

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

INDUSTRY, BUSINESS, AND LABOR COMMITTEE

Thursday, September 18, 2008
Fort Union Room, State Capitol
Bismarck, North Dakota

Representative Rick Berg, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Rick Berg, Bill Amerman, Donald L. Clark, Mark A. Dosch, Glen Froseth, Jim Kasper, Darrell D. Nottestad, Gary Sukut, Elwood Thorpe, Don Vigesaa, Steve Zaiser; Senators Arthur H. Behm, Nicholas P. Hacker, Robert M. Horne, Jerry Klein

Members absent: Representative Tracy Boe; Senator Terry M. Wanzek

Others present: See [Appendix A](#) for additional persons present.

INSURANCE DEPARTMENT REPORT

Chairman Berg called on Mr. Michael Fix, Director of the Life and Health Division and Actuary, Insurance Department, to provide a report relating to findings regarding insurers' use of modified community rating for health insurance or health benefits coverage policies. Mr. Fix submitted written testimony ([Appendix B](#)).

In response to a question from Representative Kasper, Mr. Fix said before the change in the law in 1995, individual consumers purchased individual policies. After the change, he said, individual consumers were able to purchase through group policies. Because health care costs have gone up, he said, it is more difficult for a health insurer to establish a foothold in the state. He said it would be unfair to conclude that the modified community ratings have resulted in the reduction in the number of insurers doing business in the state. He said he can attempt to provide the committee with additional information regarding small group plans and guaranteed issue.

In response to a question from Representative Berg, Mr. Fix said although the Insurance Department generates several reports with respect to health insurance coverage in the state, the reports generally are not distributed. However, he said, those reports are available for review upon request.

In response to a question from Senator Horne, Mr. Fix said insurance companies are regulated and must provide reports regarding the financial status of the companies. However, he said, those reports do not address the noninsurance side of the business conducted by large holding companies such as AIG.

In response to a question from Representative Berg, Mr. Fix said the regulatory environment for insurance companies includes target levels of

reserves or surpluses. He said no insurance company doing business in this state has fallen under the trigger amount at which the Insurance Commissioner would more closely monitor the business operations of the company.

Representative Berg said it appears that this is the first time the Insurance Department has provided a report to an interim committee regarding the modified community rating. Although the requirement has been in the statute since 1995, he said, nobody appears to have missed the report. He suggested the Insurance Commissioner consider introducing legislation to remove the reporting requirement.

WIRELESS INDUSTRY STUDY

Chairman Berg called on Mr. Todd Kranda, Verizon Wireless, for comments regarding incentives to encourage additional wireless investment in the state. Mr. Kranda submitted a proposal ([Appendix C](#)) for a sales tax exemption for communications equipment. He said the proposal needs additional work and covers all types of telecommunications service, not just wireless. He said he has shared the proposal with representatives of other wireless carriers, but has not heard any comments regarding the proposal. He said he has discussed with representatives of Verizon Wireless other proposals such as state and private partnerships similar to the state transmission authority. He said he has requested Verizon Wireless representatives to look at programs in other states or develop something new that may promote additional investment in this state.

Representative Berg said North Dakota has been at the top nationally with respect to job creation and income growth. He said wireless carriers should look at what has been done in other areas in the state and be creative to work with the state to expand service within the state.

In response to a question from Senator Hacker, Mr. Kranda said the proposed sales tax exemption would not be intended to cover items such as the purchase of ringtones. He said the intent is to look at providing exemptions for hard equipment and towers.

In response to a question from Representative Dosch, Mr. Kranda said Verizon Wireless has invested a significant amount of money in the state, including over \$26 million in capital expenditures in 2007. He said Verizon Wireless investment

expenditures in this state in 2006 were over \$20 million and over \$25 million in 2005.

Chairman Berg requested the Legislative Council staff to prepare a bill draft based upon the proposal submitted by Mr. Kranda.

In response to a question from Representative Kasper, Mr. Kranda said wireless services provided by Verizon Wireless in this state are equal to that provided by the company in more populous areas. However, he said, there are some logistical problems with the build-out in rural areas.

PHARMACY AND PHARMACIST REGULATION STUDY

At the request of Chairman Berg, committee counsel distributed copies of North Dakota Century Code (NDCC) Sections 43-15-13.1 through 43-15-13.6, which relate to the North Dakota Pharmaceutical Association.

Representative Berg said the committee should consider at least amending the law to allow the North Dakota Pharmaceutical Association to legally return a portion of the license fees pursuant to an opt-out procedure.

At the request of Chairman Berg, committee counsel distributed a memorandum entitled [Professional and Occupational Licensing and Registration Boards](#).

In response to a question from Representative Berg, committee counsel said the list includes 40 professional and occupational licensing and registration boards. He said the State Bar Association of North Dakota appears to be the only professional association that receives a portion of licensing fees similar to the North Dakota Pharmaceutical Association.

At the request of Chairman Berg, committee counsel distributed a memorandum entitled [Pharmacist Licensure Fees and Pharmacist Association Dues](#) which lists licensing fees and pharmacist association dues from each of the states.

In response to a question from Representative Berg, Mr. Howard C. Anderson, State Board of Pharmacy, said the South Dakota Board of Pharmacy provides a portion of the license fees to the pharmacists association in that state.

In response to a question from Senator Klein, committee counsel said the opt-out procedure implemented by the North Dakota Pharmaceutical Association to return \$100 to any pharmacist who requests the return of the fee is not addressed in state law.

Representative Berg said North Dakota is unique in the tie between the licensing board and the professional association for pharmacists. He said the association likely could make more money in dues if the association were separate from the board and would not have had to request a change in state law to increase the amount of money passed through the board to the association.

In response to a question from Representative Berg, committee counsel said because the North Dakota Pharmaceutical Association is recognized under statute to perform what may be considered governmental functions and because the association receives public funds from the pharmacists licensure fees, the association likely would be subject to open meetings and open records provisions under the Constitution of North Dakota and the Century Code.

Representative Berg said it is his understanding that the State Bar Association of North Dakota considers itself a public entity subject to open meetings and open records requirements.

In response to a question from Representative Froseth, Mr. Michael D. Schwab, North Dakota Pharmaceutical Association, said the association allows for associate memberships, which include out-of-state pharmacists and drug wholesalers. He said approximately 5 percent of the members of the association are associate members.

In response to a question from Representative Berg, Mr. Schwab said pharmacists who choose to receive their \$100 fee pursuant to the opt-out procedure remain members of the association. He said he believes the association has operated in an open manner over the past couple of years. He said he has no problem providing information regarding the association to pharmacists or anyone who requests the information.

In response to a question from Senator Hacker, Mr. Schwab said many of the out-of-state members of the association maintain a membership to stay in touch with the state. He said a number of those members are retired pharmacists.

In response to a question from Representative Berg, Mr. Schwab said the Federal Trade Commission investigation of the North Dakota Pharmaceutical Association has been pending for a significant amount of time. He said representatives of the association are communicating with the Federal Trade Commission and trying to resolve the issue. He said the Federal Trade Commission is looking to bring an action based on an invitation to collude, which would be an unusual procedure and would set a precedent. He said the costs of dealing with the issue are not necessarily related to the request to increase the cap for the license fee during the last legislative session. He said the communication that resulted in the complaint was sent in October or November of 2005 under a previous director of the association. He said there are various interpretations of the regulations in question.

Mr. Anderson said he always has viewed the association as an open organization. He said the financial records of the association are available because the association is a nonprofit organization. Although the association may not have always complied with the meeting notice requirements under state law, he said, the association has been very open. He said the State Board of Pharmacy receives regular reports from the association regarding the

finances of the association. He said the issues with the Federal Trade Commission began when the prior leader of the association sent a letter that should not have been sent. He said no expenses for legal costs relating to the complaint have been paid directly by the association. He said the North Dakota Pharmacy Service Corporation has paid the legal fees.

In response to a question from Representative Berg, Mr. Anderson said the previous director of the association requested the State Board of Pharmacy to raise the cap for license fees. He said the board did not favor increasing the license fee. He said the previous director of the association believed that the association may need additional funds in the future to cover the expenses of the association.

Representative Berg said the board has a reserve of \$1 million and the current license fee is probably too high. Nonetheless, he said, the board came to the Legislative Assembly to raise the cap on behalf of the association. He said there appears to be a conflict of interest with the board and the association.

Mr. Anderson said the board did not agree to increase the license fee. He said the bill only would have authorized the board to increase the fee to the higher cap. He said the board is very fiscally conservative, which has resulted in the board's reserve increasing. He said the board has maintained a substantial reserve in the event the law were changed which relates to the licensing of the out-of-state wholesalers and pharmacies and to provide funds in the event of litigation. He said the board may consider spending some of its reserve for research projects with North Dakota State University. In addition, he said, the board may consider funding educational programs and training. He said the board regulates the profession of pharmacy and works to improve the capability of pharmacists to serve the public.

In response to a question from Representative Berg, Mr. Anderson said the previous director of the association suggested changing the license fee structure to transfer 80 percent of the fees collected to the association. However, he said, the board opposed that proposal.

In response to a question from Senator Hacker, Mr. Anderson said the North Dakota Pharmaceutical Association does not interfere with disciplinary actions taken by the board. He said pharmacists want the board to take disciplinary action if a pharmacist is not acting appropriately. He said the mission of members of the association is to take care of patients and protect consumers.

In response to a question from Representative Berg, Mr. Anderson said a situation arose in which a drug representative who was also a pharmacist traded drug samples for merchandise at stores. He said there is a substantial federal fine for selling or trading drug samples and the federal government prosecuted the offense as a felony. He said the State Board of Pharmacy disciplined the individual involved but was unable to bring disciplinary proceedings against any of

the pharmacists that purchased the samples because the federal government did not share its investigatory information with the board. He said the board had no evidence or specific information on which to pursue disciplinary action against any of the pharmacists who bought the drug samples.

Representative Berg said it seems that the issue could have been pursued further and that the Attorney General could have been involved in the investigation. He questioned whether the board is doing its job to protect consumers.

In response to a question from Senator Behm, Mr. Anderson said physicians likely are providing patients with fewer drug samples because the samples are difficult to track and hospitals that seek accreditation must keep detailed records regarding all drugs handled, including samples.

In response to a question from Representative Zaiser, Mr. Anderson said physicians and health care providers may face liability issues related to the use of drug samples which is another reason fewer physicians are providing samples to patients.

In response to a question from Representative Berg, Mr. Anderson said the association registered the trade name of the North Dakota Society of Health-Systems Pharmacists. He said the action was taken to ensure that no one else could use that name. He said the name has been reserved for the society and protects the society from other groups using that name.

Representative Berg said the action of registering the name could be perceived as an attempt to gain leverage over the hospital pharmacists.

Mr. Schwab said the North Dakota Society of Health-Systems Pharmacists appeared to be moving toward an academy status with the North Dakota Pharmaceutical Association. He said registration of the name was an attempt to follow proper steps and assure the name is used for that group. He said the association is addressing the issue with the officers of the society.

Chairman Berg requested Mr. Gordy Smith, State Auditor's office, to comment regarding the financial status of the State Board of Pharmacy. Mr. Smith said he has reviewed the financial statement of the State Board of Pharmacy and of a number of other boards and commissions. He said a reserve of \$1 million for such an entity is an enormous amount compared with other boards. He said the State Board of Pharmacy has almost the equivalent of four years of expenditures in reserve. However, he said, there are some smaller licensing boards with a similar reserve ratio. He said the board has generated \$130,000 and \$100,000 in profit during the last two years. He said the largest expenditures of the board are related to salary and travel expenses. He said compliance actions and investigations amounted to less than \$13,000 and legal expenses were under \$6,000. Therefore, he said, the amount of reserve is more than adequate to address investigations or legal actions.

Representative Berg said the professional and occupational boards are in somewhat of a cannot win situation. If the boards save money, he said, they are criticized, and if the boards do not have adequate reserves, the boards may not have sufficient funds to take disciplinary actions.

Representative Kasper requested Mr. Smith to provide the committee with information relating to the operating budget and reserves of each of the professional and occupational licensing and registration boards included on the list distributed to the committee.

Ms. Joan Johnson, North Dakota Society of Health-Systems Pharmacists, said she is the District 6 representative of the North Dakota Pharmaceutical Association and the Secretary/Treasurer of the North Dakota Society of Health-Systems Pharmacists. She said the society members have not decided whether to become an academy under the North Dakota Pharmaceutical Association. She said members of the society are looking into incorporating, but need to have control of the society's name to do so.

Ms. Johnson submitted a document ([Appendix D](#)) that expresses the support of the North Dakota Society of Health-Systems Pharmacists for changing the membership of the State Board of Pharmacy. She also submitted a copy of a draft order from the Federal Trade Commission ([Appendix E](#)) which relates to the investigation of the North Dakota Pharmaceutical Association.

Mr. Arnold Thomas, North Dakota Healthcare Association, submitted written testimony ([Appendix F](#)) regarding the relationship between the State Board of Pharmacy and the North Dakota Pharmaceutical Association.

In response to a question from Representative Kasper, Mr. Thomas said the North Dakota Healthcare Association is a private association and does not include consumer members on its board. He said the Health Council licenses health care facilities and is completely separate from the North Dakota Healthcare Association board.

In response to a question from Representative Zaiser, Mr. Thomas said the North Dakota Healthcare Association board frequently discusses the membership of the board and seeks input from a variety of sources. However, he said, the board generally is comprised of chief executive officers or other individuals authorized to make decisions for the hospital members.

In response to a question from Senator Klein, Mr. Thomas said the State Board of Pharmacy shows a preference toward retail pharmacists. He said the board has a duty to regulate and not favor one type of pharmacist over another. He said other regulatory boards do not sponsor continuing education or become involved with advocating for one particular type of organizational structure. He said advocacy is the responsibility of a professional association.

In response to a question from Representative Berg, Mr. Thomas said the implication that a hospital-

based pharmacist provides a lesser service is incorrect. He said it is inappropriate that a regulatory board would imply that a pharmacist is less capable because the pharmacist does not own 51 percent of the pharmacy.

At the request of Chairman Berg, committee counsel reviewed a memorandum entitled [Pharmacy Ownership Restrictions - Summary of Litigation Challenging the Restrictions](#).

At the request of Chairman Berg, committee counsel distributed documents ([Appendix G](#)) prepared by the State Board of Pharmacy relating to the opening and closing of pharmacies since 2000 and to pharmacist disciplinary actions.

Mr. Schwab submitted written testimony ([Appendix H](#)).

Representative Berg said the charge of this committee is to make recommendations based on information it receives during the interim. He said the pharmacy ownership issue is an issue in which the committee is not likely to develop a consensus and is an issue that will be dealt with during the next legislative session. He said he hopes the differences in the economic impact studies can be addressed, and the Legislative Assembly will have sufficient information upon which to make decisions regarding patient services and access to pharmacists. He said the issue relating to the relationship between the board and the association is separate from the ownership issue. He said he believes the connection between the two entities does not benefit consumers. Therefore, he said, he requested the Legislative Council staff to prepare a bill draft that would eliminate the statutory linkage between the board and the association.

At the request of Chairman Berg, committee counsel reviewed a bill draft [[90299.0100](#)] that would reduce the license fee for pharmacists to \$100 and eliminate the statutory connection between the State Board of Pharmacy and the North Dakota Pharmaceutical Association. Committee counsel said one issue that the committee may consider is section 1 of the bill draft which relates to the composition of the State Board of Pharmacy. He said the committee should consider whether the appointments to the board should be made upon the recommendation of the North Dakota Pharmaceutical Association and whether members of the board should be required to be a member of the association.

In response to a question from Representative Berg, Mr. Schwab said the members of the association vote for their preference and the names of the three members who receive the highest number of votes are forwarded to the Governor for consideration for appointment to the board.

In response to a question from Representative Amerman, committee counsel said the bill draft would eliminate the mandatory membership of pharmacists in the North Dakota Pharmaceutical Association, and the association would become a voluntary membership entity.

Representative Zaiser said the amount of the license fee could be tied to the amount of reserve held by the board.

Representative Berg said the board would retain the ability to set the appropriate amount of fees up to the maximum amount provided in statute. He said the board would have the ability to address financial concerns and could come to the Legislative Assembly for an increase in the statutory limitation if necessary.

Representative Froseth questioned whether the board should be required to submit a biennial report to the Governor. He said policymakers often do not realize that an entity has financial problems until it is too late.

Mr. Anderson said although the statute provides the discretion as to whether to submit the biennial report to the Governor, the board has chosen to submit the report.

Representative Berg said the Legislative Assembly frequently requires entities to submit a variety of reports and those reports often are ignored. He said there probably should be an official responsible for reviewing all the financial reports of boards and commissions.

In response to a question from Representative Berg, Mr. Anderson said the \$100 portion of the pharmacist license fee that is retained by the board currently is adequate. He said if the license fee were to remain at \$200, the board likely would consider implementing a program such as a tuition repayment program to try to keep young pharmacists in the state.

WORKERS' COMPENSATION REVIEW

At the request of Chairman Berg, committee counsel distributed a copy of initiated measure No. 4 ([Appendix I](#)) and a memorandum entitled [2008 General Election Ballot Measures and Fiscal Analysis](#).

Representative Berg said injured workers frequently have stated they are seeking fast decisions and a reduction in the uncertainty regarding decisions relating to their claims. He said initiated measure No. 4 does not change benefits. He said the employees of Workforce Safety and Insurance (WSI) were removed from the state personnel system to help the agency provide a higher level of service and to motivate the employees to reduce a backlog in claims. By placing the employees back under the state personnel system, he said, the claims review process could end up being delayed. He said the proposal in the measure to require that decisions of administrative law judges be final decisions would not solve the problems that have been expressed to this committee. He said a process under which the decisions would be final would be unique to WSI.

Chairman Berg called on Ms. Jodi Bjornson, Workforce Safety and Insurance, for comments regarding the initiated measure. Ms. Bjornson said the WSI staff prepared a document ([Appendix J](#)) for the WSI Board of Directors which provided a preliminary review of the initiated measure. Although several areas have been identified which may need to

be addressed if the measure is adopted, she said, as employees of the state, WSI employees are not taking a position on the measure. She said it will be necessary to address the relationship between the board and the executive director if the measure passes.

Chairman Berg said the committee welcomes comments on the measure. He said the committee has actively sought input throughout its review of WSI. He said approximately 55 injured workers contacted the Legislative Council office and 16 of those individuals have signed releases of information. He requested each member of the committee to summarize the member's discussion with the injured worker assigned to the member.

Representative Vigesaa said he spoke with Mr. Daniel Dosch, who suffered a back injury in 2003. He said medical tests revealed that Mr. Dosch had degenerative back problems, including disk disease and arthritis of the spine. He said Mr. Dosch returned to work soon after his injury and reinjured his back. He said WSI paid Mr. Dosch disability payments and paid all medical costs after the first injury and reinstated disability and medical payments after the subsequent injury. He said an occupational medical evaluation showed significant degenerative disease and an independent medical evaluation diagnosed chronic back pain and osteoarthritis of the spine. He said it appeared that lifting at work clearly aggravated the injury, but WSI determined that the ongoing pain was due to the degenerative state and ceased benefits.

In response to a question from Representative Berg, Representative Vigesaa said the case appears to be a situation where doctors had to determine what was the result of the work injury and what was the result of the degenerative disk disease. He said at least four doctors have agreed that the ongoing pain suffered by Mr. Dosch is from the degeneration. He said it does not appear that the case could have been handled any differently.

Representative Nottestad said he spoke with Mr. David Mattson, who was injured in April 2000. He said Mr. Mattson suffered leg, arm, elbow, and back injuries and had surgery on his leg and elbow. He said Mr. Mattson returned to work in a food service job, but could not be on his feet for long periods of time. He said the employer placed Mr. Mattson on probation for various issues at work and later terminated Mr. Mattson's employment. He said Mr. Mattson reapplied for benefits and was denied on a couple of occasions. He said it was difficult for Mr. Mattson to get to Grand Forks for medical treatment and Mr. Mattson experienced problems in his interaction with the physicians in Grand Forks. He said it appears that Mr. Mattson did not fully understand the nature of his discussions with WSI and if Mr. Mattson would have had someone to help him better understand the discussions, the result of his case may have been different. He said it is important that injured workers are able to fully understand their

rights and the expectations placed upon them by their employers and WSI. Although Mr. Mattson indicated that his claim was closed, he said, WSI indicated otherwise. He said Mr. Mattson may be able to make the appropriate contacts to deal with his claim.

Representative Berg said it appears that a lack of understanding of the process is an issue that may need to be addressed. He said injured workers must be informed of the process that must be followed with respect to a claim.

Mr. Ed Christianson said degenerative injuries are a problem. He said no one is responsible for injuries that develop over time while a worker is engaging in hard labor. He said the workers' compensation system should consider the impact of long-term work on a worker. He said WSI uses degeneration as an excuse not to pay claims. He said he is seeing 39-year-old workers denied benefits due to degenerative disk disease.

Representative Clark said he spoke with Mr. Russell Thompson, who was injured in July 2000. He said Mr. Thompson indicated that he was working in a management capacity, but injured his wrist while shoveling. He said Mr. Thompson stated the injury was misdiagnosed as a sprain or a bruise and Mr. Thompson continued to work. He said Mr. Thompson received medical benefits, but was determined to have only a 6 percent impairment. He said it appeared that Mr. Thompson would have liked to receive an impairment award. He said Mr. Thompson had carpal tunnel surgery about two years after his injury and continued to experience pain. He said Mr. Thompson had additional surgery and was told by his physician to lift no more than 10 pounds. He said Mr. Thompson was downsized from his job in May 2003 and received job training, which he completed in May 2004. He said Mr. Thompson was unable to find work and his benefits were discontinued. He said Mr. Thompson's family life deteriorated in part due to money concerns, and Mr. Thompson suffered depression. He said Mr. Thompson's claim continued and his case went before an administrative law judge on three occasions. He said the independent medical examination report concluded that Mr. Thompson inflated his symptoms and was uncooperative. He said Mr. Thompson spent \$20,000 on attorney's fees to pursue the claim and argued his case before an administrative law judge. He said the administrative law judge ordered WSI to provide Mr. Thompson total permanent disability. He said WSI and Mr. Thompson settled the case, and Mr. Thompson receives approximately \$36,000 per year with the settlement and social security disability combined. He said Mr. Thompson believes the decision of an administrative law judge should be final. He said the conversation with Mr. Thompson indicated that Mr. Thompson is bitter toward his employer and unhappy with WSI. He said he was impressed with Mr. Thompson, but found it hard to believe that he could not be employed.

Representative Zaiser said he was assigned to speak with Mr. Starr Roberts, but was unable to contact him.

Representative Froseth said he spoke with Mr. Michael Pajalla who was injured in May 2007. He said Mr. Pajalla is a 21-year-old man who struck his head on a car hoist. He said Mr. Pajalla was cleared for full release to work with no restrictions in September 2007. He said Mr. Pajalla has been treated and his injury has been reviewed by four or five physicians, including physicians at the Abbott Northwestern Hospital in Minneapolis. Although Mr. Pajalla has received a clean bill of health, he said, Mr. Pajalla suffers seizures. He said Mr. Pajalla indicated that he had never had a seizure before the injury and Mr. Pajalla believes the seizures are a result of the injury. He said physicians believe the seizures are due to depression and anxiety and not a result of the injury. He said Mr. Pajalla has returned to college and is working part-time. He said he is confident that Mr. Pajalla will succeed with his education. He said Mr. Pajalla was satisfied with WSI taking care of the medical costs, but would like additional help with his educational costs and travel expenses. He said he encouraged Mr. Pajalla to contact WSI to see if additional help is available.

Representative Zaiser said the stress and anxiety experienced by Mr. Pajalla may be the result of the work injury. He said it is not uncommon to have secondary effects due to an injury.

Representative Amerman said the Workers' Compensation Review Committee has addressed depression and mental health issues. He said proving that 50 percent of the mental health issue is caused by an injury is very difficult.

Representative Froseth said one of the medical reports indicated that Mr. Pajalla had experienced a history of depression. However, he said, it is possible that the accident also could have affected his mental health.

In response to a question from Representative Berg, Mr. Tim Wahlin, WSI, said Mr. Pajalla suffered a concussion and the seizures developed later. He said it was determined that the pseudoseizures were caused by depression and not related to the concussion. He said state statute provides that a mental or psychological injury caused by a physical injury is compensable only when the physical injury is determined with reasonable medical certainty to be at least 50 percent of the cause of the condition as compared with all other contributing causes combined, and only when the condition did not preexist the work injury. He said Mr. Pajalla had a history of depression before his work injury. He said some states make mental injuries compensable, but a majority of the states require that a physical injury must be the cause the mental injury. He said it is difficult to obtain an objective measure and determine the cause of a mental injury.

In response to a question from Representative Vigesaa, Mr. Wahlin said an injury 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 condition, is not compensable unless the employment of the individual substantially accelerates its progression or substantially worsens the severity.

In response to a question from Representative Zaiser, Mr. Wahlin said numerous life situations affect an injured worker's ability to recover from an injury and return to work. He said WSI is an insurer of work-related injuries, and adding other components to the process would result in WSI becoming more than an insurer of work-related injuries and require WSI to provide coverage for an individual's situation in life. When the North Dakota Supreme Court recognized liberal construction, he said, a court adjudicated cases to give the benefit of the doubt to a claimant with respect to benefit payment. He said state statute provides that there will be no bias in the consideration of a claim. He said he is not aware of the use of liberal construction in other states.

Representative Zaiser said liberal construction would help an individual who has had a life of tragedies.

In response to a question from Representative Thorpe, Mr. Wahlin said if an injury is determined to be work-related, WSI provides coverage for the injured worker.

Senator Behm said he spoke with Mr. William Westerholm, who suffered a knee injury. He said Mr. Westerholm believed he needed a knee replacement, but WSI refused to pay for the replacement. Therefore, he said, Mr. Westerholm paid for a knee replacement. He said Mr. Westerholm has returned to work. He said Mr. Westerholm has given up on WSI helping him, in part, because any payments to him would be offset from his Social Security. Although Mr. Westerholm appears to be significantly overweight, he said, WSI should have paid for the knee replacement surgery.

Mr. Wahlin said Mr. Westerholm filed his claim in 1999, but had a prior knee surgery in 1970. He said medical records indicated that Mr. Westerholm had substantial arthritis in the knee dating back to 1983. He said WSI accepted responsibility for the bruising of the knee from the 1999 injury. He said Mr. Westerholm is diabetic and weighs about 300 pounds, which influences the ability of the body to heal. He said WSI concluded that the 1999 fall, which caused the bruising of the knee, did not substantially worsen or progress Mr. Westerholm's prior injury.

Representative Thorpe said it appears that workers must be in good health if they want to receive workers' compensation coverage for a work injury.

Representative Berg said Mr. Westerholm's medical history appears to show a long and substantial history of knee problems that were not work-related.

Senator Behm said Mr. Westerholm believed the work injury started his knee problems.

Representative Dosch said he visited with Mr. Mike Menschel, who initially had a back injury and subsequently had a number of additional workers' compensation claims. He said Mr. Menschel felt that he did not get proper treatment initially, which caused his injuries to progress. He said Mr. Menschel believed that if he had received comprehensive medical treatment he would not have had the later problems that he experienced. He said many of Mr. Menschel's concerns dealt primarily with the physicians who treated him. He said there also appeared to be a lack of communication with WSI. He said Mr. Menschel indicated that he was waiting to hear if he would receive a permanent partial impairment award.

Mr. Wahlin said he is unsure if a permanent partial impairment award has been granted, but the award is not likely because Mr. Menschel will not be eligible until he reaches maximum medical improvement. He said WSI needs to have a doctor certify that the injured worker has achieved maximum medical improvement before the permanent partial impairment award can be determined.

In response to a question from Representative Berg, Mr. Wahlin said the determination of a permanent partial impairment may take years, and is not based upon any timetable.

In response to a question from Senator Hacker, Mr. Wahlin said Mr. Menschel is receiving wage loss benefits.

Representative Dosch said it appears that a major part of Mr. Menschel's frustration is that there is no closure to his claim. He said it may be necessary to establish a point at which a determination can be made with respect to a permanent partial impairment award.

Mr. Wahlin said state law requires that an injured worker reach maximum medical improvement before the permanent partial impairment can be determined. He said there must be a measurement of the impairment, and a measurement is not possible until the maximum medical improvement has been reached. He said medical conditions change over time.

Representative Zaiser said he has spoken with Mr. Menschel, and Mr. Menschel is very anxious about a determination being made with respect to his permanent partial impairment.

Senator Hacker said he visited with Mr. Darren Knutsvig, who suffered a back injury. He said Mr. Knutsvig has seen six doctors in this state and has had two back surgeries. He said Mr. Knutsvig needs another spinal fusion, but the surgeons will not perform the surgery due to questions regarding Mr. Knutsvig's quality of life after the surgery. He said an independent medical evaluation indicated that Mr. Knutsvig could work as a security guard. He said it appeared that Mr. Knutsvig believed that the independent medical examination would be more comprehensive than it was. He said Mr. Knutsvig entered an educational program, but dropped out of

the program due to pain and his lack of ability to learn computer skills. He said a physician in Grand Forks concluded that Mr. Knutsvig should not work. He said a functional capacity evaluation indicated that Mr. Knutsvig could work only two hours per day. Because Mr. Knutsvig quit school, he said, Mr. Knutsvig's benefits were terminated. He said Mr. Knutsvig expressed concerns with respect to the educational requirements and the fact that the independent medical examination trumped the opinions of four other physicians.

Mr. Wahlin said WSI awarded retraining benefits to Mr. Knutsvig. Although Mr. Knutsvig indicated he was unable to succeed in the educational program, he said, others perceived Mr. Knutsvig's lack of success as a result of his lack of desire to succeed in the program. He said Mr. Knutsvig's alcohol and chemical dependency issues were significant impairments to his success in the vocational process. He said a panel of three independent medical experts--a surgeon, a psychologist, and a pain specialist--agreed that Mr. Knutsvig's physical abilities would allow retraining and work. He said Mr. Knutsvig's benefits were terminated for noncompliance.

In response to a question from Representative Berg, Mr. Wahlin said Mr. Knutsvig's termination is final because he has not come into compliance after being given the opportunity to comply.

Senator Klein said he was assigned to speak to Ms. Maria Nolasco. He said he contacted Ms. Nolasco, but she was unable to speak English. He said he spoke briefly with Ms. Nolasco's husband. He said Ms. Nolasco fractured her ankle in July 2006, and she is still using crutches or a wheelchair. He said pins were replaced in the ankle to aid in the healing. He said Ms. Nolasco went to one physical therapy session and quit therapy. He said Ms. Nolasco wanted the pins removed and disagreed with her doctor. He said Ms. Nolasco subsequently changed physicians. He said WSI paid medical benefits for Ms. Nolasco. He said Ms. Nolasco's wage loss benefits were terminated after she refused to attend English classes two hours per day. He said when he spoke with Ms. Nolasco's husband, Ms. Nolasco was at the clinic to receive an injection in her spine. He said it appears that Ms. Nolasco may be having sympathetic pain complex. He said one of the difficulties with this case may have been Ms. Nolasco's lack of English proficiency. He said WSI may need to consider addressing language barrier issues.

Mr. Wahlin said Ms. Nolasco was contacted in writing and by phone with respect to obtaining information needed for her claim. He said WSI identified language as an impairment to Ms. Nolasco's return to work. He said Ms. Nolasco did not respond to contacts and did not continue her physical therapy or English classes. He said WSI is very proactive in attempting to followup with claimants with respect to completion of treatments. He said WSI is continuing

to pay for Ms. Nolasco's pain treatments, but has denied a bill for psychological treatment.

In response to a question from Representative Vigesaa, Representative Berg said Ms. Nolasco is the woman who was featured in a news story last winter.

In response to a question from Representative Berg, Mr. Wahlin said the news story regarding Ms. Nolasco did not provide the full story regarding her claim. He said Ms. Nolasco's benefits were terminated due to noncompliance. He said Ms. Nolasco refused to follow the orders of her physician. He said it is difficult to deal with Ms. Nolasco's claim because all communications must go through her husband.

Representative Thorpe said he spoke with Mr. Bruce Lee and Mr. Lee is in attendance at the meeting.

Mr. Lee said he has had a number of workers' compensation claims. He said WSI sent him to a physician in Minot who treated him for a 1991 injury, and his 1997 and 1991 injuries were rolled into one claim. He said WSI later denied his claim and he is waiting for a decision from an administrative law judge. He said he applied for the continuing jurisdiction review, but was denied by WSI. He said his 2005 back injury was denied because it was determined to be a preexisting injury. He said he is aware of two coworkers who received disability payments because of arthritis.

In response to a question from Representative Zaiser, Mr. Lee said his employer reprimanded him in 2000 for filing too many workers' compensation claims. He said WSI argues that his continuing pain is due to back injuries and not to prior work-related injuries.

In response to a question from Representative Thorpe, Mr. Lee said WSI should accept responsibility for his back injuries. He said WSI required him to attend vocational training classes in Grand Forks, which is about 100 miles from his home. He said he makes the trip to Grand Forks two to three times per week, which does not help his back problems. He said he has short-term memory issues that are related to the pain medication, and he is unable to do the computer work that WSI has said he can do.

In response to a question from Representative Zaiser, Mr. Wahlin said Mr. Lee's 2005 claim revolved around whether his ongoing spine problems were attributable to work injuries or degeneration. He said Mr. Lee's case was subject to a medical review within WSI and was reviewed by a surgeon. In addition, he said, the case has gone through the administrative hearing process. He said an administrative law judge determined that Mr. Lee's injury was preexisting and not compensable. He said the decision took into account symptoms and claims filed for "flare-ups," and the medical testimony led the administrative law judge to conclude that the injury was not work-related. He said the testimony indicated that certain people will develop certain back problems. He said Mr. Lee had experienced a back problem as a child, which was

determined likely to be the cause of his back pain. He said the medical opinion relating to the cause of the problem was subject to cross-examination and the preponderance of the evidence indicated that the work injury was not the cause of the problem.

Representative Thorpe said the change in the law to remove liberal construction likely had some impact on this case. He said he believes Mr. Lee had three or four doctors who agreed that Mr. Lee was unable to return to work. He said WSI used an independent medical examination to deny the claim, which seems egregious. He said WSI should reexamine the case.

Senator Behm said he frequently hears injured workers express concerns regarding diagnoses of North Dakota physicians being contradicted by out-of-state independent medical examinations.

Representative Berg said WSI attempts to use in-state physicians. However, he said, many physicians are not willing to make decisions against their patient or against other local doctors. Furthermore, he said, within certain specialties, there are a very limited number of physicians in the state.

Representative Amerman said he spoke with Mr. Russell Robert. He said Mr. Robert was receiving benefits for a work injury, but did not indicate on a form that he was sent by WSI that he had received other income. He said WSI asserted that Mr. Robert had committed fraud and demanded that Mr. Robert return workers' compensation benefits that he had received. He said Mr. Robert entered a stipulation with WSI that provided Mr. Robert would not have to return the benefits sought by WSI, but that if he suffered a future injury, the amount owed to WSI would be deducted from any benefits to which he may be eligible. He said Mr. Robert indicated that WSI would not provide Mr. Robert with medical records Mr. Robert had sought and that Mr. Robert would not have signed the stipulation if WSI had provided those records. In addition, he said, when Mr. Robert received his medical records, other claimants' medical records were included.

Mr. Wahlin said WSI treats confidentiality issues seriously, and the inappropriate release of records is wrong and inexcusable. However, he said, mistakes have occurred. He said WSI received a hotline tip indicating that Mr. Robert had been working and was being paid while he was receiving workers' compensation benefits. He said Mr. Robert contended that he was not being paid, but records obtained by WSI showed otherwise.

Senator Horne said he spoke with Mr. David Gee, who suffered an injury in 2004. He said Mr. Gee broke several bones in his left foot and had surgery. He said Mr. Gee is unable to place any weight on the foot and was offered a transitional job answering phones. He said Mr. Gee did not like that work and was assigned a job that placed stress on his foot and delayed his recovery. He said Mr. Gee was certified as fully recovered and the WSI vocational contractor reported that Mr. Gee could obtain other jobs in the community. He said WSI terminated Mr. Gee's

benefits in December 2006. He said Mr. Gee lost his job because the employer said Mr. Gee could not do the work Mr. Gee wanted to do. He said Mr. Gee is working at a lower paying job. He said Mr. Gee said the evaluation by the WSI contractor was a joke and WSI received the opinion it sought. He said Mr. Gee believed the report was biased and corrupt and Mr. Gee was convinced that appealing the decision would not change anything. He said Mr. Gee's issue was with the requirements with a return-to-work program and a quick denial of benefits. He said Mr. Gee wanted to return to his prior position but could not handle the physical nature of the job even though the physician said he could. He said the case worker at WSI hinted that Mr. Gee's employer may have released Mr. Gee from his job due to other issues not related to the injury. He said WSI should work to lean toward paying benefits longer, provide higher benefits, and provide additional retraining.

Mr. Wahlin said state law requires WSI to terminate benefits if a comparable job is available in the community which meets the worker's skills and the worker does not take such a job.

In response to a question from Representative Zaiser, Senator Horne said the WSI case worker indicated that Mr. Gee was able to do what was requested of him on the job. He said the case worker suggested that Mr. Gee's attitude may have been a problem and Mr. Gee wanted to do things that the employer did not want him to do.

In response to a question from Representative Zaiser, Mr. Wahlin said anecdotal evidence is not part of a benefit decision. However, he said, a claims handler may need to weigh some information, such as the willingness to return to work, and determine whether the worker can return to the employer.

Representative Zaiser said there appears to be a double standard in the determination of benefits.

Representative Sukut said he visited with Ms. Maryann Volk, who was injured in September 1990. He said Ms. Volk suffered a back injury and first had surgery in 1992. He said a second surgery was performed in 1994. He said Ms. Volk went through retraining because she was no longer able to lift. He said Ms. Volk did not complete the training initially because Ms. Volk said she could not handle the training. He said Ms. Volk completed the training in 1999. He said WSI paid all medical and wage loss benefits for Ms. Volk. In December 2007, he said, Ms. Volk wrote a letter to WSI seeking information regarding permanent disability. He said Ms. Volk indicated that WSI did not respond to her letter. He said WSI indicated that a response was given, but the response did not satisfy Ms. Volk. In February 2008, he said, Ms. Volk wrote another letter to WSI and WSI responded through a letter explaining the responsibility of WSI under the law. He said the letter indicated that disability decisions depend on advice from medical experts, but did not directly tell Ms. Volk what to do regarding her claim. He said Ms. Volk quit her job due to pain in April 2008 and Ms. Volk

reapplied for benefits. In June 2008, he said, Ms. Volk had a functional capacity evaluation that indicated that Ms. Volk could do sedentary work up to four hours per day. He said Ms. Volk was unable to sit or stand for any length of time and needed to be moving around frequently. He said Ms. Volk called WSI in July, and WSI indicated that additional information from her doctor, who was also her employer, was needed. He said a letter from Ms. Volk's doctor stated that Ms. Volk quit her job due to pain and that it was in Ms. Volk's best interest not to work. He said WSI denied Ms. Volk's reapplication for benefits because the doctor did not provide enough information. He said Ms. Volk has reapplied for benefits. He said WSI followed the law and did what the agency is supposed to do. However, he said, Ms. Volk believed she was not receiving direct answers from WSI.

Mr. Wahlin said he could not comment further on Ms. Volk's case because the case is in litigation.

Chairman Berg thanked each of the committee members who made the effort to contact the claimants and understand the claims. He said the review of the claims has shed some light on issues affecting people. He said it is important that claimants with concerns sign a release of information so that legislators may hear both sides of the story. He said he commends those who signed releases and visited with committee members.

At the request of Chairman Berg, committee counsel distributed a document ([Appendix K](#)) prepared by WSI which summarizes constituent service requests received by WSI.

At the request of Chairman Berg, Ms. Bjornson distributed a document ([Appendix L](#)) summarizing WSI litigation statistics.

Representative Berg said supporters of the initiated measure relating to WSI suggest that WSI frequently overturns decisions of administrative law judges. He said the statistics indicate that WSI rarely exercises the authority to change administrative law judge decisions. He said only two decisions have been rejected by WSI this year.

At the request of Chairman Berg, Ms. Bjornson distributed a document ([Appendix M](#)) relating to the payment of attorney's fees by WSI.

In response to a question from Representative Berg, Ms. Bjornson said attorney's fees paid to a claimant's attorney progress in increments to a total of \$10,000 when a claimant prevails at the Supreme Court. She said WSI will pay a claimant's attorney's fees to allow the claimant to receive counsel to review a settlement offer.

In response to a question from Representative Berg, Mr. Wahlin said independent medical examinations frequently focus on whether an injury or problem is work-related. He said the use of independent medical examinations has been reviewed in a consultant's report and in the recent performance evaluation. He said the performance evaluation, which will be released soon, has a number of findings

with respect to the use of independent medical examinations.

In response to a question from Representative Berg, Mr. Smith said independent medical examinations were addressed in the performance evaluation. He said the recommendations likely will not show a dramatic need to change procedures. He said there does not appear to be any significant difference between independent medical examinations done with North Dakota doctors and examinations done by out-of-state doctors. He said legislators likely will be pleased with the results of the performance evaluation. He said the performance evaluation examined 100 denied claims, 100 random claims, and 50 independent medical examinations. He said the report is not final but is very good. He said he is pleased with the professionals who conducted the report. He said it appears blame is often put on WSI by injured workers for problems where the concern is probably with the laws in place.

Representative Berg said there is a lack of understanding with respect to the role of WSI. He said people who are disappointed with the result of a claim blame WSI.

Senator Horne said independent medical examination physicians spend little time with the patients.

Mr. Wahlin said that type of comment is common. However, he said, by the time the physician conducts the examination, the physician has a significant amount of medical information available and has reviewed all the prior examinations and tests. He said independent records reviews also are conducted and should be distinguished from independent medical examinations.

Representative Clark said in the case he reviewed, the claimant stated that the independent medical examination lasted one hour. However, he said, the physician's report was 25 pages long. He said it was clear that the physician took a significant amount of time to review the case and prepare the report.

Representative Berg said the Workers' Compensation Review Committee has considered a bill draft to address independent medical examinations and records reviews.

Chairman Berg called on Mr. John Halvorson, Workforce Safety and Insurance, for comments regarding workers' compensation premiums and losses. Mr. Halvorson submitted a written summary ([Appendix N](#)) of historical premiums and losses. He said the workers' compensation fund was approximately \$250 million in deficit in 1993 because premiums during the 1980s were inadequate to cover losses.

Representative Berg said the committee received information from Nevada and West Virginia which indicated that similar problems were experienced in those states due to political forces controlling ratesetting. In addition, he said, when political influence is a consideration in paying benefits, the fund level is affected.

At the request of Chairman Berg, committee counsel distributed a bill draft [\[90241.0200\]](#) that relates to the setting of workers' compensation premium rates. He said the bill draft would require WSI to establish premium rates annually on an actuarial basis and require that the statewide average premium rate level not deviate by more than 10 percent from the actuarial recommendation for that year.

In response to a question from Representative Thorpe, Mr. Halvorson said most states' workers' compensation rates are based on actuarial projections.

Representative Berg said it may be necessary to revise the bill draft to allow WSI to spread the cost of a catastrophic situation over a period of time similar to the determination of premiums by Job Service North Dakota.

Mr. Halvorson said the ratesetting process is tempered to address a variety of situations, and catastrophic situations are part of the actuarial determination. He said the bill draft allows WSI to deviate up to 10 percent from the actuarial determinations. Therefore, he said, the agency could not set rates that would pay one-half of the premiums needed from the reserve.

At the request of Chairman Berg, committee counsel distributed a bill draft [\[90306.0100\]](#) relating to the reporting of political influence on claims decisions. He said the bill draft would allow an employee of WSI who believes that inappropriate influence has been placed upon that employee by another employee or officer of the organization or from an elected or appointed official with respect to a claims decision to

file a statement detailing the concerns with the director of the organization. He said the director would then be required to investigate the statement and provide a summary of the investigation to the WSI Board of Directors and to the interim Workers' Compensation Review Committee.

Chairman Berg said he contacted officials from the other three monopolistic workers' compensation state funds. He said the Ohio system is the largest workers' compensation system in the country and has liabilities of \$18 billion and premiums of \$2 billion per year. He said the fund has \$20 billion in assets. He encouraged committee members to contact the officials from the other systems if they have specific questions regarding those systems.

MODIFIED WORKERS' COMPENSATION COVERAGE PROGRAM AND ROUGH RIDER INDUSTRIES AUDIT

Mr. Barry Schumacher, Workforce Safety and Insurance, distributed a copy of the performance audit of the modified workers' compensation coverage program and safety inspection of the Roughrider Industries work programs ([Appendix O](#)).

There being no further business, Chairman Berg adjourned the meeting at 4:45 p.m.

John Bjornson
Committee Counsel

ATTACH:15