

1999 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1263

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1263

House Industry, Business and Labor Committee

Conference Committee

Hearing Date 1-25-99

Tape Number	Side A	Side B	Meter #
1	x		0 - 27.3
Committee Clerk Signature <i>Lisa Horner</i>			

Minutes:

HB 1263 Relating to workers Compensation Attorney Fees.

Chairman Berg opened the meeting on the bill.

Ms. Sandy Tabor, Executive Director of the State BAR Association, testified in support of the bill. They support the deletion of language in section 4 which occurred in 1995 and at that time members of workers compensation suggested more legal representation for workers.

Mr. Steve Latham, ND Trial Lawyers Association, testified in support of the bill. He explained that the bill would result in savings to the Workers Compensation Bureau. Latham talked about the 3 phases of process for injured workers.

Berg asked for examples of claims.

Latham explained the processes which begins with the denial phase. He went on to say that options available to injured workers are the greatest misunderstood areas.

Mr. Dave Kemnitz, AFL-CIO, testified in support of the bill. He said claimants need a bill like this.

Rep. Keiser asked what portion of help will claimants actually receive.

Kemnitz explained that it depends on the claim. Workers in general need legal advise.

Mr. Sebald Vetter, Vice President of Care, Concerned Advocate Rights of Employees, testified in support of the bill. He said injured workers have no money for fees. People that commit serious crimes get court appointed counsel. Injured workers don't get counsel.

Berg mentioned that if any cases should be made public, they should explain the problems.

Mr. Mark Allenmonth, Linclon, ND, testified in support of the bill. Mark was surgically operated on and has been unable to work. Employers will not tell him why they won't hire him.

Rep. Stefonowicz asked if Mark was recovered from his surgery. Mark said he was willing to work if someone would hire him.

Koppang asked Mark if he was retrained and Mark said he was retrained but no one will hire him in a job.

Mr. Dave Theile, counsel for Workers Compensation Bureau, testified in opposition to the bill.

(see attached written testimony)

Keiser asked who contributed to the problem of claims open for beyond 60 days.

Theile said usually the bureau is waiting for record information from outside sources to the bureau.

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House Industry, Business and Labor Committee

Bill/Resolution Number Hb 1263

Hearing Date 1-25-99

Keiser asked Theile to give information about a void that is not being filled between Workers Advisory group and what workers can do.

Theile said he does not agree that a void is the case. He said attorneys are helpful but they can, however, create an adversarial situation. Theile went on to say that the injured worker program is being expanded to determine if more can be done for the injured worker and additionally communication has improve dramatically.

Mr. Jack Kavaney, National Federation of Independent Business testified in opposition to the bill.

(see attached written testimony)

Chairman Berg closed the hearing on the bill.


1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1263 2-2-99

House Industry, Business and Labor

Conference Committee

Hearing Date 2-2-99

Tape Number	Side A	Side B	Meter #
2		x	9.5-11.9
Committee Clerk Signature 			

Minutes :

Chairman Berg asked the committee what it wanted to do with this bill.

ACTION: Vice Chair Kempenich made a motion of DO NOT PASS and Rep. Froseth seconded the motion.

ROLL CALL VOTE: 13 YES and 1 NO with 1 ABSENT. Passed. Rep. Keiser will carry the bill.

FISCAL NOTE

(Return original and 10 copies)

Bill/Resolution No.: HB 1263 Amendment to: _____

Requested by Legislative Council Date of Request: 1-13-99

- 1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts.

Narrative:

See attached.

- 2. State fiscal effect in dollar amounts:

1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
General Fund	Special Funds	General Fund	Special Funds	General Fund	Special Funds

Revenues:

Expenditures:

- 3. What, if any, is the effect of this measure on the appropriation for your agency or department:
 - a. For rest of 1997-99 biennium: _____
 - b. For the 1999-2001 biennium: _____
 - c. For the 2001-03 biennium: _____

- 4. County, City, and School District fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

If additional space is needed, attach a supplemental sheet.

Date Prepared: 01-20-99

Signed J. Patrick Traynor

Typed Name J. Patrick Traynor

Department Workers Compensation Bureau

Phone Number 328-3856

***NORTH DAKOTA WORKERS COMPENSATION BUREAU
1999 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION***

BILL DESCRIPTION: Attorney Fees

BILL NO: HB 1263

SUMMARY OF ACTUARIAL INFORMATION: The Workers Compensation Bureau, with the assistance of its Actuary, Glenn Evans of Pacific Actuarial Consultants, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation requires the Bureau to pay attorney fees for an injured employee following constructive denial of a claim or the issuance of a notice of informal decision on any issue in a claim; removes the 20% cap on attorney's fees; removes the provision authorizing the Bureau to pay an employee's attorney fees only when the employee prevails, requiring that attorney fees be paid even if the case did not have legal merit; allows a hearing officer or court to order the maximum cap on attorney fees be exceeded; amends the binding arbitration statute by removing the requirement of paying attorney fees only when the employee prevails and eliminating the 20% cap on attorney fees; and requires the Bureau to pay an hourly rate for an attorney for any claimant receiving vocational testing.

FISCAL IMPACT:

While the fiscal impact is difficult to quantify, the minimum impact can be estimated at \$4.8 million per year. This is based on the anticipated increase in hearing requests from current levels to those experienced in 1994-95. In 1994 and 1995, there were 1,400 and 1,338 requests for hearing or arbitration, respectively. In 1998, the total number of hearings requested was 455.

Assuming that requests for hearing go back to 1994-95 levels, there will be an increase in requests for rehearing of approximately 900 per year. This estimate is likely conservative, since in 1994-95 the claimant was required to prevail in order to be entitled to attorney fees and there is no such requirement in this bill.

The current fee cap for resolution before hearing (settlement) is \$1,800; the current fee cap at hearing level is \$3,600. Assuming claimant's counsel and Bureau counsel have similar billings for each claim and assuming that $\frac{1}{2}$ of the additional requests resolve before hearing and $\frac{1}{2}$ after hearing, this will result in an estimated average cost of \$2,700 per case for claimant's counsel and \$2,700 for Bureau counsel. Total costs related to additional requests for rehearing will therefore be in excess of \$4.8 million per year (5,400x900). This figure does not include costs associated with fees for constructive denial, informal notice of decision, vocational rehabilitation or appeals beyond the administrative hearing level. Since fees will be paid win or lose, it can reasonably be expected that many actions will continue beyond the administrative hearing level. The estimate also does not factor in any administrative costs associated with the increase in litigation. Actual costs could therefore be well in excess of \$4.8 million per year.

(cont.)

HB 1263 (continued)

Actuarial Impact on Rate and Reserve Levels:

The proposed bill is difficult to quantify but will likely increase litigation costs in the State because the proposed changes will effectively reverse many of the litigation cost containment provisions that were adopted in the 1991, 1995, and 1997 legislative sessions. The reform effort has helped the Bureau to reduce the number of litigated claims by more than half during the last four years. Thus, an increase in the Bureau's current annual litigation expenditures of \$2 to \$3 million will likely occur if litigation rates increase to prior levels. The result will be rate and reserve level increases that we cannot quantify at this time.

DATE: 1-21-99

Date: 2-2-99
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1263

House Industry, Business and Labor Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken do not pass

Motion Made By Kempenich Seconded By Froeth

Representatives	Yes	No	Representatives	Yes	No
Chair - Berg	/		Rep. Thorpe		/
Vice Chair - Kempenich	/				
Rep. Brekke	/				
Rep. Eckstrom	/				
Rep. Froeth	/				
Rep. Glassheim	/				
Rep. Johnson	/				
Rep. Keiser	/				
Rep. Klein	/				
Rep. Koppang	/				
Rep. Lemieux	/				
Rep. Martinson	/				
Rep. Severson	/				
Rep. Stefonowicz					

Total (Yes) 13 No 1

Absent 1

Floor Assignment Keiser

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

REPORT OF STANDING COMMITTEE (410)
February 2, 1999 4:41 p.m.

Module No: HR-21-1726
Carrier: Keiser
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1263: Industry, Business and Labor Committee (Rep. Berg, Chairman) recommends **DO NOT PASS** (13 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). HB 1263 was placed on the Eleventh order on the calendar.

1999 TESTIMONY

HB 1263

WORKERS COMPENSATION ATTORNEY FEES
Testimony
Before the House Industry, Business, and Labor Committee

January 25, 1999

David Thiele, Senior Litigation Counsel
North Dakota Workers Compensation Bureau

Mr. Chairman, Members of the Committee:

My name is David Thiele and I am the senior litigation counsel for the Workers Compensation Bureau. I am here today to testify in opposition to House Bill No. 1263. This bill amends sections 65-02-08, 65-02-15, 65-05.1-06.1 and 65-10-03 of the North Dakota Century Code dealing with payment of attorney fees.

This bill effectively reverses all changes made during the last three legislative sessions relating to payment of attorney fees. In addition, the bill requires attorney fees to be paid to claimant's counsel regardless of whether they actually prevail in an issue and regardless of the level of litigation. The fiscal impact of this bill is conservatively estimated to be in excess of **4.8 million dollars per year**.

Currently, North Dakota is one of only 6 states that pay claimant attorney fees in addition to benefits paid to the claimant. In the vast majority of jurisdictions the injured worker pays attorney fees. Typically, attorney fees are deducted out of any benefits awarded as a result of litigation (social security operates in this manner, attorney fees are paid out of any award). Most states also cap how much an attorney may receive out of any such award (typically 20%). Currently North Dakota attorneys are paid at the rate of \$85.00 per hour, with fee caps based on the level of litigation. The attorney may not collect from both the claimant and the Bureau, but may enter into a separate contract for fees with the claimant. If the claimant **prevails**, the attorney will be paid, but not in excess of 20% of the amount awarded. An attorney is deemed to have prevailed only if the attorney actually obtains some additional benefit for the claimant.

HB 1263 eliminates the requirement that the claimant actually prevail in litigation to be paid attorney fees and eliminates the 20% limit on the amount awarded as a cap. It also requires in some circumstances that fees be paid for services before there is even any actual dispute (constructive denial, vocational rehabilitation). There are two arguments that are most likely to be used to justify expanding attorney fees; an alleged inability of claimants to retain attorneys without a retainer, and that expanded use of attorneys will force the Bureau to its services.

The first argument has merit only if one assumes that everyone has the right to a free lawyer to litigate any issue, regardless of merit. Under the current system attorneys must assess the merits of each case; the less likely the claimant is to prevail, the greater the need for the attorney to require a high retainer. This is just common business sense and is common to all litigation. Under the proposed bill the attorney is paid win or lose, and therefore there is no incentive to evaluate the merits of any appeal. In fact, careful analysis of the actual merits of an appeal would be counterproductive to the attorney from a purely financial standpoint. By requiring fees to be paid only if the claimant prevails, there is a built-in check and balance against frivolous litigation.

North Dakota has already determined that claimants should have financial assistance in litigation. In the vast majority of states, if an injured worker litigated an issue and prevailed, they would be required to pay attorney fees out of the award. For example, if a claimant prevailed and was awarded \$2,000, with the typical 20% cap on attorney fees, this would give the injured worker only \$1,600. In North Dakota the claimant is given the full \$2,000 and the attorney is paid \$400, or 20% of the award, out of the fund.

The second argument can also be shown to be without merit. The bill as proposed would require payment of attorney fees on any claim that has not been accepted or denied within 60 days of being filed (constructive denial). The legislative change eliminating attorney fees during the period of constructive denial was in the 1995 session. Before then, when attorneys were paid to be involved in cases of constructive denial, **only 80%** of all claims were accepted or denied within 60 days. Since then, **with no attorney involvement** in constructive denial claims, the Bureau has dramatically improved the timeliness of claims adjudication. Now, **98%** of all claims are accepted or denied within 60 days. Not only was attorney involvement not productive in improving the system, statistically it appears it was hindering the process.

The Bureau has made great improvement in resolving issues with claimants prior to litigation. This committee has already heard the positive results and praise of the Workers Advisor Program (soon to be Office of Independent Review) and will hopefully approve expanding that program. This is the type of alternative dispute resolution that has proven to be effective. Expanding attorney fees, however, has not been shown to be effective from either a cost or efficiency standpoint. The Bureau will continue to explore and expand alternatives to litigation that will promote efficiency and fairness. We are committed to providing injured workers with a fair and quick process to resolve issues. Not only have we improved efficiency in virtually every area, surveys of both injured workers and employers reveal satisfaction with the overall handling and processing of claims is at an all time high.

The Bureau respectfully urges this committee to vote do not pass on HB 1263. Allow the Bureau to continue to work with alternatives to litigation like the expanded Worker Advisor Program.

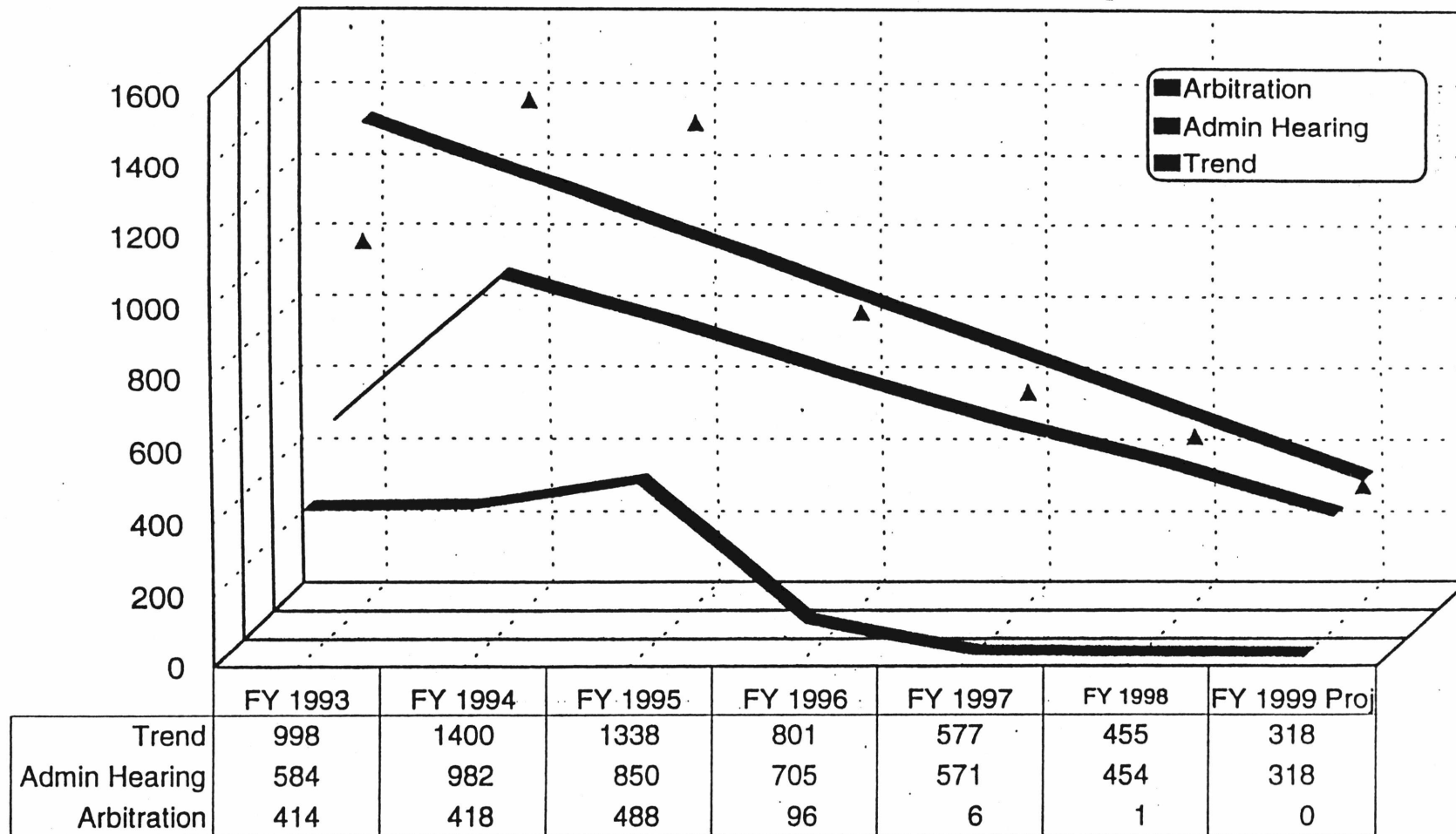
North Dakota Workers Compensation Bureau

QUICK FACTS AND FIGURES	1994	1995	1996	1997
Covered workforce	255,000	265,000	273,000	281,000
Employer premiums (\$million)	\$104.6	\$120.9	\$133.1	\$125.8
Rate level changes	+10%	-8.5%	-3.0%	-8.5%
Funding status (\$millions)	-\$228	-\$154	-\$87	\$1
Contingency reserve (\$millions)	none	none	\$35	\$62
Investments (\$millions)	\$245	\$328	\$415	\$600
Administrative costs (\$millions)	\$7.6	\$10.3	\$8.9	\$10.4
Number of claims filed	19,628	20,302	20,428	20,448
Wage-loss claims	3,745	3,459	3,218	2,966
Indemnity benefits paid (\$millions)	\$40.3	\$39.6	\$37.8	\$33.1
Medical benefits paid (\$millions)	\$33.8	\$32.0	\$30.2	\$33.2
Weekly wage-loss benefit (maximum)	\$366	\$376	\$387	\$402
Risk management program employers	67	545	718	926
Claims pending over 60 days	N/A	629	237	46
Claims processed within 21 days	N/A	43%	61%	82%
Claims processed within 60 days	N/A	80%	93%	98%
Dispute resolution time (months)	7.6	4.6	4.1	3.1
Claim received to date paid (days)	N/A	58.7	43.9	31.4
Callers' average time on hold (seconds)	N/A	143	73	23
Bureau employee turnover rate	N/A	N/A	22%	11%



Workers Compensation Bureau Legal Department

Formal Hearing/Arbitration Request Trend

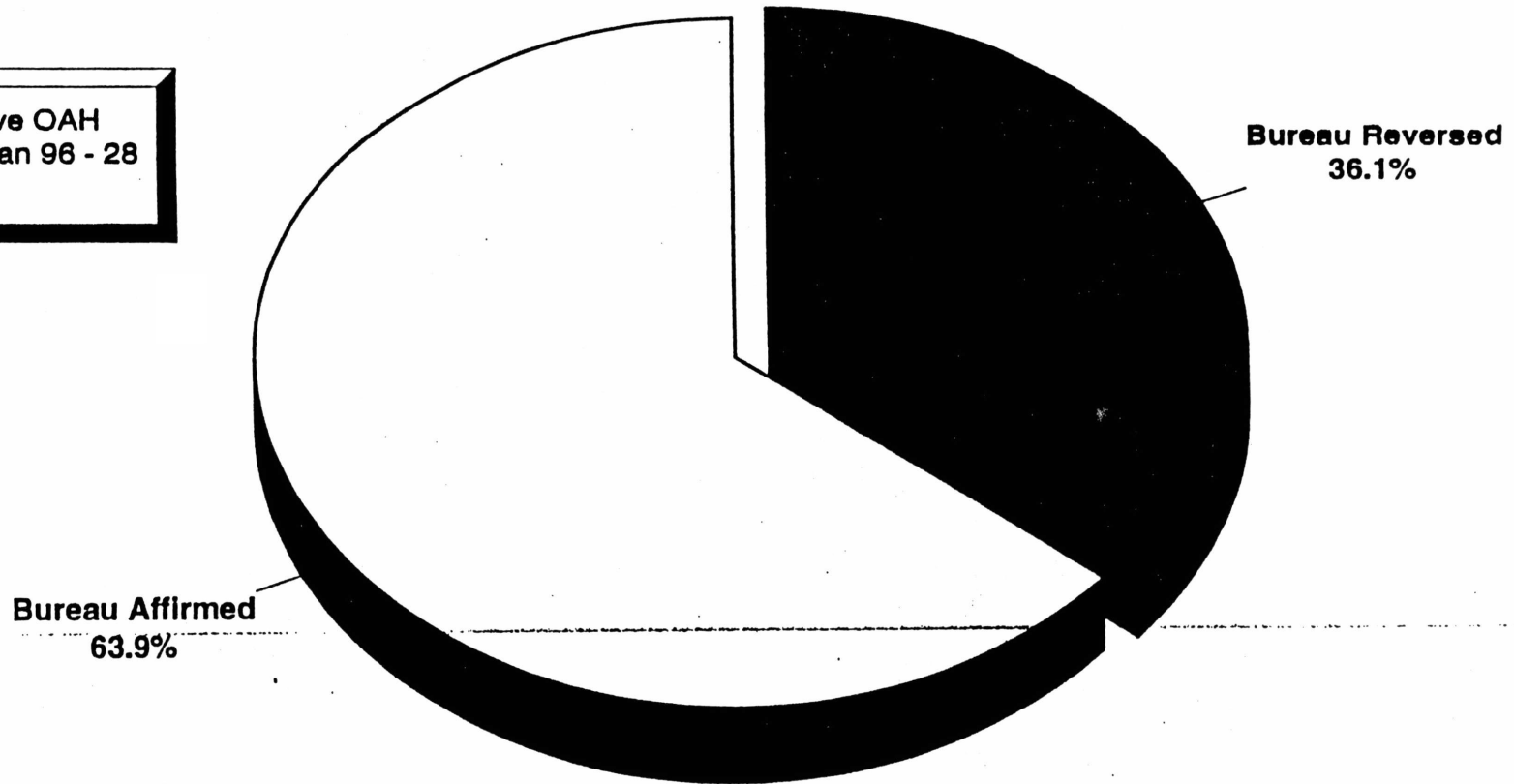




Workers Compensation Bureau Legal Department

Administrative Hearings - Affirmed/Reversed

Cumulative OAH
data: 1 Jan 96 - 28
April 98



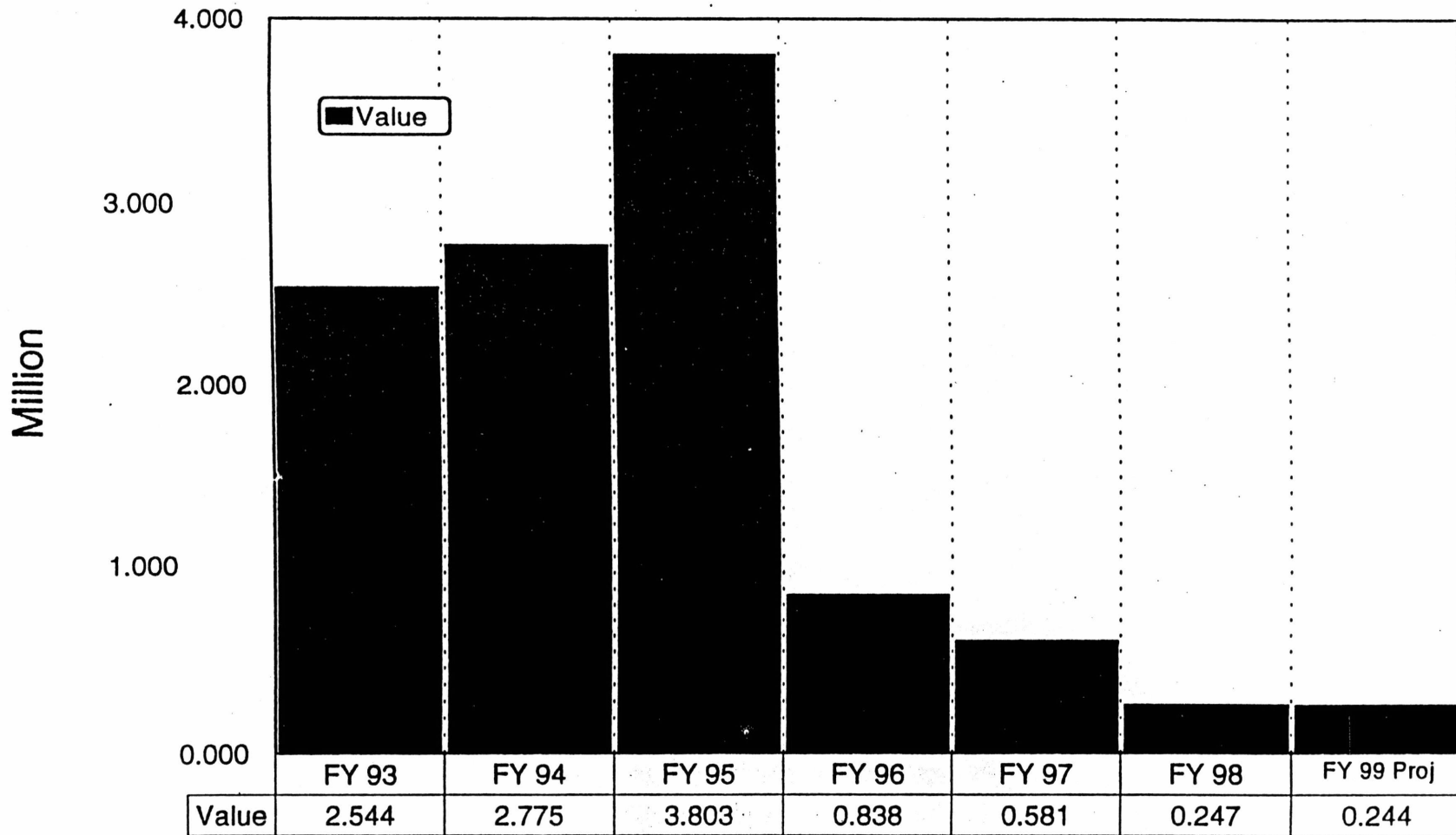
Data Source: OAH

As Of: 28 Apr 98



Workers Compensation Bureau Legal Department

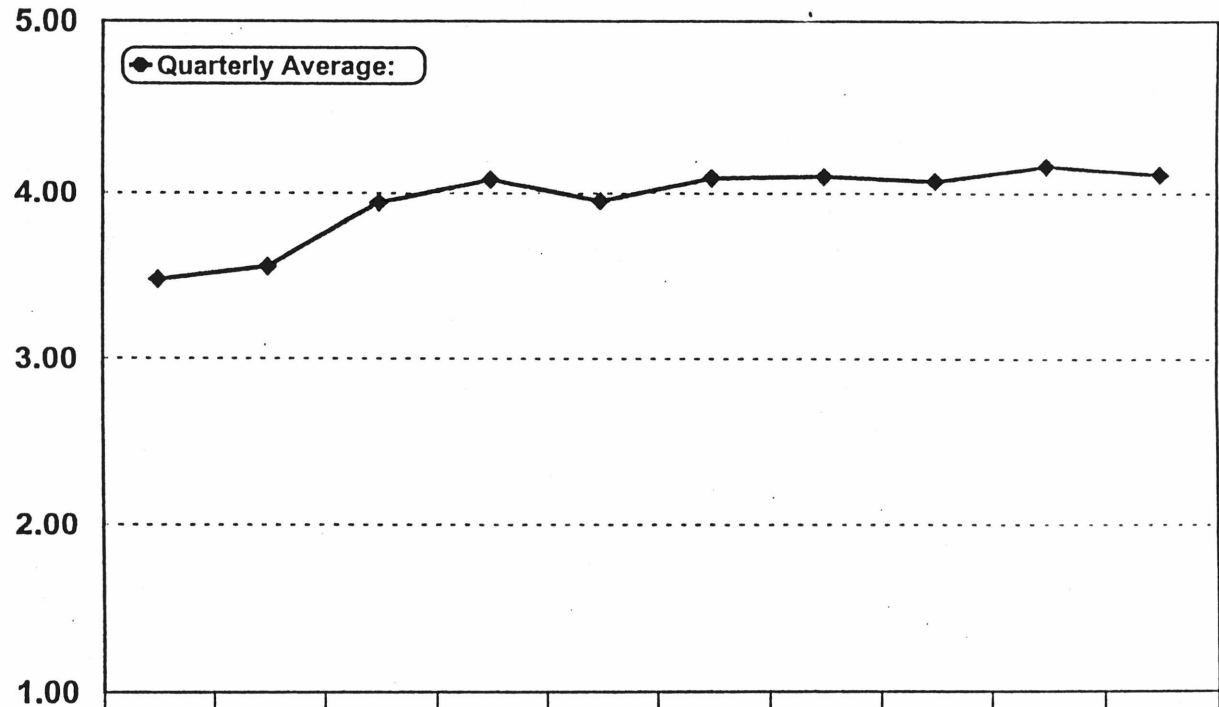
Value of Stipulations by Fiscal Year



As of end of Sep 98

Claimant Customer Satisfaction Survey

The Bureau started conducting quarterly surveys on July 1, 1996. Each quarter we randomly select 500 claimants who experienced work related injuries and were 60 to 90 days post claim acceptance. The graph to the right indicates the results of the surveys conducted to date. We asked claimants to rate us in terms of services provided for the categories listed below (a 1 would indicate least satisfied with a 5 being most satisfied).

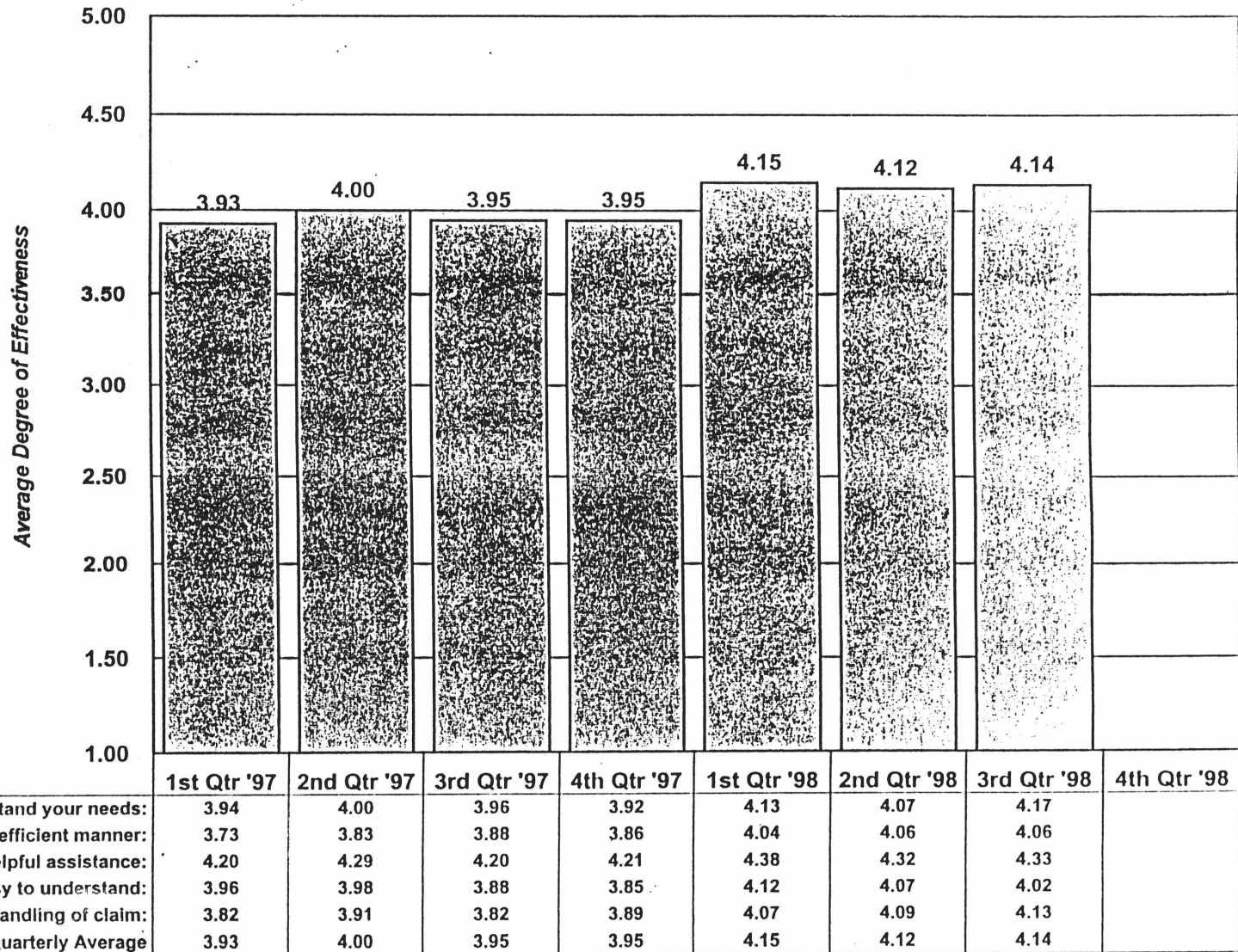


	3rd Qtr '96	4th Qtr '96	1st Qtr '97	2nd Qtr '97	3rd Qtr '97	4th Qtr '97	1st Qtr '98	2nd Qtr '98	3rd Qtr '98	4th Qtr '98
Accepting/Denying Claim in Timely Manner:	3.36	3.41	3.94	4.06	3.93	4.11	4.19	4.09	4.15	4.25
Paying Benefits in a Timely Manner:	3.31	3.28	3.78	3.83	3.71	3.80	3.82	3.88	4.03	4.03
Providing Polite and Helpful Assistance:	3.63	3.88	4.16	4.32	4.23	4.30	4.33	4.38	4.29	4.44
Returning Phone Calls in a Timely Manner:	3.55	3.62	3.83	4.01	4.01	4.08	3.85	3.91	4.11	3.43
Overall Handling of Claim:	3.49	3.56	3.98	4.07	3.89	4.07	4.21	4.09	4.20	4.42
Quarterly Average:	3.47	3.55	3.94	4.08	3.95	4.09	4.10	4.07	4.16	4.11

Closed Claims Satisfaction Survey

□ Quarterly Average

The Bureau started conducting quarterly claims satisfaction surveys on all closed lost time claims on January 1, 1997. The survey is conducted by mail and is sent to all injured workers whose lost time claim is closed during the quarter the survey is conducted. The graph to the right indicates the results of the surveys conducted to date. We asked injured workers to rate us in terms of services provided for the categories listed below (1 would indicate least satisfied with 5 being most satisfied).



October 31, 1998

Testimony of Jack Kavaney, State Chairman, National Federation of Independent Business (NFIB) opposing HB 1263

NFIB represents approximately 3000 small business owners throughout North Dakota.

Positions on issues before the legislature by NFIB are determined entirely by member ballots.

NFIB has had a long standing position in support of the Workers Compensation Bureau providing payment of attorney fees only to the prevailing party when decisions relating to the Bureau are disputed. In 1995, a great majority of our members, fully 87%, voted in favor of this position in a statewide ballot. That position has stood the test of time with NFIB.

HB 1263 removes the 20% cap on the awarding of attorney fees, as well as the provision that payment of attorney fees and costs can only be made in the event that an injured party prevails in binding dispute resolution or in an administrative hearing. We strongly oppose removal of these provisions!

By reinstating these provisions, members are concerned that the workers compensation system will return to its prior condition of being bogged down with litigation. And back in those days, payment requests from lawyers in many cases exceeded the amount in controversy.

Statistics show that the practice of awarding attorney fees only to prevailing parties resulted in the volume of litigation being substantially reduced. Lawyers and their clients only pursue litigation if the case is legitimate and when they truly believe that they have a chance of winning.

On behalf of the many small business owners who comprise the membership of NFIB I strongly urge committee members to recommend a "do not pass" to your colleagues in the House of Representatives.