19:56)

Senator Laffen: If we say that the presumption is not established in favor of the injured employees treating doctor does that then assume that presumption is given to the IME or is it still just independent or neither of them.

Representative Ruby: Neither.

Chairman Klein: I don't think we are taking anything away because it wasn't in there to begin with. What we sent over established that. I think in our haste to move it across we probably didn't understand the total impact that it may have or what precedence we were setting because we were setting it in the code. We will adjourn for today.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

SB 2298
April 16, 2013
Job Number 21170

☒ Conference Committee

Committee Clerk Signature Eva Lieb

Explanation or reason for introduction of bill/resolution:

Relating to workers' compensation treating doctors opinion

Minutes: Attachments and Vote

Chairman Klein: Opened the conference committee on SB 2298 and the clerk took the roll. Senator Klein, Senator Laffen, Senator Murphy, Representative Ruby, Representative Keiser and Representative M. Nelson were present.

Chairman Klein: Committee we had some discussion the last time where the House explained the amendments. We have had further information handed out and would you go over your information Senator Murphy.

Senator Murphy: Said he contends that he thinks this is difficult for people to understand and certainly for himself. He goes over a handout that shows a summary of the current law, the law under Senate-Passed Version of SB 2298 and the law under House-Passed Version of SB 2298. Handout Attached (1). (:38-3:10)

Representative Ruby: Said he understands Senator Murphy's concern but the confusing situation for the House was the current administrative rule that does require the "reasoning mind would have reasonably decided" language. If they aren't following that they aren't following the current code. The intent of the House was to clarify in statute what is currently in code.

Senator Murphy: Said his understanding is that the reasoning mind standard is when the case has already been appealed after this process. That instituting the reasonable mind standard this early in the process would make it nearly impossible for anyone to ever win a case if you're an injured worker. It is for later on when it is under appeal that it is currently in the code.

Representative Keiser: Said that from his perspective Senator Murphy has provided the evidence for the House bill. (4:40-6:30) Amendment Attached 13.0754.02004, (2) and marked up version (3).

Discussion continued on the amendment (6:35-11:25)

Allen C. Hoberg, Administrative Law Judge and Director of the Office of Administrative Hearings: Said as to the change in regard to the application, they did suggest that change to Representative Keiser and his office and legislative council were in consultation as to the reasons for taking that out. It would create confusion as to when exactly you would apply the law change, whatever the law change is in this bill. When the law takes effect it would make it simpler and easier for them and WSI to implement whatever changes the rest of the bill makes.

Discussion (12:45-15:00)

Representative M. Nelson: Made the motion that the House recede from its amendments as printed on page 1142 of the Senate journal and additional pages and further amended as follows; according to version 02004.

Senator Laffen: Seconded the motion.

Roll Call Vote: Yes - 2 No - 4 Motion Failed

Senator Laffen: Made a motion for the Senate accede to the House amendments and further amend.

Representative Ruby: Seconded the motion.

Senator Schneider: Said that he thinks before the vote goes one way or the other the committee should go through how this works in practice. (17:08-20:35)

Tim Wahlin, Director of Workforce Safety and Insurance: Said the statute historically came out in 2009. (23:36-26:15)

Discussion continued on what this amendment would do. (26:35-36:40)

Chairman Klein: Said we have a motion on the floor and a second.

Roll Call Vote: Yes - 4 No - 2 Motion Passed

Senator Laffen will carry for the Senate

Representative Ruby will carry for the House

Note: The motion was reconsidered and the intent was that the House recedes from its amendments as printed on page 1142 of the Senate Journal and pages 1132, 1234, and 1235 of the House Journal and that Engrossed Senate Bill 2298 be amended. Amendment 13.0754.02004

2013 SENATE STANDING COMMITTEE MINUTES

Senate Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

SB 2298
April 24, 2013
Job Number 21492

☒ Conference Committee

Committee Clerk Signature Era Liebelt

Explanation or reason for introduction of bill/resolution:

Relating to workers' compensation consideration of treating doctor's opinion

Minutes: Attachment

Chairman Klein: Said the Senate side rejected the conference committee report. We are here to have some discussion as to what we think we might be able to do. Some people may have felt we were going over the top. Let's see if there is someplace we can go with this.

Representative Keiser: Said he just received a copy sent out by Dan Ulmer relative to Blue Cross Blue shield and this bill. He would be interested in understanding Dan's rational on it.

Dan Ulmer, BC/BS: Said the memo is verily straight forward. What happened was there were a number of questions from folks on the bill. We hadn't paid a great deal of attention to it until it started bubbling up. The question was what kind of cost shift we would incur. We went back to WSI and got the data on the number of appeals. He refers to the handout, Attached (1).

Representative Ruby: Said that it is obviously dealing with their decision based on an injury but it could affect not only the medical benefits but also the wage loss benefits as well, which is a sole cost of WSI.

Dan Ulmer: Said the data they looked at was without the wage loss in it, it was a health cost and most of these cases are verily expensive.

Representative Keiser: This is taking the number of cases that were involved in a period of time, thirty and saying if we had fifty percent of those this would be the impact to us and the cost shift.

Dan Ulmer: Yes.

Representative Keiser: Asked if there was a measure of the cost shifting that is going on right now.

Dan Ulmer: Said no, they know it exists. They don't know how many folks check the box that asks if it is work related and then how many folks check the box with work related and not covered.

Senator Laffen: Said that he understood that they had been doing this the same since the 1981 Bromley case. We changed some language in 2009 within the statute and now we are trying to leave it the way it was. Why does that change the number of cases, are we not writing it right?

Dan Ulmer: Said he would say yes.

Representative Ruby: The current language of the law really didn't specify presumption one way or another but the interpretation was that there wasn't a presumption on the treating physician's opinion since 2009. He said there view is the language of law is clarifying the original intent and interpretation. (6:51-8:15)

Chairman Klein: Said that was certainly his view that they were just returning to what they always believed historically how they treated this from the 1981 case to 2009 when an attempt to make it more clear they muddied the water.

Senator Murphy: I have no trouble believing you are saying this in good faith. That you do believe that this version that was defeated yesterday on the Senate floor was actually bringing it back but in fact it is much worse. He hopes they can find something reasonable.

Representative Schneider: Said he had a discussion with their attorneys and said this language as it was adopted was not consistent with where they were in 1990, it did make a change. If you wanted to literally return to the language in the code with at the time in 1990 that you would simply repeal section 6505-08.3 and I don't support that. This section does give direction to WSI and how to approach the review of the case on behalf of the injured worker. With current administrative rule, with current practice, what we did attempt to do is put in to this section 6505-08.3 language that was consistent with what the current practice was. (9:30-11:32)

Representative M. Nelson: Asked about what the talk was on the Senate floor.

Senator Kilzer: Said that the present version is unrecognizable from the original that was put in. The original bill was designed to make the playing field more level for the injured worker who is coming to an administrative hearing and the workers' compensation or WSI has been using this office of administrative hearings more frequently in recent years. (13:36-16:55)

Chairman Klein: As you heard the Senator was basically speaking to his bill that he introduced and it is no longer the way he introduced it. His issue still centers around the things that he spoke the IME's and the lack of representation by the docs at the hearings.

Senator Laffen: Asked if there is other language that they could write other than the presumption not given to the treating doctor.

Senator Murphy: Said he doesn't understand why they wouldn't want the treating doctor's opinion to have some decent weight.

Discussion continues on what changes could be made and the interpretation of what the language is saying.

Representative Ruby: Said for WSI to rule against the treating physician's opinion earlier in the process they have a bar to meet there and then in this process according to this language it is here. If there is conflicting opinions they then have this level they have to meet too. He said he just doesn't see it the same way either and that it is just bringing it back to where it was supposed to be.

Chairman Klein: Said he will see if they can find a way to make this work better and adjourned the meeting.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

SB 2298
April 26, 2013
Job Number 21537

☒ Conference Committee

Committee Clerk Signature Ella Lieblt

Explanation or reason for introduction of bill/resolution:

Relating to workers' compensation consideration of treating doctor's opinions

Minutes: Attachments

Chairman Klein: Called the conference committee to order and the clerk took the roll. Senator Klein, Senator Laffen, Senator Murphy, Representative Ruby, Representative Keiser and Representative M. Nelson were present. He asked Representative Keiser to share the information he brought.

Representative Keiser: Said there were some issues raised by Senator Kilzer concerning this bill. He went over his handouts to address those concerns brought by Senator Kilzer. He said they can make statements but the information that they are providing shows they are being relatively conservative in the use of IMEs and that any rates of increase can be explained easily because they have leveled the playing field in a very appropriate way. Handout attached (1). (:45-6:40)

Chairman Klein: Said he suggested the other day that they go back and find some language that would probably ease some, not everyone's, minds. He handed out a rough draft of the amendment and a copy of how the bill would look with those changes. The amendment from legislative council was also handed out, 13.0754.02006. Amendment attached, (2) and Bill attached, (3). The amendment for legislative council was also handed out, Attachment (4). (6:52-8:05)

Representative Ruby: Said he was thinking if some language could be found that would make it clear that it isn't necessarily showing favoritism one way or another. The House version didn't necessarily say that the emphasis would be on WSI and their doctor and put the employee's treating doctor in a minority position or not being considered as strongly as the other physician. He said Senator Klein's amendment accomplishes that.

Representative Ruby: **Motioned for the House to recede from their amendments and further amend.**

Representative Keiser: Asked why they would want to say, "may consider", rather than, "they shall consider"? These seem like reasonable things for them to consider and they do have other relevant factors.

Chairman Klein: We are always looking for the terminology that would be softer. He said he didn't have a preference there, unless someone can give additional information.

Representative Keiser: Said he just didn't want it to appear to be a bias that they are giving flexibility to the agency to what factors they can selectively choose.

Tim Wahlin, WSI: With respect to the draft that you have before you, the "may" instead of "shall", would also go towards not necessarily making a cookie cutter approach where each one of those factors has to be clicked off in every single case some may apply and others may not. (11:12-11:51)

Representative Keiser: Said he does prefer the "shall" for them to at least to have considered it.

Senator Murphy: Said he would support that small change.

Representative Ruby: Said with that change from "may" to "shall", he would move that the House recede and further amend.

Representative Keiser: Seconded the motion.

Representative M. Nelson: Said that Representative Keiser's information shows that the system is working. He is concerned with why they are changing this. They are opening up an area of code and changing it when the evidence is that it is working. He is going to resist this from the standpoint that it is not prudent or necessary to change this code.

Chairman Klein: Said in his opinion they would try to make every bill the best that they can and as they bring it to the floor try to bring in everybody's ideas on this particular issue. In an attempt to get to that point is why he bought the amendment. Once again the motion is for the House to recede and further amend on this 02006 with the change from "may" to "shall".

Roll Call Vote: Yes - 4 No - 2

Senate Carrier: Senator Laffen was appointed the carrier.

House Carrier: Representative Ruby.

Chairman Klein: Meeting was adjourned.

13.0754.06000

FISCAL NOTE
Requested by Legislative Council
04/29/2013

Amendment to: Engrossed SB 2298

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **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 amended legislation provides that a presumption may not be established in favor of any doctor's opinion.

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.*

see attached

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

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

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

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

Name: John Halvorson
Agency: WSI
Telephone: 328-6016
Date Prepared: 04/29/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: Engrossed SB 2298 w/ Conference Committee Amendments

BILL DESCRIPTION: Consideration of Treating Doctor's Opinions

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The amended legislation provides that a presumption may not be established in favor of any doctor's opinion.

FISCAL IMPACT: The amended bill will not result in a change to WSI's current and historical application of the statute; however, it may preclude further litigation costs resulting from alternative interpretations of the current statute.

DATE: April 29, 2013

13.0754.05000

FISCAL NOTE
Requested by Legislative Council
04/22/2013

Amendment to: SB 2298

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **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 amended legislation provides that a presumption may not be established in favor of a treating doctor's opinion.

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.*

see attached

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

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

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

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

Name: John Halvorson
Agency: WSI
Telephone: 328-6016
Date Prepared: 04/22/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: Engrossed SB 2298 w/ Conference Committee Amendments

BILL DESCRIPTION: Consideration of Treating Doctor's Opinions

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The amended legislation provides that a presumption may not be established in favor of a treating doctor's opinion.

FISCAL IMPACT: The amended bill will not result in a change to WSI's current and historical application of the statute; however, it may preclude further litigation costs resulting from alternative interpretations of the current statute.

DATE: April 22, 2013

13.0754.04000

FISCAL NOTE
Requested by Legislative Council
04/04/2013

Amendment to: SB 2298

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **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 amended legislation provides that a presumption may not be established in favor of a treating doctor's opinion.

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.*

see attached

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

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

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

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

Name: John Halvorson
Agency: WSI
Telephone: 328-6016
Date Prepared: 04/05/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: Engrossed SB 2298 w/ House Amendment

BILL DESCRIPTION: Consideration of Treating Doctor's Opinions

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The amended legislation provides that a presumption may not be established in favor of a treating doctor's opinion.

FISCAL IMPACT: The amended bill will not result in a change to WSI's current and historical application of the statute; however, it may preclude further litigation costs resulting from alternative interpretations of the current statute.

DATE: April 4, 2013

FISCAL NOTE
Requested by Legislative Council
03/29/2013

Amendment to: SB 2298

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

2 A. **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 amended legislation provides that a presumption may not be established in favor of a treating doctor's opinion and provides for the standard of review to be used in rehearings of administrative orders and appeals of posthearing administrative orders.

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.*

see attached

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

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

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

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

Name: John Halvorson
Agency: WSI
Telephone: 328-6016
Date Prepared: 04/01/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: Engrossed SB 2298 w/ House Amendment

BILL DESCRIPTION: Consideration of Treating Doctor's Opinions

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The amended legislation provides that a presumption may not be established in favor of a treating doctor's opinion and provides for the standard of review to be used in rehearings of administrative orders and appeals of posthearing administrative orders.

FISCAL IMPACT: No fiscal impact is anticipated as the amended bill will not result in a change to WSI's current and historical application of the statute. However, the amended bill may preclude further litigation costs resulting from alternative interpretations of the current statute.

DATE: April 1, 2013

FISCAL NOTE
Requested by Legislative Council
02/15/2013

Amendment to: SB 2298

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

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

The proposed legislation provides that an organization determination is subject to de novo review at an administrative hearing.

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.*

see attached

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

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

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

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

Name: John Halvorson
Agency: WSI
Telephone: 328-6016
Date Prepared: 02/15/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: Engrossed SB 2298

BILL DESCRIPTION: De Novo Review

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation provides that an organization determination is subject to de novo review at an administrative hearing.

FISCAL IMPACT: Our understanding is the engrossed bill changes the standard of review at the administrative hearing level. We are unable to quantify the proposed change.

DATE: February 15, 2013

FISCAL NOTE
Requested by Legislative Council
01/22/2013

Bill/Resolution No.: SB 2298

1 A. **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.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

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

The proposed legislation provides that an organization determination is subject to de novo review at an administrative hearing and provides for organizational payment of testifying expenses for the treating doctor at an administrative hearing.

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.*

see attached

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

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

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

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

Name: John Halvorson
Agency: WSI
Telephone: 328-6016
Date Prepared: 01/24/2013

WORKFORCE SAFETY & INSURANCE
2013 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: SB 2298

BILL DESCRIPTION: De Novo Review/Payment of Treating Doctor Testifying Expenses

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuarial firm, Bickerstaff, Whatley, Ryan & Burkhalter Consulting Actuaries, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation provides that an organization determination is subject to de novo review at an administrative hearing and provides for organizational payment of testifying expenses for the treating doctor at an administrative hearing.

FISCAL IMPACT: Because estimated costs associated with this bill rely on an estimate of the number of injured workers utilizing this provision, and the number will likely change should this bill become law; we believe the fiscal impact is not quantifiable. However, if utilized, potentially significant costs will be generated by the provision allowing the employee's treating doctor to testify at the administrative hearing at the expense of the organization.

DATE: January 24, 2013

13.0754.02004
Title.05000

Prepared by the Legislative Council staff for
Representative Keiser
April 12, 2013

4-16-13

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2298

That the House recede from its amendments as printed on page 1142 of the Senate Journal and pages 1234 and 1235 of the House Journal and that Engrossed Senate Bill No. 2298 be amended as follows:

Page 1, line 2, remove "; and to provide for"

Page 1, line 3, remove "application"

Page 1, line 8, overstrike "If the organization does not give" and insert immediately thereafter "A presumption may not be established in favor of"

Page 1, overstrike lines 9 through 11

Page 1, line 12, overstrike "employee's record based on one or more of" and insert immediately thereafter ". The organization shall resolve conflicting medical opinions and in doing so the organization may consider"

Page 1, line 20, remove "At an administrative hearing, the organization's determination under subsection 1 is"

Page 1, remove line 21

Page 1, line 22, remove "3."

Page 2, remove lines 1 and 2

Renumber accordingly

13.0754.02007
Title.06000

Adopted by the Conference Committee

April 26, 2013

4-26-13

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2298

That the House recede from its amendments as printed on page 1142 of the Senate Journal and pages 1234 and 1235 of the House Journal and that Engrossed Senate Bill No. 2298 be amended as follows:

Page 1, line 2, remove "; and to provide for"

Page 1, line 3, remove "application"

Page 1, line 8, overstrike "If the organization does not give an injured employee's treating" and insert immediately thereafter "A presumption may not be established in favor of any"

Page 1, overstrike lines 9 through 11

Page 1, line 12, overstrike "employee's record based on one or more of" and insert immediately thereafter ". The organization shall resolve conflicting medical opinions and in doing so the organization shall consider"

Page 1, line 20, remove "At an administrative hearing, the organization's determination under subsection 1 is"

Page 1, remove line 21

Page 1, line 22, remove "3."

Page 2, remove lines 1 and 2

Renumber accordingly

Date: 4/16/2013

Roll Call Vote # **1**

2013 SENATE CONFERENCE COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. **SB 2298** as (re) engrossed

Senate Industry, Business and Labor Committee

Action Taken

☐ SENATE accede to House Amendments

☐ SENATE accede to House Amendments and further amend

☐ HOUSE recede from House amendments

☒ HOUSE recede from House amendments and amend as follows

☐ **Unable to agree**, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Representative M. Nelson Seconded by: Senator Laffen

Senators	4/12	4/16		Yes	No	Representatives	4/12	4/16		Yes	No
Klein	✓	✓			x	Ruby	✓	✓			x
Laffen	✓	✓			x	Keiser	✓	✓			x
Murphy	✓	✓		x		Nelson	✓	✓		x	
Total Senate Vote				1	2	Total Rep. Vote				1	2

Vote Count Yes: 2 No: 4 Absent: 0

Senate Carrier _____ House Carrier _____

LC Number _____ . _____ of amendment

LC Number _____ . _____ of engrossment

Date: 4/16/2013

Roll Call Vote # **2**

2013 SENATE CONFERENCE COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. **SB 2298** as (re) engrossed

Senate Industry, Business and Labor Committee

Action Taken

☐ SENATE accede to House Amendments

☒ SENATE accede to House Amendments and further amend

☐ HOUSE recede from House amendments

☐ HOUSE recede from House amendments and amend as follows

☐ **Unable to agree**, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Senator Laffen Seconded by: Representative Ruby

Senators				Yes	No	Representatives				Yes	No
Klein				x		Ruby				x	
Laffen				x		Keiser				x	
Murphy					x	Nelson					x
Total Senate Vote				2	1	Total Rep. Vote				2	1

Vote Count Yes: 4 No: 2 Absent: 0

Senate Carrier Senator Laffen House Carrier Representative Ruby

LC Number 13.0754 . 02004 of amendment

LC Number _____ . _____ of engrossment

Date: 4/16/2013

Roll Call Vote **# 3**

2013 SENATE CONFERENCE COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. **SB 2298** as (re) engrossed

Senate Industry, Business and Labor Committee

Action Taken

- ☐ SENATE accede to House Amendments
- ☐ SENATE accede to House Amendments and further amend
- ☐ HOUSE recede from House amendments
- ☒ HOUSE recede from House amendments and amend as follows
- ☐ **Unable to agree**, recommends that the committee be discharged and a new committee be appointed

The motion was reconsidered as the intent was;

Motion Made by: _____ Seconded by: _____

Senators				Yes	No	Representatives				Yes	No
Klein						Ruby					
Laffen						Keiser					
Murphy						Nelson					
Total Senate Vote						Total Rep. Vote					

Vote Count Yes: _____ No: _____ Absent: _____

Senate Carrier Senator Laffen House Carrier Representative Ruby

LC Number 13.0754 . 02004 of amendment

LC Number _____ . _____ of engrossment

Note: Senator Laffen was appointed carrier

Date: 4/26/2013

Roll Call Vote #1

2013 SENATE CONFERENCE COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. **SB 2298** as (re) engrossed

Senate Industry, Business and Labor Committee

Action Taken

☐ SENATE accede to House Amendments

☐ SENATE accede to House Amendments and further amend

☐ HOUSE recede from House amendments

☒ HOUSE recede from House amendments and amend as follows;**13.0754.02006 and change may to shall on page 1, line 12**

☐ **Unable to agree**, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Representative Ruby Seconded by: Representative Keiser

Senators				Yes	No	Representatives				Yes	No
Klein				x		Ruby				x	
Laffen				x		Keiser				x	
Murphy					x	M. Nelson					x
Total Senate Vote				2	1	Total Rep. Vote				2	1

Vote Count Yes: 4 No: 2 Absent: 0

Senate Carrier Senator Laffen House Carrier Representative Ruby

LC Number 13.0754. 02007 of amendment

LC Number _____ . _____ of engrossment

REPORT OF CONFERENCE COMMITTEE

SB 2298, as engrossed: Your conference committee (Sens. Klein, Laffen, Murphy and Reps. Ruby, Keiser, M. Nelson) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ page 1142, adopt amendments as follows, and place SB 2298 on the Seventh order:

That the House recede from its amendments as printed on page 1142 of the Senate Journal and pages 1234 and 1235 of the House Journal and that Engrossed Senate Bill No. 2298 be amended as follows:

Page 1, line 2, remove "; and to provide for"

Page 1, line 3, remove "application"

Page 1, line 8, overstrike "If the organization does not give" and insert immediately thereafter "A presumption may not be established in favor of"

Page 1, overstrike lines 9 through 11

Page 1, line 12, overstrike "employee's record based on one or more of" and insert immediately thereafter ". The organization shall resolve conflicting medical opinions and in doing so the organization may consider"

Page 1, line 20, remove "At an administrative hearing, the organization's determination under subsection 1 is"

Page 1, remove line 21

Page 1, line 22, remove "3."

Page 2, remove lines 1 and 2

Renumber accordingly

Engrossed SB 2298 was placed on the Seventh order of business on the calendar.

REPORT OF CONFERENCE COMMITTEE

SB 2298, as engrossed: Your conference committee (Sens. Klein, Laffen, Murphy and Reps. Ruby, Keiser, M. Nelson) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ page 1142, adopt amendments as follows, and place SB 2298 on the Seventh order:

That the House recede from its amendments as printed on page 1142 of the Senate Journal and pages 1234 and 1235 of the House Journal and that Engrossed Senate Bill No. 2298 be amended as follows:

Page 1, line 2, remove "; and to provide for"

Page 1, line 3, remove "application"

Page 1, line 8, overstrike "If the organization does not give an injured employee's treating" and insert immediately thereafter "A presumption may not be established in favor of any"

Page 1, overstrike lines 9 through 11

Page 1, line 12, overstrike "employee's record based on one or more of" and insert immediately thereafter ". The organization shall resolve conflicting medical opinions and in doing so the organization shall consider"

Page 1, line 20, remove "At an administrative hearing, the organization's determination under subsection 1 is"

Page 1, remove line 21

Page 1, line 22, remove "3."

Page 2, remove lines 1 and 2

Renumber accordingly

Engrossed SB 2298 was placed on the Seventh order of business on the calendar.

2013 TESTIMONY

SB 2298

Before the Senate Industry, Labor and Business Committee

Testimony of Dean J. Haas on 2013 Senate Bill 2298, January 29, 2013

Hon. Chairman Jerry Klein and Members of the Senate Industry, Business and Labor Committee

I am an attorney practicing law at Larson Latham Huettl, LLP, including practice in worker's compensation. My familiarity with North Dakota worker's compensation law dates back to 1984, when I served as counsel to the Bureau until 1995. I have been representing injured workers on and off for since then. I testify today on behalf of injured workers in favor of SB 2298.

This bill amends the treating doctor statute, N.D.C.C. § 65-05-08.3, which currently gives "controlling weight" to the opinions of the employee's treating doctor over the opinion provided by a doctor in at "Independent Medical Examination," or Review, especially based on the treatment relationship, consistency of the opinion, and specialty. The amendments in this bill would ensure that the treating doctor rule applies at the time of the hearing in the case, and provides the employee with the funds to call the treating doctor to testify at a hearing—but only in those circumstances that WSI is relying on the IME to deny the employee's claim.

The statute uses the same language as the rule governing social security disability, 20 C.F.R. § 404.1527, which requires the Social Security Administration—and its Hearing Officers (Administrative Law Judges)—to give more weight to the treating doctor's opinion than to its own consultants. The treating doctor rule has no real meaning unless it is applied in the hearing on the matter.

WSI recently promulgated an Administrative rule, N.D.A.C., § 92-01-02-02.4, which provides that:

> When making findings of fact and conclusions of law in connection with an adjudicative proceeding, a hearing officer must affirm the organization's determination whether to give a treating doctor's opinion controlling weight under North Dakota Century Code section 65-05-08.3 if a reasoning mind reasonably could have decided that the organization's determination was supported by the greater weight of the evidence from the entire record.

Under the strange (invalid) rule that WSI seeks to apply, the hearing officer would be bound by whatever WSI wants to do, if a "reasoning mind" could have so decided. What non-lawyers may not know is that the reasoning mind standard is very easy to fulfill. The Court's review of every factual finding of the hearing officer is extremely limited; the Court "does not substitute its judgment for that of the agency," as it is up to the fact-finder to weigh the evidence, including testimony of lay and expert witnesses. *Curran v. WSI*, 2010 ND 227, ¶ 17, 791 N.W.2d 622. Almost no decision relating to the facts of the case—including the weight to be given to testimony—can be over-turned under the reasoning mind standard. That's why the reasoning mind standard is only correctly

applied by the Courts in their review of whether or not the fact finder could possibly have reached the findings she did. If the Hearing Officer is already bound by the factual findings of WSI, there is no fair hearing.

WSI's rule is clearly inconsistent with the statute as it is written, and would make WSI sole arbiter of whether or not the statute is given effect in any given case. This is worth emphasizing: **to bind Hearing Officers in this manner makes a mockery of the hearing**. We Americans, regardless of party or legal philosophy, value most highly our liberty rights. High among these is the right to be heard by a jury of our fellow citizens or by a neutral judge when important property rights are at stake. This applies no less to Administrative cases. If the Hearing Officer cannot apply the treating doctor rule unless WSI approves, we have made the Hearing Officer a mere rubber stamp for WSI, just like the Appellate Court that does not itself make the factual findings. Essential to the Constitutional right to a fair hearing is an independent fact-finder, and this requires that the Hearing Officer decide whether or not the treating doctor rule is overcome. This is also consistent with how SSA applies its rule, for the treating doctor rule has no meaning whatsoever if it does not apply at the hearing unless WSI allows it to.

It is important to note that the 2008 "Performance Evaluation Report" compiled by Berry, Dunn, McNeil & Parker, underscores that 82% of all of the IME's were performed by Minnesota physicians, and only 18% by North Dakota physicians. More ominously, the IME reviewer disagreed with the treating doctor most of the time—65% in frank disagreement.

At one time, WSI relied on IME's only in unique or complicated cases, and otherwise would elect to examine the treating doctor under oath. In my time as an Assistant Attorney General representing the Bureau, relying on the treating doctor's frank and complete opinion generally satisfied everyone. In fact, the full-bodied opinions of many treating doctors were nuanced to the extent they actually favored WSI in many respects. IME's should not be the go-to option in all routine litigated cases as it has become.

At hearing, WSI always calls the IME physician to testify, who laboriously nitpicks the treating doctor's opinion, thus given the last word. Employees cannot afford to pay the costs of calling the treating doctor to testify. This bill addresses this issue, requiring WSI to pay the cost of the treating doctor—but only when WSI uses an IME to rebut the opinion of the treating doctor. This would help to level the playing field just a bit, and provide a fairer hearing to employees.

Moreover, this legislation ensures that treating doctors are honored for the service they perform, and that their professional integrity is not brought into question simply because they think their patient was hurt at work, requires a certain kind of medical care, and may need work restrictions during recovery. WSI's widespread questioning of the veracity of our good and decent North Dakota treating physicians—by ignoring their opinions in favor of an out-of-state hired-gun IME—is an affront to the profession, and chilling to the provision of medical services to the injured. It is unfortunate that increasingly North Dakota physicians are reluctant to treat the work injured; the

administrative burden and questioning attitude are becoming too much for many. The proliferation of IME's to question the opinions of our state's treating doctors requires legislative response.

Thank you for listening to the employee's perspective. I share your interest in improving North Dakota's Worker's Compensation system, and hope to continue to provide constructive input from an important stakeholder—injured workers—who have no organized voice to present their legitimate views and concerns.

Dean J. Haas
Attorney at Law
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(701) 223-5300

(2)

State of North Dakota
Workforce Safety & Insurance

2008 Performance Evaluation Report

October 8, 2008

BERRY.DUNN.MCNEIL & PARKER

BDMP

Report prepared by:

Berry, Dunn, McNeil & Parker

Certified Public Accountants ▪ Management Consultants

existing or degenerative conditions with which to make a claim compensability decision. The denial trend supports the fact that the increased rigor of the initial investigations resulted in additional denials.

Evaluation of Independent Medical Exam (IME) Program

Objective

This component of Element Six required an evaluation of claims involving Independent Medical Exams (IME's), to determine the efficiency and efficacy of IME practices and to assess whether WSI was doing enough to encourage North Dakota physicians to participate in the IME program.

Observations & Findings

BDMP reviewed 50 random claims that had IMEs scheduled during the 2006/2007 calendar years.

- Forty-eight of the claims evaluated (96%) followed the appropriate IME referral process outlined in the WSI Claims Procedure Manual.

- The two instances that deviated from the standard referral process were appropriate IMEs however they did not have form C54—Prep Form Claims Assessment completed in a timely manner. This is an administrative form to be completed by the adjuster that instructs the claim technician to enter the IME into the Medical Events Window and generate a notice to the injured worker to attend the IME.

- The claim evaluations revealed that IMEs were utilized appropriately in the claims process and ultimately helped drive claims towards resolution 86% of the time. In other words, the claim adjuster was able to make decisions on the claim once they obtained an independent medical opinion. The remaining 14% of evaluated claims are still ongoing and have not yet been resolved. According to WSI, 0.5% of the claims are sent for IMEs. In every case BDMP examined, the adjuster chose an IME physician based on the specialty required to provide a thorough and accurate independent medical exam.

    - In many cases, rather than simply trying to match the specialty of the treating provider on record, the adjusters picked appropriate specialists based on the injured workers' injury types and the specific questions the adjusters had about the treatment/injury.

    - In every claim evaluated, the specialty of the IME physician was either the same as the treating physician or was a specialty better versed in the specific injury or treatment that was in question. The specialty of the IME physician was often

documented on the forms sent to the injured worker and on the report forwarded back to the adjuster.

- BDMP also noted that adjusters routinely worked to accommodate injured workers' schedules, assisted with travel planning and/or paid travel expenses when out-of-state trips were required for IMEs.

- Of the IME claims evaluated by BDMP with completed IME reports, 35% of the IME physicians agreed and 65% disagreed with the treating physician.

- Of the IME claims evaluated, only 18% were completed with North Dakota physicians, while 82% were scheduled with Minnesota physicians.

  - In multiple instances however, the Minnesota IME physicians traveled to North Dakota to complete the IME.

  - There was no significant difference between the IME results (agree/disagree with the treating physician) related to the location of the IME physician. 33% of the North Dakota IME physicians agreed with the treating physician compared to 35% of the Minnesota IME physicians.

  - The use of out-of-state IME physicians did not appear to significantly impact the efficiency of the claims process as IMEs performed in MN required a total of 46 days from the date the C54 Claims Assessment Worksheet was completed to the date the IME report was received. By comparison, IMEs scheduled in North Dakota required 41.4 days from the C54 to the final IME report.

During the interview phase, WSI staff charged with increasing the number of in-state IME providers outlined several significant initiatives that had been implemented in an effort to encourage North Dakota providers to participate in the IME program, but also noted that the fundamental challenge they face is the size of the North Dakota provider community. We noted:

- The most recent data from The Kaiser Family Foundation State Health Facts identifies a total of only 1,782 Non-Federal primary care physicians in North Dakota, compared to 17,295 in Minnesota and 973,524 nationally.[25]

- In addition, a significant number of the 1,782 physicians identified in North Dakota would not be appropriate for workers' compensation claims, as the Kaiser data suggests that 9% of all in state providers are Pediatricians and another 8% specialize in Obstetrics/Gynecology. If those specialties are removed from the North Dakota totals,

[25] Kaiser State Health Facts, http://www.statehealthfacts.org/profileind.jsp?ind=433&cat=8&rgn=36, (Jun 2008)

SSA Social Security
The Official Website of the U.S. Social Security Administration

Code Of Federal Regulations

§ 404.1527. Evaluating opinion evidence.

(a) *General.* (1) You can only be found disabled if you are unable to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. See § 404.1505. Your impairment must result from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. See § 404.1508.

(2) Evidence that you submit or that we obtain may contain medical opinions. Medical opinions are statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions.

(b) *How we consider medical opinions.* In determining whether you are disabled, we will always consider the medical opinions in your case record together with the rest of the relevant evidence we receive. See § 404.1520b.

(c) *How we weigh medical opinions.* Regardless of its source, we will evaluate every medical opinion we receive. Unless we give a treating source's opinion controlling weight under paragraph (c)(2) of this section, we consider all of the following factors in deciding the weight we give to any medical opinion.

(1) *Examining relationship.* Generally, we give more weight to the opinion of a source who has examined you than to the opinion of a source who has not examined you.

(2) *Treatment relationship.* Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed in paragraphs (c)(2)(i) and (c)(2)(ii) of this section, as well as the factors in paragraphs (c)(3) through (c)(6) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.

(i) *Length of the treatment relationship and the frequency of examination.* Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the source's opinion more weight than we would give it if it were from a nontreating source.

(ii) *Nature and extent of the treatment relationship.* Generally, the more knowledge a treating source has about your impairment(s) the more weight we will give to the source's medical opinion. We will look at the treatment the source has provided and at the kinds and extent of examinations and testing the source has performed or ordered from specialists and independent laboratories. For example, if your ophthalmologist notices that you have complained of neck pain during your eye examinations, we will consider his or her opinion with respect to your neck pain, but we will give it less weight than that of another physician who has treated you for the neck pain. When the treating source has reasonable knowledge of your impairment (s), we will give the source's opinion more weight than we would give it if it were from a nontreating source.

(3) *Supportability.* The more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion. The better an explanation a source provides for an opinion, the more weight we will give that opinion. Furthermore, because nonexamining sources have no examining or treating relationship with you, the weight we will give their opinions will depend on the degree to which they provide supporting explanations for their opinions. We will evaluate the degree to which these opinions consider all of the pertinent evidence in your claim, including opinions of treating and other examining sources.

(4) *Consistency.* Generally, the more consistent an opinion is with the record as a whole, the more weight we will give to that opinion.

(5) *Specialization.* We generally give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist.

(6) *Other factors.* When we consider how much weight to give to a medical opinion, we will also consider any factors you or others bring to our attention, or of which we are aware, which tend to support or contradict the opinion. For example, the amount of understanding of our disability programs and their evidentiary requirements that an acceptable medical source has, regardless of the source of that understanding, and the extent to which an acceptable medical source is familiar with the other information in your case record are relevant factors that we will consider in deciding the weight to give to a medical opinion.

(d) *Medical source opinions on issues reserved to the Commissioner.* Opinions on some issues, such as the examples that follow, are not medical opinions, as described in paragraph (a)(2) of this section, but are, instead, opinions on issues reserved to the Commissioner because they are administrative findings that are dispositive of a case; *i.e.,* that would direct the determination or decision of disability.

(1) *Opinions that you are disabled.* We are responsible for making the determination or decision about whether you meet the statutory definition of disability. In so doing, we review all of the medical findings and other evidence that support a medical source's statement that you are disabled. A statement by a medical source that you are "disabled" or "unable to work" does not mean that we will determine that you are disabled.

(2) *Other opinions on issues reserved to the Commissioner.* We use medical sources, including your treating source, to provide evidence, including opinions, on the nature and severity of your impairment(s). Although we consider opinions from medical sources on issues such as whether your impairment(s) meets or equals the requirements of any impairment(s) in the Listing of Impairments in appendix 1 to this subpart, your residual functional capacity (see §§ 404.1545 and 404.1546), or the application of vocational factors, the final responsibility for deciding these issues is reserved to the Commissioner.

(3) We will not give any special significance to the source of an opinion on issues reserved to the Commissioner described in paragraphs (d)(1) and (d)(2) of this section.

(e) *Opinions of nonexamining sources.* We consider all evidence from nonexamining sources to be opinion evidence. When we consider the opinions of nonexamining sources, we apply the rules in paragraphs (a) through (d) of this section. In addition, the following rules apply to State agency medical and psychological consultants, other program physicians and psychologists, and medical experts we consult in connection with administrative law judge hearings and Appeals Council review:

(1) In claims adjudicated by the State agency, a State agency medical or psychological consultant may make the determination of disability together with a State agency disability examiner or provide one or more medical opinions to a State agency disability examiner when the disability examiner makes the initial or reconsideration determination alone (see § 404.1615(c) of this part). The following rules apply:

(i) When a State agency medical or psychological consultant makes the determination together with a State agency disability examiner at the initial or reconsideration level of the administrative review process as provided in § 404.1615(c)(1), he or she will consider the evidence in your case record and make findings of fact about the medical issues, including, but not limited to, the existence and severity of your impairment(s), the existence and severity of your symptoms, whether your impairment(s) meets or medically equals the requirements for any impairment listed in appendix 1 to this subpart, and your residual functional capacity. These administrative findings of fact are based on the evidence in your case but are not in themselves evidence at the level of the administrative review process at which they are made.

(ii) When a State agency disability examiner makes the initial determination alone as provided in § 404.1615(c)(3), he or she may obtain the opinion of a State agency medical or psychological consultant about one or more of the medical issues listed in paragraph (f)(1)(i) of this section. In these cases, the State agency disability examiner will consider the opinion of the State agency medical or psychological consultant as opinion evidence and weigh this evidence using the relevant factors in paragraphs (a) through (e) of this section.

(iii) When a State agency disability examiner makes a reconsideration determination alone as provided in § 404.1615(c)(3), he or she will consider findings made by a State agency medical or psychological consultant at the initial level of the administrative review process and any opinions provided by such consultants at the initial and reconsideration levels as opinion evidence and weigh this evidence using the relevant factors in paragraphs (a) through (e) of this section.

(2) Administrative law judges are responsible for reviewing the evidence and making findings of fact and conclusions of law. They will consider opinions of State agency medical or psychological consultants, other program physicians and psychologists, and medical experts as follows:

(i) Administrative law judges are not bound by any findings made by State agency medical or psychological consultants, or other program physicians or psychologists. State agency medical and psychological consultants and other program physicians, psychologists, and other medical specialists are highly qualified physicians, psychologists, and other medical specialists who are also experts in Social Security disability evaluation. Therefore, administrative law judges must consider findings and other opinions of State agency medical and psychological consultants and other program physicians, psychologists, and other medical specialists as opinion evidence, except for the ultimate determination about whether you are disabled (see § 404.1512(b)(8)).

(ii) When an administrative law judge considers findings of a State agency medical or psychological consultant or other program physician, psychologist, or other medical specialist, the administrative law judge will evaluate the findings using the relevant factors in paragraphs (a) through (d) of this section, such as the consultant's medical specialty and expertise in our rules, the supporting evidence in the case record, supporting explanations the medical or psychological consultant provides, and any other factors relevant to the weighing of the opinions. Unless a treating source's opinion is given controlling weight, the administrative law judge must explain in the decision the weight given to the opinions of a State agency medical or psychological consultant or other program physician, psychologist, or other medical specialist, as the administrative law judge must do for any opinions from treating sources, nontreating sources, and other nonexamining sources who do not work for us.

(iii) Administrative law judges may also ask for and consider opinions from medical experts on the nature and severity of your impairment(s) and on whether your impairment(s) equals the requirements of any impairment listed in appendix 1 to this subpart. When administrative law judges consider these opinions, they will evaluate them using the rules in paragraphs (a) through (d) of this section.

(3) When the Appeals Council makes a decision, it will follow the same rules for considering opinion evidence as administrative law judges follow.

[56 FR 36960, Aug. 1, 1991, as amended at 62 FR 38451, July 18, 1997; 65 FR 11877, Mar. 7, 2000; 71 FR 16445, Mar. 31, 2006; 75 FR 62681, Oct. 13, 2010; 76 FR 24807, May 3, 2011; 77 FR 10656, Feb. 23, 2012]

Last reviewed or modified 01/11/2013

(4)

2013 Senate Bill No. 2298
Testimony before the Senate Industry, Business, and Labor Committee
Presented by: Tim Wahlin, Chief of Injury Services
Workforce Safety & Insurance
January 29, 2011

Mr. Chairman, Members of the Committee:

My name is Tim Wahlin, Chief of Injury Services at WSI. I am here on behalf of WSI to provide information to the Committee to assist in making its determination regarding the merits of this legislation. After review and analysis of the history of this statute, WSI opposes this proposed legislation. WSI's Board likewise opposes this legislation.

This Bill seeks to amend two statutes. Section 2 of the bill changes 65-05-28 at subsection 3. This portion of our current law controls when WSI may seek either an independent medical examination (IME) or independent medical review (IMR).

> An independent medical examination and independent medical review must be for the purpose of review of the diagnosis, prognosis, treatment, or fees. An independent medical examination contemplates an actual examination of an injured employee, either in person or remotely if appropriate. An independent medical review contemplates a file review of an injured employee's records, including treatments and testing. NDCC 65-05-28(3).

This amendment makes WSI responsible for the payment of all fees and costs associated with calling an employee's treating physician to appear and testify at any administrative hearing in which WSI has obtained an IME or IMR.

WSI has a number of concerns with this provision including the fact that the statute provides no caps or limits on the costs. Additionally, there is a lack of clarity regarding whether "opinions" might be considered other than officially recognized IME's or IMR's. For instance, would consultation with a contract physician regarding a second opinion qualify for reimbursement? Would a second opinion that may differ with the treating physician's qualify?

Recent economic changes in the North Dakota workforce have dramatically increased the number of non-North Dakota employees encompassed by our system. Many of these injured employees travel "home" after an injury to treat with local providers that are in any one of our fifty states and Canadian Provinces. Costs in securing and bringing medical providers from all over the nation to testify likely would be significant.

Obviously, opening a state agency to unknown and possibly unrestrained economic costs is problematic. This provision would do exactly that.

This proposal likewise alters what has been a cornerstone of North Dakota law since the reforms of the mid-1990s. Prior to those reforms, attorney fees and costs were paid irrespective of the case outcome. In other words, regardless of whether an injured employee prevailed, his or her attorney fees were paid. This policy incentivized litigation without respect to outcome and was part the reason the agency was running a $250 million deficit. This provision removes the requirement of success for reimbursement of the associated costs.

Finally, the agency currently does reimburse not only the costs of physician testimony but also attorney fees to successful litigants. As a result, the laws providing for this reimbursement will only affect those instances when a litigant decides his or her specific case does not warrant bearing this risk. To the extent these cases now begin entering litigation, there is little question the litigation numbers will increase. This will have a compounding impact.

Section 1 of 2013 SB 2298 seeks to amend NDCC 65-05-08.3. This section currently provides guidelines to be followed by WSI in the event conflicting medical opinions exist within a claim. This law was passed by the 2009 Legislative Assembly and was an attempt to legislatively enact what already was established North Dakota caselaw, and had been the standard for 28 years. See, Bromley v. N.D. Work Comp, 304 N.W.2d 412 (N.D. 1981). That case established WSI cannot make a claims decision that is

contrary to a treating doctor's opinion without first having a supported and defendable reason for doing so. Section 65-05-08.3 was intended to codify this standard.

Currently this understanding is on appeal to the North Dakota Supreme Court and we await an opinion as to whether the statute unintentionally created a presumption of correctness of a treating physician's opinion to be rebutted by presentation of testimony to the contrary. This presumption was never before required by the Supreme Court prior to this statute being enacted. In other words, apparently our efforts to clarify this matter have failed and we await the Court's determination.

Section 1 of 2013 SB 2298 amends this statute by proscribing the type of review administrative law judges (ALJ) employ in reviewing WSI's findings when medical testimony does conflict.

Currently, the review an ALJ employs when analyzing conflicting medical testimony is that of an appellate body. The standard directs they review WSI's conclusions for reasonableness in light of the evidence contained within the entire record. This is subtly different from a "de novo" review wherein the ALJ would review the entire record and make findings without respect to those of the agency. WSI anticipates the removal of deference to the original findings will increase the time associated with ALJ inquiry, extend hearings and may increase costs.

With these concerns, WSI and it Board request a "Do not pass" on SB 2298.

This concludes my testimony. I would be happy to answer any questions at this time.

(1) SB 2298
3-20-2013

2013 Engrossed Senate Bill No. 2298
Testimony before the House Industry, Business, and Labor Committee
Presented by: Tim Wahlin, Chief of Injury Services
Workforce Safety & Insurance
March 20, 2013

Mr. Chairman, Members of the Committee:

My name is Tim Wahlin, Chief of Injury Services at WSI. I am here on behalf of WSI to provide information to the Committee to assist in making its determination regarding the merits of this legislation. In the bill's original form, WSI's Board opposed this legislation. Following engrossment, and after significant discussion, the Board reconsidered its position and chose to support the legislation with a 5-4 vote.

Engrossed 2013 SB 2298 seeks to amend NDCC 65-05-08.3. This section currently provides guidelines to be followed by WSI in the event conflicting medical opinions exist within a claim. This law was passed by the 2009 Legislative Assembly and was an attempt to legislatively enact what already was established North Dakota case law, and had been the standard for 28 years. See, Bromley v. N.D. Work Comp, 304 N.W.2d 412 (N.D. 1981). That case established WSI cannot make a claims decision that is contrary to a treating doctor's opinion without first having a supported and defendable reason for doing so. Section 65-05-08.3 was intended to codify this standard.

No review standard is proscribed by the statute. During implementation of the statute in 2009, WSI followed our legislative mandate to simply enact NDCC 65-05-08.3 to mimic the current law. This makes sense because it was to codify caselaw that had been in existence for the prior 28 years. In doing so, WSI needed to address the standard of review.

The review standard in existence proscribes that Administrative Law Judges (ALJ's) review WSI decisions similar to that of an appellate court. As a result, the Agency implemented an administrative rule that clearly reestablished the review basis. See

N.D.Admin Rule 92-01-02-02.4. The Rule directs an ALJ to use a reasonability standard which requires an ALJ to affirm the Agencies position if:

> "a reasoning mind reasonably could have decided that the organization's determination was supported by the greater weight of the evidence from the entire record." Id.

This standard is commonly employed in instances of administrative law and serves to acknowledge the Agency's expertise in the matters commonly before it. As a result, some deference is given to Agency findings, and this standard is commonly referred to as a "reasonableness standard." This is subtly different from a "de novo" review wherein the ALJ would review the entire record and make findings without respect to those of the Agency. WSI anticipates the removal of deference to the original findings may slightly increase the time associated with ALJ inquiry, may extend hearings, and may have a propensity to increase costs.

Currently WSI's interpretation of 65-05-08.3 is on appeal to the North Dakota Supreme Court and we await an opinion as to whether the statute unintentionally created a presumption of correctness of a treating physician's opinion to be rebutted by presentation of testimony to the contrary. This presumption was never before required by the Supreme Court prior to this statute being enacted. In other words, apparently our efforts to clarify this matter have failed and we await the Court's determination.

This concludes my testimony. I would be happy to answer any questions at this time.

(2) SB 2298
3-20-2013

OFFICE OF ADMINISTRATIVE HEARINGS

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MEMORANDUM

TO: Sixty-third Legislative Assembly
State of North Dakota
House Industry, Business, and Labor Committee

FROM: Allen C. Hoberg, Director
Office of Administrative Hearings

RE: Senate Bill No. 2298

DATE: March 20, 2013

Senate Bill No. 2298 adds a new subsection to section 65-05-08.3 requiring Workforce Safety and Insurance (WSI) determinations not to give the treating doctor's opinion controlling weight under subsection 1 to be subject to a de novo review by the hearing officer. Although we believe the law already requires that WSI decisions at the administrative hearing level be conducted on a de novo review basis, this new subsection is advisable and we support it because WSI has adopted a rule that purports to set a different standard for the hearing officer to apply in this solitary situation.

De novo review only means that the hearing officer considers all of the relevant evidence presented at the administrative hearing, including information available to WSI when it made

its decision in-house, as well as evidence that WSI has not considered that is admitted at the hearing.

The rule WSI has adopted, North Dakota Administrative Code section 92-01-02-02.4, provides that there is only a limited review of WSI's determination not to give the treating doctor's opinion controlling weight; it limits hearing officer (an OAH administrative law judge) review to a "reasoning mind" standard, rather than preponderance of the evidence standard, that must be met by the party challenging the decision. The rule is attached.

The reasoning mind standard applied in WSI's administrative rule is the standard applied on an appeal to the district or supreme court. This is inconsistent with the de novo review required for decisions issued by the ALJ. *See, Workforce Safety & Ins. v. Auck*, 2010 ND 126, ¶ 9; 785N.W.2d 186. (The court does not make findings independent from those of the ALJ that has issued a final decision but decides whether "a reasoning mind reasonably could have determined the finding were proven" and gives deference to the ALJ's findings of fact when they issue a final decision.)

As stated in *Auck*, the reasoning mind standard is a standard used by the courts in reviewing the matter on appeal from a final agency decision. N.D.C.C. § 65-02-22.1 provides that it is the

responsibility of the ALJ to issue a final determination for WSI administrative hearings. N.C.C.C. § 65-02-22.1 is attached.

The ALJ reviews the evidence presented at the administrative hearing on a de novo basis. Because the ALJ sits as hearing officer for the agency (WSI) in de novo review, the reasoning mind standard is not applied by the ALJ to WSI's non-final orders. Rather, the ALJ must analyze anew the facts given in evidence at a hearing under the factors stated in subsection 1 of section 65-05-08.3.

The addition of the language in subsection 2 reiterates the current status of the law by expressly stating that ALJs sitting as WSI's hearing officer must analyze the facts under subsection 1 of section 65-05-08.3 *de novo* and must make the determination upon evidence given at the hearing. Enacting this statute would reverse WSI's attempt to change this standard of review by enacting a rule, and may prevent costly litigation to sort out the conflict between the statute enacted in 2009 and the rule adopted by WSI in 2012.

Again, I want to emphasize that under the administrative agencies practice act provisions, N.D.C.C. chapter 28-32, and North Dakota Supreme Court decisions, hearings conducted by OAH ALJs as hearing officers issuing final decisions on behalf of WSI are de novo hearings. Any

first opportunity for the parties to present evidence at an administrative hearing, unless specifically limited by statute, is conducted as a de novo hearing.

In summary, the Office of Administrative Hearings supports this bill because it will reinforce the current state of the law that, at a WSI hearing, WSI's determination not to give a treating doctor's opinion controlling weight must be reviewed de novo by the hearing officer.

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92-01-02-02.4. Treating doctor's opinion. When making findings of fact and conclusions of law in connection with an adjudicative proceeding, a hearing officer must affirm the organization's determination whether to give a treating doctor's opinion controlling weight under North Dakota Century Code section 65-05-08.3 if a reasoning mind reasonably could have decided that the organization's determination was supported by the greater weight of the evidence from the entire record.

65-02-22.1. Appointment of administrative law judges - Hearings. Notwithstanding any other provisions of law, workforce safety and insurance shall contract with the office of administrative hearings for the designation of administrative law judges who shall conduct evidentiary hearings and issue final findings of fact, conclusions of law, and orders. Rehearings must be conducted as hearings under chapter 28-32.

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State wants second look at WSI's 'second opinions'

ND worker's comp reviews again under scrutiny

FARGO – Tim Lambertson has fought a long legal battle to keep from seeing the doctor. The former truck driver, who was sidelined from work by an injury sustained while unloading potatoes, would welcome medical treatments to end his debilitating back pain. Social Security classifies him as disabled.

By: Patrick Springer, INFORUM

FARGO – Tim Lambertson has fought a long legal battle to keep from seeing the doctor.

The former truck driver, who was sidelined from work by an injury sustained while unloading potatoes, would welcome medical treatments to end his debilitating back pain. Social Security classifies him as disabled.

But he is waging a legal fight – so far unsuccessfully – over whether he must submit to so-called independent medical examinations ordered by Workforce Safety & Insurance, North Dakota's workers' compensation program.

The reason for his obstinacy: Lambertson believes the reviews by doctors hired by WSI for a "second opinion" will be used to override his treating physicians' opinions that he is not able to work.

"They keep sending me and sending me and sending me until they can cut my benefits off," Lambertson said of the barrage of WSI-ordered evaluations.

A consultant's report five years ago found that the outside physicians hired by WSI disagreed with workers' treating doctors 65 percent of the time.

That's significant, because administrative law judges who decide claims disputes usually issue rulings agreeing with outside physicians hired by WSI for another opinion, lawyers representing injured workers said.

Long a source of controversy, WSI's use of "second opinions" will be a focus of an upcoming performance review by the North Dakota State Auditor's Office.

To clarify or cut off?

Figures show that WSI uses the outside medical examiners in less than 1 percent of all claims, far less than some other workers' comp programs that consultants looked at in a comparison, a WSI spokesman said.

"Use of IMEs" – independent medical examinations – "by WSI is rare," said Clare Carlson, deputy director of North Dakota workers' compensation.

"Their purpose is to get a second opinion when medical evidence is in conflict with other information," he said. "IMEs help provide clarity."

A 2010 study found WSI uses independent medical examiners an average of 150 times a year. WSI estimates that three years later is using, on average, 77 independent medical examinations per year, with estimates of the total cost ranging from $231,000 to $308,000. It handles about 24,000 new claims per year.

But lawyers who represent injured workers say WSI routinely uses IMEs as a tool when disputed claims end up in litigation, either administrative appeals or in court, such as Lambertson's case.

Mark Schneider, Lambertson's lawyer, believes WSI intended to use "second opinions" to come up with information it could use to determine it did not have to accept liability for Lambertson's disability claim.

In court documents, WSI argued that it wanted the outside medical examinations for a fresh evaluation of Lambertson's vocational rehabilitation potential.

But WSI had ordered the "second opinions" just days after conceding Lambertson had exhausted all vocational rehabilitation, indicating its true interest was to find a reason to deny the claim, Schneider said.

"What they're doing is looking for any way to cut this guy off," he said.

WSI would not comment on Lambertson's case because it is in litigation, Carlson said.

New study planned

WSI's use of independent medical examiners has been studied in three earlier reviews, and each time found their use was rare, Carlson said. Other workers' comp programs used the exams in 3.7 percent and 10.1 percent of their claims.

The 2008 consultant's study of WSI's use of outside medical examinations noted a "sense of pessimism" by workers and their representatives "that they can achieve a neutral or independent opinion from any IME."

Or, as Schneider puts it, the "independent medical examinations" should be called "adverse medical examinations" because of how often doctors hired by WSI disagree with workers' treating physicians.

State Auditor Bob Peterson decided to take another look at the use of outside medical examiners due to the frequent disagreements.

"It seems to me that people should be agreeing on a course of action," he said, adding that his office makes no presumptions before an evaluation or audit.

Results of the study, which will take place next year, should be ready in time for the 2015 legislative session, Peterson said.

#1 pg2

Courtney Koebele, executive director of the North Dakota Medical Association, which represents the state's doctors, said WSI's use of independent medical examiners bears scrutiny because the reviews often involve "tough cases."

"It's something we want to take a look at," she said.

Dean Haas, a lawyer who worked for North Dakota workers' compensation from 1984 to 1995 and now represents workers, said the agency used to rely almost exclusively on the opinion of treating doctors, even when claims were disputed.

"I came into this system that was all about treating doctors," he said. "You can always get an IME to say this is nothing but a progression of a pre-existing condition," and therefore not a compensable claim, Haas added.

The 2010 study of WSI's use of independent medical examiners said while the usage was "fairly low" given the number of injuries, the exams can become a "lightening rod" for complaints because they involve a shift in power over health care from the employee to workers' comp.

Legislative debate

The issue of how much weight WSI should give to the treating physician's opinion is the subject of a debate before the North Dakota Legislature.

Senate Bill 2298 would require administrative hearing officers to take a fresh look at the treating doctor's opinion, and not rely on WSI's determination.

The bill unanimously passed the Senate after removal of a provision that would have required WSI to pay for a treating physician's appearance at hearings. WSI had objected to that provision because of cost concerns, and it also opposes the flexibility the bill allows administrative law judges to ignore its own determinations.

"WSI anticipates the removal of deference to the original findings will increase the time associated with (administrative law judge) inquiry, extend hearings and may increase costs," Tim Wahlin, WSI's chief of injury services, told legislators in written testimony.

In 2009, legislators passed a law requiring WSI to give a "supported and defendable" reason for a claims decision at odds with a treating doctor's opinion.

But an administrative rule WSI seeks to apply would negate the effect of that law, Haas and Schneider said, allowing them to discard treating doctors' advice with a hired "second opinion."

Life of pain

Although an administrative hearing judge decided earlier this year that Lambertson had to submit to two "second opinions," he is challenging that decision in court.

His treating physicians, a family medicine doctor and a pain management specialist, have said all treatments have failed to resolve his chronic back pain. His family medicine doctor said in deposition testimony that Lambertson's "severe back issues" have left him "completely incapable of work of any kind."

Even sedentary work for short periods of time proved to be unsustainable, Lambertson and his lawyer have argued.

"I've done everything they've asked," said Lambertson, who retrained in business management after his 2004 back injury and worked for seven or eight months as a shop foreman but was unable to continue because the pain was too severe.

"The pain just kept getting worse," he said. Although not strenuous, the work required a lot of walking.

"He just kept upping the pain medication and upping the pain medication to keep working," added his wife, Heidi.

Lambertson, noting that he kept working for a year and a half after his 2004 back injury, said he would much rather work that rely on disability benefits. But his back injury is too severe, he said.

"I've been to Mayo Clinic. I've been everywhere searching for answers, and I've never heard anything different," he said.

To pay for the legal fight, the Lambertsons sold some of their property, including a boat, and are considering selling their lakeside resort.

"We've had to accept that this is a lifelong injury," Heidi Lambertson said.

Readers can reach Forum reporter Patrick Springer at (701) 241-5522

Tags: northdakota, news, government, health

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Bill would classify pain as only a symptom, not sign of worsening pre-existing condition

FARGO – Proponents say a bill being considered in the state Legislature seeks to clarify North Dakota workers' compensation law regarding how pain and pre-existing injuries affect claims decisions.

By Patrick Springer, INFORUM

FARGO – Proponents say a bill being considered in the state Legislature seeks to clarify North Dakota workers' compensation law regarding how pain and pre-existing injuries affect claims decisions.

But a physician who is a pain expert testified that the measure is based on a "profound misunderstanding" of pain that dates back to the 17th century.

Critics say the legislation, if passed, would be the most significant alteration in workers' compensation law in decades, to the detriment of injured workers.

House Bill 1163 would declare that pain is only a symptom and not a sign of a substantial "worsening" or "acceleration" of a pre-existing condition under workers' compensation law.

That language is important because only instances where work causes substantial worsening or acceleration of a pre-existing injury or condition are eligible for workers' comp benefits.

If work simply triggers symptoms in a pre-existing condition, it is not a compensable claim, under North Dakota law.

The bill passed the House of Representatives 61-28, and has been heard by a Senate committee, but has not yet been acted upon in that chamber.

Tim Wahlin, a lawyer and chief of injury services for Workforce Safety and Insurance, is advocating the change in law. He said it will clarify the law, which he said has frustrated members of the North Dakota Supreme Court.

"No portion of this bill renders pain irrelevant or unimportant," Wahlin said in written testimony. "No portion of this bill denies medical coverage for treatment of pain in compensable conditions."

Dean Haas, who worked for workers' compensation for 11 years and now represents injured workers, said passage of the bill would mean a "profound change" to the law.

"The legislation introduced at the request of Workforce Safety and Insurance states that a significant change in pain – even chronic pain – cannot be used to show a worsening in a pre-existing condition," Haas said.

That means that without evidence of a worsening condition from a medical scan or test, a patient's work injury would not present a valid claim, under the proposed law, Haas said.

"I think the significance of this is starting to dawn on people," he added. "I don't think workers' comp can keep minimizing this."

Physicians testified that pain is important in diagnosing injuries and medical conditions, and can be evidence of alterations in the nervous system following an injury.

"The wording of this legislation is based on a profound misunderstanding of what pain is," Dr. Michael Gonzalez, a pain management specialist who practices in Fargo, said in written testimony.

"It mixes the idea of acute pain with chronic pain and does not reflect at all what we know about pain from contemporary scientific study," Gonzalez said, adding the bill is based on a "17th century" understanding.

If lawmakers believe there is a "compelling need for a change in the law," Gonzalez pleaded with legislators to consult with medical experts before considering legislation dealing with pain and medical conditions.

"It is far too complex to be dealt with by a brief, general, and poorly defined addendum to existing law," he said.

He added: "The determination of what pain is and the significance of pain and its disabling effects should rightly be the province of medical practice."

Dr. Michael R. Moore, an orthopedic surgeon based in Bismarck and a member of the board of Workforce Safety and Insurance, also offered testimony.

In an age of sophisticated medical technology, there is a public misperception that every condition can be detected or diagnosed by a scan or test, Moore said.

A symptom of pain can be "crucial in determining the severity or significance of an injury, disease or condition," he said in written comments.

Still, Moore said WSI "reasonably wishes to avoid accepting liability for every ache or pain that accompanies the normal process of aging," or comes from a pre-existing condition.

Moore submitted what he said was language to better clarify existing law to avoid opening the door to "an unlimited number of claims." He also noted that House Bill 1163 could have an unintended consequence:

"If the presence of pain or worsening of pain cannot be considered evidence of an injury or of a condition's worsening, then it follows that the absence of pain or improvement of pain cannot be considered evidence that an injury has healed or a condition improved."

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That could, Moore said, "raise all manner of new contentious issues surrounding questions of when a patient could return to work."

Readers can reach Forum reporter Patrick Springer at (701) 241-5522

Tags: north dakota, news, legislature

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2012 ND 164

James Mickelson, Appellant
v.
North Dakota Workforce Safety and Insurance, Appellee
and
Gratech Company, Ltd., Respondent

No. 20110232

Appeal from the District Court of McLean County, South Central Judicial District, the Honorable Bruce A. Romanick, Judge.
REVERSED AND REMANDED.
Opinion of the Court by Kapsner, Justice.
Dean J. Haas, P.O. Box 2056, Bismarck, N.D. 58502-2056, for appellant.
Jacqueline S. Anderson, Special Assistant Attorney General, P.O. Box 2626, Fargo, N.D. 58108-2626, for appellee.

Mickelson v. Workforce Safety & Insurance

No. 20110232

Kapsner, Justice.

[¶1] James Mickelson appeals from a judgment affirming a Workforce Safety and Insurance ("WSI") decision denying his claim for workers' compensation benefits. He argues WSI erred in deciding he did not suffer a compensable injury. We conclude WSI misapplied the definition of a compensable injury, and we reverse and remand for further proceedings.

I

[¶2] On December 17, 2009, Mickelson applied to WSI for workers' compensation benefits, claiming he "developed soreness in lower back due to repetitive motion over time using foot pedal and driving over rough terrain" on August 30, 2009, while employed as an

equipment operator for Gratech Company, Ltd. According to Mickelson, he began working for Gratech on July 29, 2009, as an equipment operator, and he generally worked twelve-hour days, sitting in a pay loader and operating it with his right foot. Mickelson reported he operated the pay loader over rough terrain, which resulted in significant jarring and jolting. He claimed that before working for Gratech, he had not had any lower back pain, or pain radiating into his right leg. According to Gratech, Mickelson did not miss any work because of an injury from July 29 through December 3, 2009, when he was laid off, and he did not report the injury to Gratech until December 14, 2009.

[¶3] On August 30, 2009, Mickelson saw Dr. Matthew Goehner, a chiropractor, and Dr. Goehner's contemporaneous office note stated Mickelson had "pain across the lower back and pain/numbness into the right thigh and calf to foot" and diagnosed "[l]umbosacral region dysfunction with associated soft tissue damage causing nerve root irritation, lumbosacral strain from repetitive foot control use." Mickelson did not seek further treatment from Dr. Goehner until December 7, 2009, and he also saw Dr. Goehner for treatment five more times in December 2009, and once in January 2010. Dr. Goehner's notes state Mickelson reported low back pain with right leg numbness after standing for ten minutes and describe a decreased range in motion. In January 2010, Mickelson received treatment from Linda Regan, a physician assistant. An x-ray indicated "[m]ild degenerative changes of the lumbar spine," and Regan's preliminary report stated "[n]o degenerative joint disease seen" and "[l]umbar strain with right radiculopathy on standing." A January 2010 MRI of Mickelson's lumbosacral spine revealed "moderate to severe degenerative disk disease with a central disk protrusion at L5-S1." Regan later wrote a letter "to whom it may concern," stating that because Mickelson did not have back pain before operating the pay loader, "the combination of the rough terrain, using heavy equipment, sitting in one position for several hours at a time and also only using his right leg has caused the back pain with right leg radiculopathy for which he originally sought care." Mickelson also received treatment from Julie Schulz, a physical therapist, and she wrote a letter "to whom it may concern," stating Mickelson's "injury is directly related to his work situation. He did not have prior back pain. This is a reasonable mechanism of injury for this problem."

[¶4] In April 2010, Dr. Goehner also wrote a letter "[t]o whom it may concern," stating Mickelson had

> not presented with any lower back problems prior to 8/30/09. [His] injury is directly related to his job duties at work which included repetitive foot control use which caused stress to the muscles, ligaments, and joints of the lower back and pelvis. Following the injuries to the lower back [Mickelson] was diagnosed with degenerative disk disease. As you know, degenerative disk disease is a

> condition that develops over time and is a normal part of the aging process. Mr. Mickelson did not have any of the symptoms of degenerative disk disease prior to performing his job duty of repetitively using the foot controls and driving over rough terrain.

[¶5] Meanwhile, in February 2010, WSI initially denied Mickelson's claim for benefits, stating the January 2010 MRI revealed preexisting degenerative conditions or arthritis and concluding his "one month employment with Gratech triggered symptoms of [his] pre-existing degeneration but did not cause the condition and [he] did not report an injury to Gratech until 12/14/2009." Mickelson requested reconsideration, claiming his work substantially worsened his condition and he had never had prior lumbar spine problems. In March 2010, Dr. Gregory Peterson, a WSI medical consultant, conducted a record review and reported Mickelson's condition of "lumbar degenerative disc disease [was] not caused by his reported work injury. Repetitive motion on rough ground while operating a loader may trigger symptoms associated with lumbar degenerative disc disease, but not cause, substantially worsen, or substantially accelerate the condition." In March 2010, WSI again denied Mickelson's claim, relying on Dr. Peterson's review and concluding Mickelson had "not proven that his work activities substantially accelerated the progression of or substantially worsened the severity of his lumbar spine condition."

[¶6] Mickelson sought a formal administrative hearing, and an administrative law judge ("ALJ") was designated to issue a final decision on his claim. See N.D.C.C. § 65-02-22.1. After an administrative hearing, the ALJ affirmed WSI's denial of benefits, concluding Mickelson failed to establish he suffered a compensable injury during the course of his employment. The ALJ explained Mickelson had preexisting degenerative disc disease and his low-back pain and right leg pain and numbness were symptoms of his degenerative disc disease. The ALJ said Mickelson's employment triggered his symptoms of degenerative disc disease, but there was no evidence his employment substantially accelerated the progression or substantially worsened the severity of the degenerative disc disease. The ALJ rejected Mickelson's argument that triggering of symptoms constitutes a substantial worsening of his degenerative disc disease, concluding that interpretation would render the "trigger" language of N.D.C.C. § 65-01-02(10)(b)(7) meaningless. The ALJ also rejected Dr. Goehner's assessment of a lumbosacral strain from repetitive foot control use, concluding his assessment was not consistent with his later opinion that Mickelson's symptoms stem from degenerative disc disease. The district court affirmed the ALJ's decision.

II

[¶7] Under the Administrative Agencies Practice Act, N.D.C.C. ch.

28-32, courts exercise limited appellate review of a final order by an administrative agency. Workforce Safety & Ins. v. Auck, 2010 ND 126, ¶ 8, 785 N.W.2d 186. Under N.D.C.C. §§ 28-32-46 and 28-32-49, the district court and this Court must affirm an order by an administrative agency unless:

> 1. The order is not in accordance with the law.
> 2. The order is in violation of the constitutional rights of the appellant.
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶8] In reviewing an ALJ's factual findings, a court may not make independent findings of fact or substitute its judgment for the ALJ's findings; rather, a court must determine only whether a reasoning mind reasonably could have determined the findings were proven by the weight of the evidence from the entire record. Auck, 2010 ND 126, ¶ 9, 785 N.W.2d 186. When reviewing an appeal from a final order by an independent ALJ, similar deference is given to the ALJ's factual findings, because the ALJ has the opportunity to observe witnesses and the responsibility to assess the credibility of witnesses and resolve conflicts in the evidence. Id. Similar deference is not given to an independent ALJ's legal conclusions, however, and a court reviews an ALJ's legal conclusions in the same manner as legal conclusions generally. Id. Questions of law, including the interpretation of a statute, are fully reviewable on appeal. Id.

III

[¶9] Mickelson argues he suffered a compensable injury, because his employment caused a substantial worsening of the symptoms of his previously asymptomatic degenerative disc disease. He argues pain can be a substantial worsening of his condition and the triggering of degenerative disc disease from no symptoms to a disabling condition that requires medical care is compensable as a significant worsening of the clinical picture of his condition.

[¶10] The parties agree the provisions for aggravation in N.D.C.C. § 65-05-15 are not applicable to Mickelson's claim, because the language of that statute applies to "a prior injury, disease, or other condition, known in advance of the work injury," or to the "progression of a prior compensable injury." N.D.C.C. § 65-05-15(1) and (2). See Mikkelson v. North Dakota Workers Comp. Bureau, 2000 ND 67, ¶¶ 12-17, 609 N.W.2d 74. There is no evidence in this record that Mickelson knew about his lower back injury, disease, or other condition before he operated the loader for Gratech, and the ALJ found "there is no evidence . . . Mickelson had these symptoms [of low back pain and right leg radiculopathy] before he operated the loader for Gratech." Rather, the issue in this case involves whether Mickelson suffered a compensable injury.

[¶11] Claimants have the burden of proving by a preponderance of evidence they have suffered a compensable injury and are entitled to workers' compensation benefits. N.D.C.C. § 65-01-11; Bergum v. Workforce Safety & Ins., 2009 ND 52, ¶ 11, 764 N.W.2d 178. To carry this burden, a claimant must prove the "condition for which benefits are sought is causally related to a work injury." Bergum, at ¶ 11. To establish a casual connection, a claimant must demonstrate the claimant's employment was a substantial contributing factor to the injury and need not show employment was the sole cause of the injury. Bruder v. Workforce Safety & Ins., 2009 ND 23, ¶ 8, 761 N.W.2d 588.

[¶12] Section 65-01-02(10), N.D.C.C., defines a "compensable injury" under workers' compensation law, and provides, in relevant part:

> 10. "Compensable injury" means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings.
> . . . .
>
> b. The term does not include:
> . . . .
>
> (7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.

[¶13] In discussing the language of N.D.C.C. § 65-01-02(10)(b)(7), this Court has said "a preexisting injury must have been substantially accelerated or substantially worsened by the claimant's employment in order for the claimant to be entitled to benefits," and a "compensable injury does not exist when the claimant's employment

merely triggers symptoms of the preexisting injury," disease, or other condition. Johnson v. Workforce Safety & Ins., 2012 ND 87, ¶ 8. See also Bergum, 2009 ND 52, ¶ 12, 764 N.W.2d 178. Under N.D.C.C. § 65-01-02(10)(b)(7), this Court's decisions about a compensable injury in the context of a lower back claim generally involve a history of back-related injuries before a work incident. See Curran v. Workforce Safety & Ins., 2010 ND 227, ¶¶ 1, 3, 791 N.W.2d 622; Bergum, at ¶ 2; Bruder, 2009 ND 23, ¶ 2, 761 N.W.2d 588. Those decisions have generally recognized that whether a compensable injury exists involves a factual determination, but we have not otherwise analyzed the distinction between compensability when employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition and noncompensability when employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition.

[¶14] In Geck v. North Dakota Workers Comp. Bureau, 1998 ND 158 ¶ 6, 583 N.W.2d 621, and Pleinis v. North Dakota Workers Comp. Bureau, 472 N.W.2d 459, 462 (N.D. 1991), this Court reviewed workers' compensation decisions under a prior definition of compensable injury, which said a compensable injury did not include:

> Injuries attributable to a preexisting injury, disease, or condition which clearly manifested itself prior to the compensable injury. This does not prevent compensation where employment substantially aggravates and acts upon an underlying condition, substantially worsening its severity, or where employment substantially accelerates the progression of an underlying condition. However, it is insufficient to afford compensation under this title solely because the employment acted as a trigger to produce symptoms in a latent and underlying condition if the underlying condition would likely have progressed similarly in the absence of such employment trigger, unless the employment trigger is also deemed a substantial aggravating or accelerating factor. An underlying condition is a preexisting injury, disease, or infirmity.

[¶15] In Pleinis, 472 N.W.2d at 463 (footnote omitted), this Court construed the prior definition and rejected a claimant's argument that a predicate requirement for rejecting a claim was that a preexisting condition must clearly manifest itself before a work incident:

> The third sentence describes the consequences when employment acts as a trigger to produce symptoms in a "latent and underlying condition." In that situation compensation is not allowed if the underlying condition would likely have progressed similarly in the absence of an employment trigger, unless the employment trigger is a

> substantial aggravating or accelerating factor.
>
> The statutory language unambiguously describes when compensation is allowed for injuries attributable to both a latent underlying condition and an underlying condition which clearly manifested itself prior to the compensable injury. In both situations injuries attributable to the preexisting condition are compensable if employment substantially aggravates or accelerates the condition. . . . [T]he statute focuses on whether the underlying condition would likely have progressed similarly in the absence of employment, or whether the employment substantially aggravated or accelerated the condition.

This Court upheld a decision rejecting a claim for benefits, stating the agency's findings were sufficient to understand that the claimant's employment was not a substantial or accelerating factor of his underlying arthritis and osteoarthritic change and the underlying condition would likely have progressed similarly in the absence of his employment. Pleinis, at 463. Under Pleinis and the prior definition of compensable injury, the focus was on whether the underlying latent condition would likely have progressed similarly in the absence of employment, or whether employment substantially aggravated or accelerated the condition.

[¶16] In Geck, 1998 ND 158, ¶ 10, 583 N.W.2d 621, in the context of a latent underlying arthritic condition that was asymptomatic until a sharp knee pain was triggered while kneeling at work, a majority of this Court said there was no evidence contradicting that the claimant's pain in her left knee was caused by her work activity and that kneeling at work resulted in her latent underlying arthritic condition becoming symptomatic and painful. The majority concluded pain could be an aggravation of an underlying condition of arthritis and remanded for appropriate findings on whether the claimant's employment substantially aggravated arthritis in her left knee. Id. at ¶¶ 10-15.

[¶17] The definition of compensable injury at issue in Pleinis and Geck was amended to its current form by 1997 N.D. Sess. Laws ch. 527, § 1. See Geck, 1998 ND 158, ¶ 6 n.1, 583 N.W.2d 621. The current provisions of N.D.C.C. § 65-01-02(10)(b)(7) do not include language referring to both a latent underlying condition and an injury, disease, or condition which clearly manifested itself before a compensable injury. See Geck, at ¶ 6; Pleinis, 472 N.W.2d at 462. According to a WSI representative, however, the 1997 amendment did "not significantly change the substance" of the definition of compensable injury; rather, the amendment

> removes unnecessary and confusing language. It also adopts language that better matches the language of the "aggravation statute" at 65-05-15. This will create a more

> workable progression of compensation with no gaps between the various statutes. If the workplace incident is a "mere trigger" of a preexisting condition then there is no coverage. If the work injury significantly aggravates a known preexisting condition then there is a partial coverage. If the work injury is not really affected by the presence of the preexisting condition then it is a "new and separate" injury and is covered at 100% of benefits.

Hearing on H.B. 1269 Before House Industry, Business and Labor, 55 N.D. Legis. Sess. (Feb. 5, 1997) (written testimony of Reagan R. Pufall, WSI Attorney).

[¶18] The issue in this case involves the meaning of the current language of N.D.C.C. § 65-01-02(10)(b)(7). Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. If the language of a statute is clear and unambiguous, the letter of the statute may not be disregarded under the pretext of pursing its spirit. N.D.C.C. § 1-02-05. If the language of a statute is ambiguous, however, a court may resort to extrinsic aids to resolve the ambiguity. N.D.C.C. § 1-02-39.

[¶19] Under N.D.C.C. § 65-01-02(10)(b)(7), the Legislature has used the disjunctive word "or" in the phrase about whether employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition. The word "or" is disjunctive and ordinarily means an alternative between different things or actions with separate and independent significance. State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, ¶ 14, 712 N.W.2d 828. The Legislature's use of two different phrases with the disjunctive "or" contemplates separate and independent significance for ascertaining whether an injury attributable to a preexisting injury, disease, or other condition is compensable because employment substantially accelerates the progression or substantially worsens the severity of the injury, disease, or other condition. See id. A commonly understood meaning of "substantial" is "consisting of or relating to substance, . . . not imaginary or illusory, . . . real, true, . . . important, essential." Merriam-Webster's Collegiate Dictionary 1245 (11th ed. 2005). That source also defines "accelerate" to mean "to bring about at an earlier time, . . . to cause to move faster, . . . to hasten the progress or development of." Id. at 6. That source also defines "worsen" as to make "worse," which in turn means "more unfavorable, difficult, unpleasant, or painful." Id. at 1445. Moreover, under the statutory definition of compensable injury, an injury attributable to a preexisting injury, disease, or other condition is not compensable when employment acts as a "trigger" to produce "symptoms" in the preexisting injury, disease, or other condition. A commonly

understood meaning of "symptom" is "subjective evidence of disease or physical disturbance, . . . something that indicates the presence of bodily disorder." Id. at 1267. That source defines "trigger" as "something that acts like a mechanical trigger in initiating a process or reaction." Id. at 1337.

[¶20] When those terms are considered together to give meaning to each term, they mean injuries attributable to a preexisting injury, disease, or other condition are compensable if the employment in some real, true, important, or essential way makes the preexisting injury, disease or other condition more unfavorable, difficult, unpleasant, or painful, or in some real, true, important, or essential way hastens the progress or development of the preexisting injury, disease, or other condition. In contrast, injuries attributable to a preexisting injury, disease, or other condition are not compensable if employment acts like a mechanical trigger in initiating a process or reaction to produce subjective evidence of a disease or physical disturbance or something that indicates the presence of a bodily disorder. We recognize, as did the ALJ and Dr. Peterson, that pain can be a symptom, or subjective evidence, of an injury, disease or other condition. Under the ordinary meaning of those terms, however, employment can also substantially worsen the severity, or substantially accelerate the progression of a preexisting injury, disease, or other condition when employment acts as a substantial contributing factor to substantially increase a claimant's pain. That conclusion is consistent with our decision in Geck, that pain can be a substantial aggravation of an underlying latent condition. 1998 ND 158, ¶ 10, 583 N.W.2d 621.

[¶21] Nevertheless, under the ordinary meaning of the language in N.D.C.C. § 65-01-02(10)(b)(7), the distinction between compensability and noncompensability for injuries attributable to a preexisting injury, disease, or other condition is not clear, and we may consider extrinsic aids, including legislative history and former statutory provisions, to construe the current language. N.D.C.C. § 1-02-39(3) and (4). When the language in N.D.C.C. § 65-01-02(10)(b)(7) is considered together and in conjunction with the statement in the 1997 legislative history that those amendments did not change the substance of the definition of compensable injury, we conclude part of the analysis for assessing compensability of injuries attributable to a latent preexisting injury, disease, or other condition is whether or not the underlying preexisting injury, disease, or other condition would likely have progressed similarly in the absence of employment. See Pleinis, 472 N.W.2d at 462-63. We decline to construe those terms so narrowly as to require only evidence of a substantial worsening of the disease itself to authorize an award of benefits. Rather, the statute also authorizes compensability if employment substantially accelerates the progression or substantially worsens the severity of the injury, disease, or other condition, which we conclude requires consideration of whether the

preexisting injury, disease or other condition would have progressed similarly in the absence of employment. Under that language, employment substantially accelerates the progression or substantially worsens the severity of a preexisting injury, disease, or other condition when the underlying condition likely would not have progressed similarly in the absence of employment. That interpretation provides additional clarification and explanation for delineating between noncompensability when employment triggers symptoms in a preexisting latent injury, disease, or other condition and compensability when employment substantially accelerates the progression or substantially worsens the severity of the preexisting injury, disease, or other condition. That interpretation is also consistent with the purpose of workers compensation law to provide "sure and certain relief" for workers, see N.D.C.C. § 65-01-01, and with the principle that employment must be a substantial contributing factor for a compensable injury and need not be the sole cause of the injury. Bruder, 2009 ND 23, ¶ 8, 761 N.W.2d 588.

[¶22] Here, the ALJ relied heavily on Dr. Peterson's opinion and decided Mickelson's employment triggered his symptoms of degenerative disc disease, but did not substantially accelerate the progression or worsen the severity of the degenerative disc disease itself, stating:

> The greater weight of the evidence shows that Mr. Mickelson's low back pain and right leg radiculopathy are symptoms of his degenerative disc disease. There is no evidence that Mr. Mickelson had these symptoms before he operated a loader for Gratech Company Ltd.
>
> At the hearing, Dr. Peterson discussed the significance of Mr. Mickelson's degenerative disc disease symptoms and their relation to his alleged work injury. Dr. Peterson testified that Mr. Mickelson's degenerative disc disease was not caused by his reported work injury. Dr. Peterson explained that Mr. Mickelson's symptoms are consistent with the MRI findings and typical of degenerative disc disease, including radiation of pain into the right leg. And his symptoms upon standing, which are relieved by sitting, are also typical of degenerative disc disease. Dr. Peterson agreed with Dr. Goehner that degenerative disc disease develops over time and is an aging process. It is not the result of a repetitive injury (Dr. Goehner also characterized Mr. Mickelson's condition as "chronic" as opposed to an acute injury). According to Dr. Peterson, work activities have no significant effect on the development of degenerative disc disease and there is no evidence that repetitive stress accelerates or worsens degenerative disc disease. But, if you subject degenerative discs to the type of work Mr. Mickelson was doing, you may trigger symptoms of degenerative disc disease, but the degenerative disc disease itself is not substantially

> aggravated or worsened. In sum, Dr. Peterson opined that Mr. Mickelson's low back and right leg pain are symptoms of his degenerative disc disease. His work activities may have elicited these symptoms, but the work didn't substantially aggravate or worsen the degenerative disc disease.
>
> Drs. Peterson and Goehner agree that Mr. Mickelson has degenerative disc disease unrelated to his work duties and that his low back and right leg symptoms are related to the degenerative disc disease. They part company however, in that Dr. Goehner says that the degenerative disc disease is worse because Mr. Mickelson's work caused him to have symptoms, and he didn't have symptoms before. Dr. Peterson says that Mr. Mickelson's work may have triggered symptoms of the degenerative disc disease, but work didn't make the degenerative disc disease worse; it made it symptomatic.
>
> . . . Mr. Mickelson has preexisting degenerative disc disease and his low back pain and right leg pain and numbness are symptoms of his degenerative disc disease. Mr. Mickelson's employment triggered his symptoms of degenerative disc disease but there is no evidence that Mr.
>
> Mickelson's employment substantially accelerated the progression or substantially worsened the severity of the degenerative disc disease. Mr. Mickelson suggests that the triggering of symptoms constitutes a substantial worsening of his degenerative disc disease. If that were the case, the "trigger" language in 65-01-02[(10)](b)(7) would be meaningless. The language of section 65-01-02[(10)](b)(7) makes clear that a mere triggering of symptoms in a preexisting disease will not suffice as a compensable injury, in the absence of evidence that the disease itself is substantially worse. Here, the evidence shows that Mr. Mickelson's work acted as a trigger to make the underlying degenerative disc disease symptomatic, but there is no evidence that the underlying disease was made worse. Mr. Mickelson may think it unfair, but the legislature [has] made clear that a mere trigger of symptoms is not enough to establish compensability.

[¶23] We conclude Dr. Peterson's opinion and the ALJ's acceptance of that opinion misapplied the definition of compensable injury. The ALJ said Mickelson's condition itself, degenerative disc disease, must have substantially worsened. Although the ALJ made a conclusory statement there was no evidence Mickelson's employment substantially accelerated the progression of his degenerative disc disease, the ALJ's decision focused on whether the disease itself worsened without considering whether the underlying injury, disease, or other condition would likely have progressed

similarly in the absence of his employment. We conclude the ALJ misapplied the law by looking too narrowly at Mickelson's degenerative disc disease itself without considering whether his injury, disease, or other condition would likely not have progressed similarly in the absence of his employment so as to substantially accelerate the progression or substantially worsen the severity of his injury, disease, or other condition. We therefore reverse the judgment and remand for proper application of N.D.C.C. § 65-01-02 (10)(b)(7).

IV

[¶24] Mickelson argues the ALJ failed to address the August 30, 2009, opinion by Mickelson's treating physician, Dr. Goehner, stating Mickelson sustained a compensable soft tissue injury. WSI responds the ALJ adequately addressed that issue and could reasonably conclude Mickelson failed to establish a compensable injury to his lumbar spine in the context of resolving the issue about his degenerative disc disease.

[¶25] The ALJ's decision describes some inconsistency about the nature of Mickelson's injury, disease, or other condition in Dr. Goehner's August 30, 2009, office note and in his April 2010 letter "to whom it may concern." The ALJ found the "greater weight of the evidence shows that Mr. Mickelson's low back pain and right leg radiculopathy are symptoms of his degenerative disc disease." Contrary to the ALJ's conclusion, however, Dr. Goehner's April letter referenced stress to the muscles, and he did not specifically eliminate a muscle strain as an injury, disease, or other condition. Moreover, this issue is intertwined with the correct application of the definition of compensable injury, and on remand, WSI must adequately explain Dr. Goehner's soft-tissue or muscle strain diagnosis in the context of the correct application of N.D.C.C. § 65-01-02(10)(b)(7).

V

[¶26] Mickelson argues he adequately explained his failure to provide notice of his injury to his employer within seven days of the injury and that failure is not an independent ground to deny his claim. WSI responds the ALJ could reasonably decide WSI could consider Mickelson's failure to provide his employer with notice of injury within seven days of the injury.

[¶27] Section 65-05-01.2, N.D.C.C., provides an "employee shall take steps immediately to notify the employer that the accident occurred and . . . the general nature of the injury to the employee. if apparent," and "[a]bsent good cause, notice may not be given later than seven days after the accident occurred or the general nature of the employee's injury became apparent." Under N.D.C.C. § 65-05-

01.3, WSI "may consider" an employee's failure to notify an employer of an accident and the general nature of the employee's injury in determining whether the employee's injury is compensable. An obvious purpose of those statutes is to provide notice to an employer to allow the employer to alleviate dangerous conditions to prevent injuries. The plain language of those statutes allows WSI to "consider" a claimant's failure to notify an employer of an accident and the nature of the employee's injuries. Here, however, the ALJ did not decide Mickelson's claim on this issue, and we will not further address it.

VI

[¶28] We reverse the judgment and remand for proceedings consistent with this opinion.

[¶29] Carol Ronning Kapsner
Mary Muehlen Maring

VandeWalle, Chief Justice, concurring specially.

[¶30] I was part of the majority in Geck v. North Dakota Workers Comp. Bureau, 1998 ND 158, 583 N.W.2d 621, concluding that pain could be an aggravation of an underlying arthritic condition. While I agree with that conclusion, I am disturbed by the failure of the statutes and our opinions construing those statutes to distinguish those instances in which pain aggravates an underlying condition, i.e., substantially worsens the severity of the condition, from those instances in which, as the majority opinion here recognizes, pain is only a symptom of the condition triggered by employment. To the extent that is a factual, rather than a legal question, I am willing to remand the matter to WSI for further consideration under the facts of this case.

[¶31] Gerald W. VandeWalle, C.J.

Crothers, Justice, concurring in part and dissenting in part.

[¶32] I concur in Parts IV and V. I respectfully dissent from Part III in which the majority reverses the ALJ's decision based on what it concludes is an improper application of N.D.C.C. § 65-01-02(10)(b)(7). Majority opinion at ¶ 23. I would affirm because the ALJ correctly applied current law and because the ALJ reasonably could have found based on the evidence that Mickelson failed to prove a compensable injury.

[¶33] A "compensable injury" under workers' compensation law is defined as follows:

> "10. 'Compensable injury' means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings.
> . . . .
>
> "b. The term does not include:
> . . . .
>
> "(7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity."

N.D.C.C. § 65-01-02(10). This case focuses on exclusionary language in the statute to determine whether Mickelson's low back pain is compensable as a substantial acceleration or a substantial worsening of an existing injury.

[¶34] Mickelson's argument is substantially based on a law review article written by his lawyer and on a general Workers' Compensation treatise. The majority does not follow Mickelson down that path but spends considerable effort parsing the meaning of "symptom," "substantially" and "trigger" and applying two of this Court's decisions issued before N.D.C.C. § 65-01-02(10) was changed in 1997. Majority opinion at ¶¶ 14-21. I respectfully submit both Mickelson and the majority fail to focus on the plain words given by the legislature, which of course should direct our result. See N.D.C.C. § 1-02-02 ("Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained.").

[¶35] The statute applicable to Mickelson's claim says injuries attributable to a preexisting disease do not constitute a compensable injury. N.D.C.C. § 65-01-02(10)(b)(7). An exception to the limitation is if the injury attributable to a preexisting disease is proven to substantially accelerate or substantially worsen severity of the disease. Id. The ALJ's conclusion 2 succinctly, and I believe correctly, explains both a proper reading of the statute and why Mickelson's claim fails:

> "Mr. Mickelson has preexisting degenerative disc disease and his low back pain and right leg pain and numbness are symptoms of his degenerative disc disease. Mr. Mickelson's employment triggered his symptoms of degenerative disc disease but there is no evidence that Mr. Mickelson's employment substantially accelerated the progression or substantially worsened the severity of the

> where employment substantially aggravates and acts upon an underlying condition, substantially worsening its severity, or where employment substantially accelerates the progression of an underlying condition. It is insufficient, however, to afford compensation under this title solely because the employment acted as a trigger to produce symptoms in a latent and underlying condition if the underlying condition would likely have progressed similarly in the absence of the employment trigger, unless the employment trigger is determined to be a substantial aggravating or accelerating factor. An underlying condition is a preexisting injury, disease, or infirmity."

Geck, 1998 ND 158, ¶ 6, 583 N.W.2d 621.

[¶38] The version of N.D.C.C. § 65-01-02(10) applicable to Mickelson's claim requires a "substantial acceleration" or "substantial worsening" of the severity of the preexisting injury, disease or other condition. The current statute no longer allows recovery for "aggravation" of a condition like that considered in Geck. Therefore, even following the Geck majority's view that pain could have been an aggravation of Geck's existing condition, the current statute eliminates the possibility for compensation when pain is no more than aggravation of an underlying disease.

[¶39] Rather than requiring us to dissect the statute, I believe this case is more like Bergum v. N.D. Workforce Safety & Ins., 2009 ND 52, 764 N.W.2d 178. There, the claimant alleged a recent work incident substantially worsened or substantially accelerated his chronic low back condition. Id. at ¶ 10. This Court applied the version of the statute applicable to Mickelson's claim and held:

> "A claimant seeking workforce safety and insurance benefits has the burden of proving by a preponderance of the evidence that the claimant has suffered a compensable injury and is entitled to benefits. N.D.C.C. § 65-01-11; Manske v. Workforce Safety & Ins., 2008 ND 79, ¶ 9, 748 N.W.2d 394. To carry this burden, a claimant must prove by a preponderance of the evidence that the medical condition for which benefits are sought is causally related to a work injury. Manske, ¶ 9; Swenson [v. Workforce Safety & Ins. Fund], 2007 ND 149, ¶ 24, 738 N.W.2d 892.
>
> "Under N.D.C.C. § 65-01-02(10), a compensable injury 'must be established by medical evidence supported by objective medical findings.' Section 65-01-02(10)(b), N.D.C.C., excludes preexisting injuries from what is defined as a 'compensable injury,' stating in part:
>
> > "10. 'Compensable injury' means an injury by accident arising out of and in the course of hazardous employment which must be

> established by medical evidence supported by objective medical findings.
> . . . .
>
> "(b) The term does not include:
> . . . .
>
> "(7) Injuries attributable to a preexisting injury, disease, or other condition, including when the employment acts as a trigger to produce symptoms in the preexisting injury, disease, or other condition unless the employment substantially accelerates its progression or substantially worsens its severity.

"(Emphasis added.) Thus, under N.D.C.C. § 65-01-02(10)(b)(7), unless a claimant's employment 'substantially accelerates' the progression of, or 'substantially worsens' the severity of, a preexisting injury, disease, or other condition, it is not a 'compensable injury' when the claimant's employment merely acts to trigger symptoms in the preexisting injury, disease, or other condition.

A

"Bergum argues that although a worsening of his preexisting condition is not apparent on x-ray or other radiological testing, Bergum's symptoms have worsened since the January 2006 incident and have more significantly impacted him. Bergum further argues his injury is compensable based upon this Court's decision in Geck v. North Dakota Workers Comp. Bur., 1998 ND 158, 583 N.W.2d 621. We disagree.

"In Geck, 1998 ND 158, ¶ 10, 583 N.W.2d 621, the claimant for workers compensation benefits suffered pain in her knee caused by kneeling at work, resulting in her underlying condition of arthritis becoming symptomatic and painful. Under the version of N.D.C.C. § 65-01-02 then in effect, this Court stated that when employment 'triggers symptoms in a latent and underlying condition, compensation is generally not allowed if the underlying condition would likely have progressed similarly in the absence of the employment trigger, unless the employment trigger is a substantial aggravating or accelerating factor.' Geck, ¶ 7 (emphasis omitted); see also Hein v. North Dakota Workers Comp. Bur., 1999 ND 200, ¶ 17, 601 N.W.2d 576 (quoting Geck). In Geck, at ¶ 13, this Court held that the ALJ had failed to reconcile favorable medical evidence and failed to set forth expressly the reasons for disregarding the favorable medical evidence. In light of the medical evidence, this Court remanded the Geck case to the Bureau to make findings whether the employment

> trigger 'substantially aggravated' the arthritis in the claimant's knee. Geck, at ¶ 14.
>
> "In this case, the issue is whether Bergum's work-related incident 'substantially accelerated' the progression of, or 'substantially worsened' the severity of, a preexisting injury, disease, or other condition. Unlike Geck, the ALJ's opinion here, adopted by WSI as its final order, made a number of specific factual findings addressing the competing expert physician opinions and ultimately accepted the opinion of WSI's examining physician, Dr. Joel Gedan, a board certified neurologist, over the opinion of Bergum's treating physician, Dr. Gomez. As will be discussed further, WSI's final order contains findings of fact and conclusions of law that explicitly explain why Dr. Gedan's expert opinion was accepted over Dr. Gomez's opinion. We conclude that our decision in the Geck case does not mandate a finding that Bergum has a compensable injury in this case."

Bergum, at ¶¶ 11-15.

[¶40] Like in Bergum, Mickelson's case is controlled by the current statute requiring proof of a compensable injury stemming from employment that substantially accelerates the progression of an existing disease or substantially worsens its severity. Like in Bergum, Mickelson's case had conflicting evidence which was considered and explained by the ALJ. Like in Bergum, Mickelson's case does not turn on the holding in Geck but instead requires affirmance under a plain reading of the law, the evidence in this case and our standard of review.

[¶41] Daniel J. Crothers
Dale V. Sandstrom

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(4) 3-26-2013

13.0754.02001
Title.

Prepared by the Legislative Council staff for
Representative Keiser
March 25, 2013

2298

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2298

Page 1, line 8, overstrike "If the organization does not give" and insert immediately thereafter "A presumption may not be established in favor of"

Page 1, overstrike lines 9 through 11

Page 1, line 12, overstrike "employee's record based on one or more of" and insert immediately thereafter ". The organization shall resolve conflicting medical opinions and in doing so the organization may consider"

Page 1, line 20, remove "At an administrative hearing, the organization's determination under subsection 1 is"

Page 1, replace line 21 with "If the organization's resolution of conflicting medical opinions under subsection 1 is reviewed by a hearing officer as part of a rehearing of an administrative order or by a judge as part of an appeal of a posthearing administrative order, the hearing officer or judge shall affirm the organization's resolution if a reasoning mind could reasonably conclude that the organization's resolution is supported by the greater weight of the evidence."

Page 2, line 1, remove "administrative hearings conducted on and"

Page 2, line 2, replace "after the effective date of this Act" with "all claims, regardless of date of injury"

Renumber accordingly

13.0754.02003

Sixty-third
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED SENATE BILL NO. 2298

1
4-3-2013

Introduced by

Senators Kilzer, Carlisle

Representatives Hawken, Karls

A BILL for an Act to amend and reenact section 65-05-08.3 of the North Dakota Century Code, relating to workers' compensation consideration of treating doctor's opinions; and to provide for application.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-05-08.3 of the North Dakota Century Code is amended and reenacted as follows:

65-05-08.3. Treating doctor's opinion.

1. ~~If the organization does not give~~A presumption may not be established in favor of an injured employee's treating doctor's opinion ~~controlling weight, the organization shall establish that the treating doctor's opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the injured employee's record based on one or more of~~. The organization shall resolve conflicting medical opinions and in doing so the organization may consider the following factors:
   a. The length of the treatment relationship and the frequency of examinations;
   b. The nature and extent of the treatment relationship;
   c. The amount of relevant evidence in support of the opinion;
   d. How consistent the opinion is with the record as a whole;
   e. Appearance of bias;
   f. Whether the doctor specializes in the medical issues related to the opinion; and
   g. Other relevant factors.
2. ~~At an administrative hearing, the organization's determination under subsection 1 is subject to de novo review by the hearing officer.~~

~~3.~~ This section does not apply to managed care programs under section 65-02-20. For purposes of this section, the organization shall determine whether a doctor is an injured employee's treating doctor.

SECTION 2. APPLICATION. This Act applies to administrative hearings conducted on and after the effective date of this Act.

13.0754.02003
Title.

Prepared by the Legislative Council staff for
Representative Keiser
April 2, 2013

(2) 4-3-2013
SB 2298

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2298

In lieu of the amendments adopted by the House as printed on page 1132 of the House Journal, Engrossed Senate Bill No. 2298 is amended as follows:

Page 1, line 8, overstrike "If the organization does not give" and insert immediately thereafter "A presumption may not be established in favor of"

Page 1, overstrike lines 9 through 11

Page 1, line 12, overstrike "employee's record based on one or more of" and insert immediately thereafter ". The organization shall resolve conflicting medical opinions and in doing so the organization may consider"

Page 1, line 20, remove "At an administrative hearing, the organization's determination under subsection 1 is"

Page 1, remove line 21

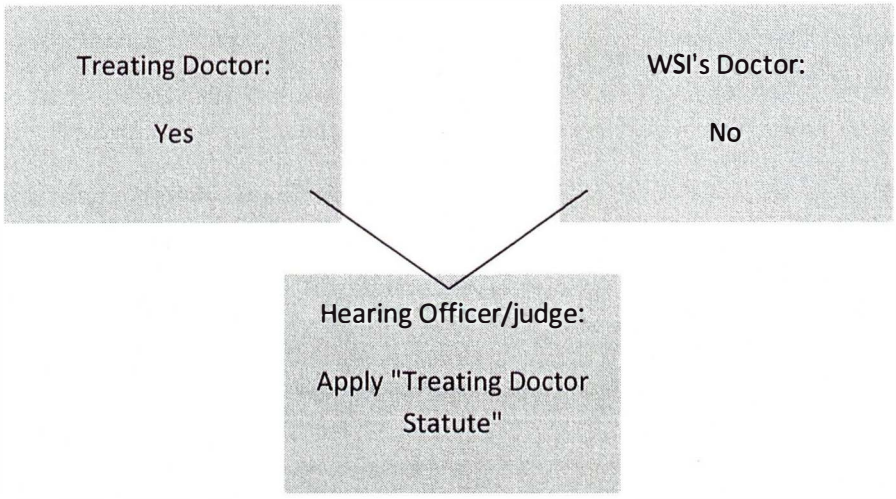
Page 1, line 22, remove "3."

Renumber accordingly

SB 2298 Summary

Under Current Law

1) "Battle of the Experts"



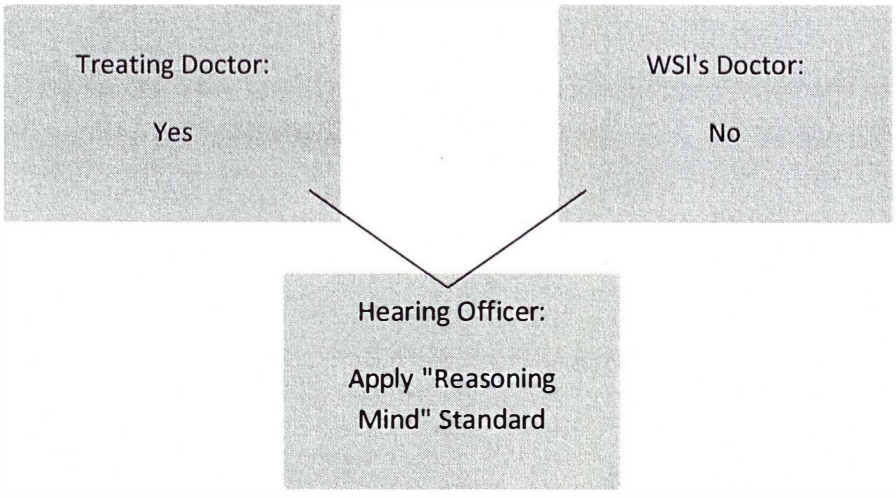
2) Hearing officers asks, "did WSI 'establish' that the treating doctor's opinion is" either 1) "Not well-supported by acceptable clinical and laboratory diagnostic techniques. Or 2) "Inconsistent with the other substantial evidence" of record.
3) If WSI can establish either 1) or 2), WSI should win.

Under Senate-Passed Version of SB 2298

Same as under current law, except the bill clarifies that the hearing officer does a "De Novo" review of whether WSI "established" 1) or 2). I.e. the judge is not bound by WSI initial decision to discount the treating doctor's opinion.

Under House-Passed Version of SB 2298

1) "Battle of the Experts"



2) Hearing officer asks, could "a reasoning mind have decided that" WSI's "determination" regarding the treating doctor's opinion was correct.
3) Worker must prove that "***no*** reasoning mind"* could have decided what WSI did.

*This is nearly an impossible standard to meet. It is the standard on appeal under current law.

(2)

13.0754.02004
Title.

Prepared by the Legislative Council staff for
Representative Keiser
April 12, 2013

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2298

That the House recede from its amendments as printed on page 1142 of the Senate Journal and pages 1132, 1234, and 1235 of the House Journal and that Engrossed Senate Bill No. 2298 be amended as follows:

Page 1, line 2, remove "; and to provide for"

Page 1, line 3, remove "application"

Page 1, line 8, overstrike "If the organization does not give" and insert immediately thereafter "A presumption may not be established in favor of"

Page 1, overstrike lines 9 through 11

Page 1, line 12, overstrike "employee's record based on one or more of" and insert immediately thereafter ". The organization shall resolve conflicting medical opinions and in doing so the organization may consider"

Page 1, line 20, remove "At an administrative hearing, the organization's determination under subsection 1 is"

Page 1, remove line 21

Page 1, line 22, remove "3."

Page 2, remove lines 1 and 2

Renumber accordingly

(3)

13.0754.02004

Sixty-third
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED SENATE BILL NO. 2298

Introduced by

Senators Kilzer, Carlisle

Representatives Hawken, Karls

A BILL for an Act to amend and reenact section 65-05-08.3 of the North Dakota Century Code, relating to workers' compensation consideration of treating doctor's opinions~~; and to provide for application~~.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-05-08.3 of the North Dakota Century Code is amended and reenacted as follows:

65-05-08.3. Treating doctor's opinion.

1. ~~If the organization does not give~~A presumption may not be established in favor of an injured employee's treating doctor's opinion ~~controlling weight, the organization shall establish that the treating doctor's opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the injured employee's record based on one or more of~~. The organization shall resolve conflicting medical opinions and in doing so the organization may consider the following factors:
   a. The length of the treatment relationship and the frequency of examinations;
   b. The nature and extent of the treatment relationship;
   c. The amount of relevant evidence in support of the opinion;
   d. How consistent the opinion is with the record as a whole;
   e. Appearance of bias;
   f. Whether the doctor specializes in the medical issues related to the opinion; and
   g. Other relevant factors.
2. ~~At an administrative hearing, the organization's determination under subsection 1 is subject to de novo review by the hearing officer.~~

~~3.~~ This section does not apply to managed care programs under section 65-02-20. For purposes of this section, the organization shall determine whether a doctor is an injured employee's treating doctor.

~~**SECTION 2. APPLICATION.** This Act applies to administrative hearings conducted on and after the effective date of this Act.~~

From: Jim Wynstra
Sent: Tuesday, April 23, 2013 02:44 PM
To: Dan Ulmer
Subject: RE: SB 2298 - changes to WSI treating doctor statute

The data provided me shows that WSI loses roughly 30 cases a year and a medical case cost $45,000. A rough estimate of the cost of this legislation is that now WSI will win 15 additional medical cases a year. This amounts to a potential cost of $675,000 a year. This estimate is not based on a scientific study and is only based on the general concept that this legislation will make it easier for WSI to win cases. The purpose of this estimate is only to give a rough overview of the magnitude of the cost of this legislation. As a cap, the most this could be worth is roughly $1.35 million if it helps WSI win all of their medical cases (roughly 30 a year).

Jim Wynstra
Director of Actuarial Services, Actuarial Services
BLUE CROSS BLUE SHIELD OF NORTH DAKOTA, FARGO
701-277-2213
jim.wynstra@BCBSND.com | www.BCBSND.com

Independent Medical Examinations (IMEs)

IMEs have been a discussion topic within numerous independent studies, evaluations, and reports conducted on WSI. Some excerpts from these reports are contained below:

2008 Independent Performance Evaluation conducted by BDMP (issued 10/8/2008)*

(p. 91) *The claim evaluations revealed that IMEs were utilized appropriately in the claims process and ultimately helped drive claims towards resolution 86% of the time. In other words, the claim adjuster was able to make decisions on the claim once they obtained an independent medical opinion. The remaining 14% of evaluated claims are still ongoing and have not yet been resolved. According to WSI, 0.5% of the claims are sent for IMEs. In every case BDMP examined, the adjuster chose an IME physician based on the specialty required to provide a thorough and accurate independent medical exam.*

(p. 91) *In every claim evaluated, the specialty of the IME physician was either the same as the treating physician or was a specialty better versed in the specific injury or treatment that was in question. The specialty of the IME physician was often documented on the forms sent to the injured worker and on the report forwarded back to the adjuster.*

(p. 92) *Of the IME claims evaluated by BDMP with completed IME reports, 35% of the IME physicians agreed and 65% disagreed with the treating physician.*

(p. 92) *Of the IME claims evaluated, only 18% were completed with North Dakota physicians, while 82% were scheduled with Minnesota physicians.*
- In multiple instances however, the Minnesota IME physicians traveled to North Dakota to complete the IME.
- There was no significant difference between the IME results (agree/disagree with the treating physician) related to the location of the IME physician. 33% of the North Dakota IME physicians agreed with the treating physician compared to 35% of the Minnesota IME physicians.

Conolly Review (issued 3/5/2008)*

(p.49) *We found it unusual that the total number of WSI ordered IME's [Independent Medical Reviews] performed in 2007, at only 110, is the subject of public controversy. In contrast with the more than 2,000 lost time cases accepted each year by WSI. The same number of IME's is very small upon a relative basis, particularly in comparison to most of the workers' compensation systems with which we are familiar. In many other jurisdictions IME's are routine, and not the exception that they clearly are in North Dakota. Moreover, IME's appear to be ordered reluctantly by WSI, and only in the more difficult or questionable cases.*

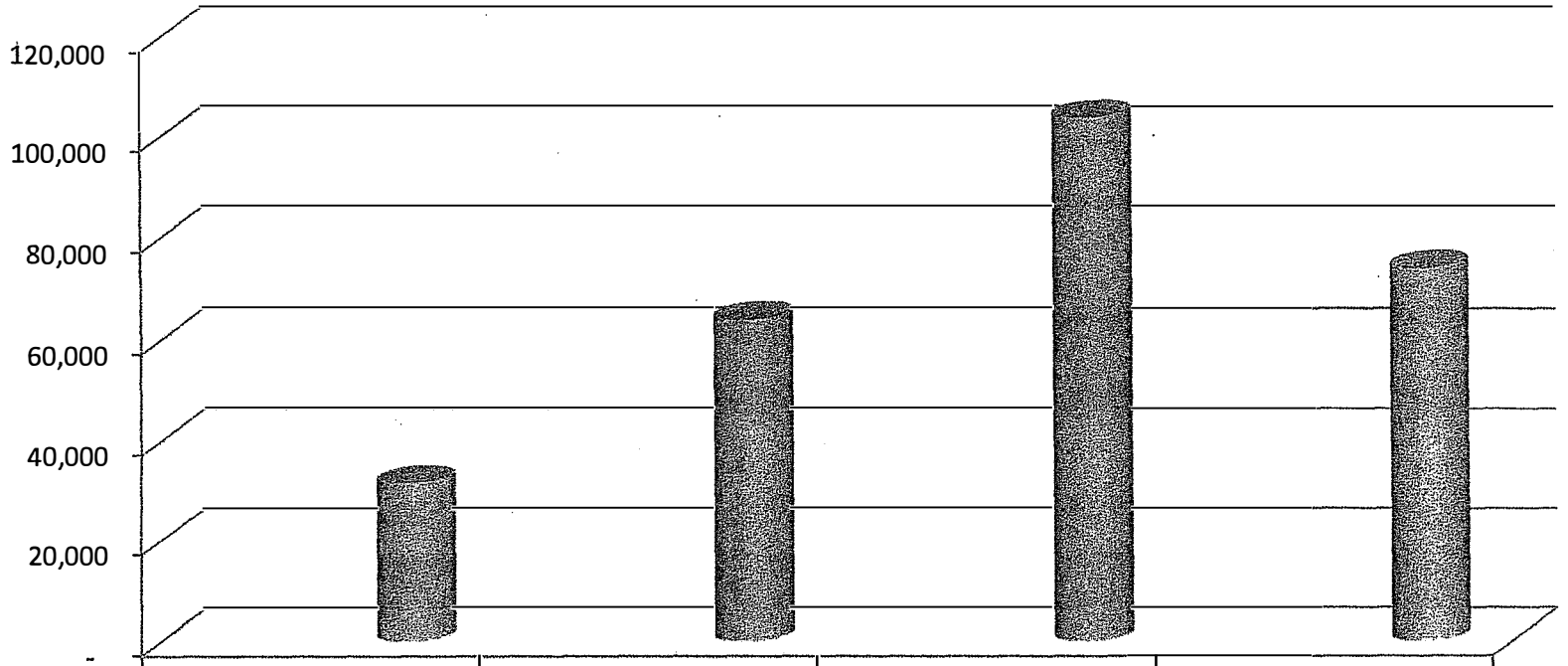
IME Audit Report conducted by DA Dronen Consulting (issued 2/1/2007)*

(p. 24) *2. WSI's utilization of IME's and Record Reviews reflects a lower percentage frequency than that of neighboring states and other insurance companies. Audit findings showed that based on a two year average of total claims filed (20,738) in 2005-06, an average of 113 IME's and Record Reviews were conducted through WSI. This reflects a 0.5% utilization rate. In comparison, a large Minnesota based workers compensation insurer shared data that demonstrates in 2005-06, on 21,134 claims filed they conducted 789 IME's/Record Reviews. This Minnesota based insurer's utilization rate of these services is 3.7%. A comparable state fund shared data that demonstrates on an average of 161,986 claims filed in 2005-06, 16,396 IME's were conducted. This represents a utilization rate of 10.1%.*

(p. 27) *However, our review of a sample of claims did reflect the rationale for obtaining IME's was consistently sound, appeared objectively driven, and was scheduled with IME vendors based on availability and scheduling habits rather than any desire to obtain a certain position favorable to WSI.*

*-indicates complete copies of the report can be found on WSI's website at www.workforcesafety.com

$500 Post DRO Attorney Consultation Fees & Costs



	FY2010	FY2011	FY2012	FY2013 @ 3/31/13
Fees	31,585	63,954	103,966	74,301
Costs	27	172	165	63
Total Fees & Costs	31,612	64,126	104,131	74,364

January 2008 through April 2013
Compiled by WSI 4.23.13
Calendar Years

	2008	2009	2010	2011	2012	2013 to date
WSI Win	64	57	57	87	87	22
WSI Loss	37	17	19	28	31	8
Stipulated	17	16	20	31	33	9
Withdrawn by IW	15	13	36	78	40	9
Return to WSI	30	9	6	9	8	7
Totals	163	112	138	233	199	55

*numbers do not reflect District and Supreme Court appeals

(2)

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2298

That the House recede from its amendments as printed on page 1142 of the Senate Journal and pages 1234 and 1235 of the House Journal and that Engrossed Senate Bill No. 2298 be amended as follows:

Page 1, line 2, remove "; and to provide for"

Page 1, line 3, remove "application"

Page 1, line 8, overstrike "If the organization does not give an injured employee's treating" and insert immediately thereafter "A presumption may not be established in favor of any"

Page 1, overstrike lines 9 through 11

Page 1, line 12, overstrike "employee's record based on one or more of" and insert immediately thereafter ". The organization shall resolve conflicting medical opinions and in doing so the organization may consider"

Page 1, line 20, remove "At an administrative hearing, the organization's determination under subsection 1 is"

Page 1, remove line 21

Page 1, line 22, remove "3."

Page 2, remove lines 1 and 2

Renumber accordingly

13.0754.02000

Sixty-third
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED SENATE BILL NO. 2298

Introduced by

Senators Kilzer, Carlisle

Representatives Hawken, Karls

A BILL for an Act to amend and reenact section 65-05-08.3 of the North Dakota Century Code, relating to workers' compensation consideration of treating doctor's opinions~~; and to provide for application~~.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 65-05-08.3 of the North Dakota Century Code is amended and reenacted as follows:

A presumption may not be established in favor of any

65-05-08.3. Treating doctor's opinion.

1. ~~If the organization does not give an injured employee's treating~~ doctor's opinion ~~controlling weight, the organization shall establish that the treating doctor's opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the injured employee's record based on one or more of~~ the following factors:

The organization shall resolve conflicting medical opinion and in doing so the organization may consid

   a. The length of the treatment relationship and the frequency of examinations;
   b. The nature and extent of the treatment relationship;
   c. The amount of relevant evidence in support of the opinion;
   d. How consistent the opinion is with the record as a whole;
   e. Appearance of bias;
   f. Whether the doctor specializes in the medical issues related to the opinion; and
   g. Other relevant factors.

2. ~~At an administrative hearing, the organization's determination under subsection 1 is subject to de novo review by the hearing officer.~~

~~3.~~ This section does not apply to managed care programs under section 65-02-20. For purposes of this section, the organization shall determine whether a doctor is an injured employee's treating doctor.

~~**SECTION 2. APPLICATION.** This Act applies to administrative hearings conducted on and after the effective date of this Act.~~

13.0754.02006
Title.

Prepared by the Legislative Council staff for
Senator Klein
April 26, 2013

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2298

That the House recede from its amendments as printed on page 1142 of the Senate Journal and pages 1234 and 1235 of the House Journal and that Engrossed Senate Bill No. 2298 be amended as follows:

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