

2009 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2435

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2435

Senate Industry, Business, and Labor

Check here for Conference Committee

Hearing Date: February 2, 2009

Recorder Job Number: 8372

Committee Clerk Signature



Minutes:

Chairman Klein: Opened the hearing on SB 2435.

Senator O'Connell: introduced and testified in support of SB 2435

Sylvan Loegering: representing North Dakota Injured Workers Support Group testified in support of SB 2435. (See attachment #1)

Senator Andrist: If you can show relevant material or evidence, how can there be a hearing.

Sylvan Loegering: This bill doesn't deal with claims that have already been heard.

Senator Horne: Based on current law, WSI has the option to reopen any case?

Sylvan Loegering: Correct

Clarence Voight: an injured worker testified in support of SB 2435 and went over his claim.
(See attachment #2)

Seibolt Vetter: testified in support of SB 2435.

LeRoy? testified in support of SB 2435.

Tim Wahlin: Chief of Injury Services at WSI testified in opposition of SB 2435. (See attachment #3),

Senator Wanzek: If we pass this bill, every prior claim that has been settled, not settled, denied, and ones that have already been acted upon, could be reopened.

Tim Wahlin: An unintended consequence of this bill would, yes.

Senator Wanzek: What is the statute of limitation on a new claim? Not on a claim that has been denied.

Tim Wahlin: One year, with exceptions.

Senator Andrist: If I file a claim and it is resolved and 3 years later another problem comes up related to a previous injury, could you reopen the case?

Tim Wahlin: Yes

Senator Horne: The statement you made in the paragraph on the last page, the one referring to eliminating all statutes of limitations, bothers me. Is this a fear tactic?

Tim Wahlin: I take responsibility for that statement, no its not necessarily fear, we believe passing SB 2435 would create this atmosphere where all cases would be subject to review.

Senator Horne: Does that open up every case

Tim Wahlin: Every case will become appealable. We will have to justify cases of denial.

Senator Andrist: What if we remove the overstrike on that sentence, would that do what you are asking?

Tim Wahlin: Yes, they already have this now.

Jeb Elking (???): representing North Dakota Chamber of Commerce testified in opposition of SB 2435. (See attachment #4)

Senator Wanzek: You're talking about a case that was settled and you need closure to it?

Jeb Elking (???): Yes, that is correct

Chairman Klein: closed the hearing on SB 2435.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2435

Senate Industry, Business and Labor Committee

Check here for Conference Committee

Hearing Date: February 4, 2009

Recorder Job Number: 8705

Committee Clerk Signature

Erin Lubelt

Minutes

Senator Horne: I need to refocus can someone review the bill?

Chairman Klein: Remove the provision that states there is no appeal from a determination not to reopen.

Senator Nodland: In effect it would eliminate all statues and limitations.

Senator Horne: Reopen only if you can show relevant material evidence that is not available when the organization issued this order.

Senator Andrist: It's not very subjective. I sometimes think getting a final determination is more beneficial then carrying it on so long. If he's gone through all the hearing process, at least he gets closure.

Senator Behm : I can't agree with you on that because if a worker is paid a partial disability and it happens to get worse and we knock that out of there he has no recourse to come back and get paid.

Senator Andrist: It doesn't deal with a worsening situation for the worker. It deals with when he got an adverse decision.

Senator Wanzek: We're talking about a worker who has gone through the whole process and is denied but in two years wants to go over it again.

Page 2

Senate Industry, Business and Labor Committee

Bill/Resolution No. 2435

Hearing Date: February 4, 2009

Senator Horne: I have a note here that says house bill 1427 is identical to this and I wrote down do not pass, eight to two.

Senator Andrist: Eight to Four. That's the other side of the issue. If it's been killed in the house we will be sending it back to be killed again.

Senator Horne: But it hasn't been killed yet.

Chairman Klein: Committee the clerk will call the roll for a do not pass on Senate Bill 2435.

Roll Call Vote: Yes: 5 No: 2 Absent: 0

Floor Assignment: Senator Nodland

FISCAL NOTE
Requested by Legislative Council
01/28/2009

Bill/Resolution No.: SB 2435

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

2007-2009 Biennium			2009-2011 Biennium			2011-2013 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

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

The proposed legislation makes WSI decisions not to reopen claims under the continuing jurisdiction statute appealable and provides that when certain criteria are met that an application for further review may not be unreasonably denied.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

WORKFORCE SAFETY & INSURANCE
2009 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: SB 2435

BILL DESCRIPTION: Continuing Jurisdiction

SUMMARY OF ACTUARIAL INFORMATION: Workforce Safety & Insurance, together with its actuary, Glenn Evans of Pacific Actuarial Consultants, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation makes WSI decisions not to reopen claims under the continuing jurisdiction statute appealable and provides that when certain criteria are met that an application for further review may not be unreasonably denied.

FISCAL IMPACT: Not quantifiable. We do not have sufficient information to evaluate the impact of the proposed bill. The legislation will likely permit the reopening of claims from prior periods as well as claims arising in future periods. WSI anticipates an increase in both the number of administrative appeals and the administrative and legal related costs associated with those appeals. To the extent that costs increase, rate and reserve levels will increase accordingly.

DATE: January 31, 2009

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

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

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

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

Name:	John Halvorson	Agency:	WSI
Phone Number:	328-6016	Date Prepared:	02/01/2009

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2435

Senate

Committee

Industry, Business and Labor

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Pass Do Not Pass Amended

Motion Made By _____ Seconded By _____

Senator	Yes	No	Senator	Yes	No
Senator Jerry Klein - Chairman	✓		Senator Arthur H. Behm		✓
Senator Terry Wanzek - V.Chair	✓		Senator Robert M. Home		✓
Senator John M. Andrist	✓		Senator Tracy Potter	✓	
Senator George Nodland	✓				

Total (Yes) 5 No 2

Absent 0

Floor Assignment Senator Nodland

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

REPORT OF STANDING COMMITTEE

SB 2435: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends DO NOT PASS (5 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2435 was placed on the Eleventh order on the calendar.

2009 TESTIMONY

SB 2435

REMARKS FOR IBL COMMITTEE re SB 2435

Sylvan Loegering, Volunteer Coordinator, ND Injured Workers Support Group
February 2, 2009

I support SB 2435 allowing a review of a claim at injured worker's request. One basic reason is **fairness**. Injured workers find themselves in a David and Goliath world where they don't really understand what is happening and someone else calls the shots. Currently WSI can and does review cases with or without explaining its reasons to anyone. It may end, diminish or increase compensation. I have heard of ending or diminishing benefits but no one has ever complained to me about their benefits increasing. I'm not sure if it happens or not. More to the point, WSI can make these reviews even if there is no new evidence or probable cause for such review. On the other hand, if an injured worker has new relevant information he or she can only request that WSI review the claim and hope it agrees to do so. Even if WSI grants all reasonable requests for review there is still the perception that Goliath calls all the shots and David does what he is told. Whether deserved or not, this perception of inequality or unfairness exists across our state. The vote last fall on Measure 4 provides evidence of that. I believe that allowing injured employees a reasonable right to reopen their claims would dull that perception and help everyone if it is properly done.

One problem with one-sided continuing jurisdiction is that awards can be taken away even if the facts in the case have not changed. The 2008 Performance Evaluation cites a change in philosophy that occurred within WSI in 2006-2007 that called for more aggressive research into preexisting and/or degenerative conditions. After adjusting for other factors BDMP says the rate of initial denials went up and the rate of subsequent reversal of denials went down due to this factor alone. Applying the BDMP percentages to a typical 20,000 injuries per year gives a net increase in permanently denied claims of approximately 500 cases per year. Under continuing jurisdiction WSI can, and I believe has, reviewed claims and reversed benefit awards based on that philosophy change. A case that comes to mind is the injured worker who had been receiving disability benefits for 6 years and suddenly had them denied because WSI had reviewed the case and unilaterally decided the injuries were preexisting at the time of the accident. This injured worker obviously now feels the deck is stacked. That feeling is exacerbated by the extremely dire circumstances brought on by the sudden loss of an already small income.

I have heard criticism of this bill saying it could open a revolving door to a never-ending series of requests on the same claim, one after the other, that would result in a logistical nightmare. I'm not sure that would happen and I know the sponsors of this bill would not want it to happen. Their goal is to provide fairness in perception and in reality. Everybody involved wants the injured employee to get sure and certain relief.

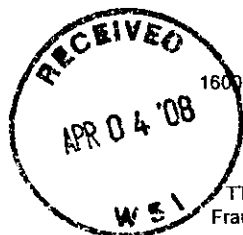
So how do we balance this desire to provide fairness and balance and at the same time prevent a landslide of requests for reviews that could overwhelm the system? I believe this committee has the power to do exactly that. I believe you can have injured workers feeling they're finally getting a little fairness and, at the same time, ease the fears of those in WSI over a potential onslaught of paperwork.

My thinking is go to line 14 of this bill and change "or" to "and". I believe that simple change would make it possible for anyone who desires fairness to support this bill. I hope that you will support it.



**North Dakota
Workforce Safety
& Insurance**
To us, it's personal.

**APPLICATION FOR
CONTINUING
JURISDICTION**
CLAIMS DIVISION
SFN 58712 (12/2007)



1601 EAST CENTURY AVENUE, SUITE 1
PO BOX 5585
BISMARCK ND 58506-5585
Telephone 1-800-777-6033
Toll Free Fax 1-888-786-8695
TTY (hearing impaired) 1-800-366-6888
Fraud and Safety Hotline 1-800-243-3331
www.WorkforceSafety.com

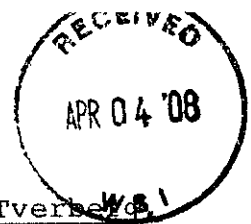
This request must be submitted between January 1, 2008 and postmarked no later than June 30, 2008.

Injured Worker's Name CLARENCE KENNETH VOIGT	Claim Number 2003-687605
What benefit was denied? MEDICAL AND TIME LOST BENEFITS	
Please give approximate date of denial. APRIL 2004	
Please explain why you think this decision was wrong. On appeal from the District Court's decision in an administrative appeal, we review the agency order in the same manner. <u>Tverberg</u> , 2006 ND 229, 8, 723 N.W.2d 676. We exercise restraint in deciding whether the agency's findings of fact are supported by a preponderance of the evidence, and do not make independent findings of fact, we do not make independent findings or substitute our judgment (see attachment to App.	
What resolution are you looking for? I'm looking for the WSI to look at this again, and when they do they should be able to see that I'm entitled to any and all benefits under the century Code. 65-05-12.2., 65-05-25 and 65-05-09	
I authorize Workforce Safety and Insurance to release ALL of my Workforce Safety and Insurance information and records on file. Please release this information and these records to: <ul style="list-style-type: none"> • Legislative Council's Workers' Compensation Review Committee; • Legislative Council staff; and • Optional - My representative (please specify) _____ I authorize the Legislative Council's Workers' Compensation Review Committee, Legislative Council staff, and Workforce Safety and Insurance officials to discuss my Workforce Safety and Insurance information and records during meetings of the Workers' Compensation Review Committee. I understand the meetings of the Workers' Compensation Review Committee are open to the public. I understand these meetings are recorded and minutes are kept and that these recordings and minutes are public records. I understand the Workers' Compensation Review Committee is NOT authorized to adjudicate claims and is NOT a forum for appeal. The committee will NOT change any existing decisions of Workforce Safety and Insurance. A copy of this release and authorization is considered as valid as the original. This release and authorization remains in effect until revoked by me or until January 1, 2009, whichever occurs first.	
Injured Worker's Signature <i>Clarence Voigt</i>	Date April 2, 2008

UPON COMPLETION OF THIS FORM, PLEASE SIGN, DATE, AND RETURN IT TO:

Attn: Claims Department
Workforce Safety & Insurance
PO Box 5585
Bismarck ND 58506-5585

C170



ATTACHMENT TO APPLICATION

for that of the agency. Fettig, 2007 ND 23, 10, 728 N.W.2d 301 Tverberg, at 8. In reviewing an agency's findings of fact we determine only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record. Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 220 (N.D. 1979) Fettig, at 10; Tverberg, at 8. However, an agency's decision on question of law are fully reviewable. Opp v. Ward County Social Services Bd., 2002 ND 45, 8, 640 N.W.2d 704.

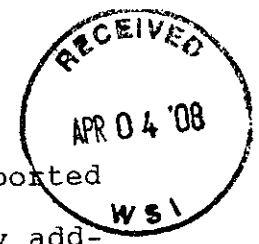
WSI has the responsibility to weigh the credibility of medical evidence and resolve conflicting medical opinions. Thompson v. Workforce Safety & Ins., 2006 ND 69, 11, 712 N.W.2d. 309; Barnes v. Workforce Safety & Ins., 2003 ND 141, 20, 668 N.W.2d 290; Negaard-Cooley v. North Dakota Workers Comp. Bureau, 2000 ND 122, 18, 611 N.W.2d 898. When confronted with a classic "battle of the experts," A fact-finder may rely upon either party's expert witness. Elshaug v. Workforce Safety & Inc., 2003 ND 177, 11, 671 N.W.2d 784. Although WSI may resolve conflicts between medical opinions, the authority to reject medical evidence selectively does not permit WSI to pick and choose in an unreasoned manner. Id.; Negaard-Cooley, at 19. WSI must consider the entire record, clarify inconsistencies, and adequately explain its reasons for disregarding medical evidence favorable to the claimant. Barnes, at 20; Negaard-Cooley, at 18.

A claimant seeking benefits from the workers compensation fund has the burden of proving by a preponderance of the evidence that he is entitled to benefits. N.D.C.C. 65-01-11; Aga v. Workforce Safety & Inc., 2006 ND 254, 13, 725 N.W.2d 204; Bachmeier v. North Dakota Workers Comp. Bureau, 2003 ND 63, 11, 660 N.W.2d 217. When a claimant's disability benefits have been discontinued and the claimant subsequently sustains a significant change in a medical condition that causes an additional wage loss, the claimant may file a reapplication for disability benefits is governed by N.D.C.C. 65-05-08 (1):

A doctor's opinion can, under limited circumstances, constitute objective medical evidence, even physician opinions, must be examined and credibility must be assessed in the process of weighing the medical evidence. See generally, Myhre v. N.D. Workers Compensation Bureau, 2002 ND 186, 15, 24, 25, 653

Courts exercise only a limited review in appeals from administrative agency decisions under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. Fettig v. Workforce Safety & Inc., 2007 ND 23, 9, 728 N.W. 2d 301; Tverberg v. Workforce Safety & Inc., 2006 ND 229, 7, 723 N.W. 2d 676. Under N.D.C.C. 28-32-46, the district court must affirm an administrative agency order unless;

1. The order is not in accordance with law.
2. The order is in violation of the constitutional rights of the applicant.
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.
- 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.

The following is from the minutes of an administrative hearing that was held on December 7, 2004 in regards to this claim 2003 687605

From page 17 lines 21-25 with regard to the issues for the hearing, does WSI intend to maintain that Mr. Voigt is prohibited from receiving benefits pursuant to 65-05-28 (5) sub 5, that is because he exceeded his restrictions to work as a painter? Page 18 1-25 Mr. Dopson; I'm not going to argue that, Judge Wahl: Are you going to abandon it? Mr. Dopson YES. Judge Wahl Excellent. Then we don't have to deal with that. Now secondly, let me ask you whether WSI intends to maintain that Mr. Voigt is prohibited from further benefits pursuant to that order, the order entered on May 2nd of 1996 for a finding of fraud? Mr. Dopson That order and what we've argued from that order is that if Mr. Voigt's current condition is in any way related to the 1990 work injury was the commencement of his problems and that order bars him from recovering anything under there-- Judge Wahl I agree with that, but is there any evidence at all of a relationship? Mr. Dopson Not and I talked to Dr. Peterson about that yesterday. I said can we establish-- and my understanding is -- in fact, I think Clarence is going to benefit from his testimony, is that he's going to testify that this "APPEARS TO BE IN A DIFFERENT AREA THAN THAT, SO--page 19 1-13 JUDGE WAHL: YEAH, I WENT BACK AND I TRIED TO JUST BASED ON THE EXHIBITS, AND I DIDN'T--YOU KNOW, I DIDN'T STUDY THEM, BUT I REVIEWED THEM AND I REVIEWED THEM MORE CAREFULLY THAN I USUALLY DO. I DON'T SEE ANY SIGNIFICANT INVOLVEMENT OF THE NECK AS A RESULT OF THE 1990 WORK INJURY. MR. DOPSON I THINK THAT'S THE CONCLUSION YOU COME TO WHEN YOU LOOK THROUGH IT. I'M NOT PREPARED TO ABANDON THAT UNTIL AFTER DR. PETERSON TESTIFIES BECAUSE HE WILL ADDRESS THAT. AND I THINK THAT'S HOW HE WILL ADDRESS IT, IS TO SAY, NO, THIS IS SOMETHING DIFFERENT."

Page 22 15-25 Mr. Voigt This is what both Dr. Johnson & Dr. McDaniels have both said "I DO BELIEVE THAT THE INJURY OF OCTOBER 21ST, 2003 SUBSTANTIALLY ACCELERATED THE PROGRESSION OR SUBSTANTIALLY WORSENE THE SEVERITY OF HIS PREEXISTING CONDITION. I believe his condition was chronic and longstanding and substantially aggravated by long periods "WITH HIS NECK IN A HYPEREXTENDED STATE FOR PAINTING OVERHEAD SURFACES AND OTHER UNUSUAL POSITIONS PAINTERS MUST FIND THEMSELVES IN FROM TIME TO TIME. THIS IS WHAT CAUSED MY CERVICAL SPINE INJURY."

Page 23 line 1-20 Mr. Voigt in 1990 I only had a slight amount of degeneration at the C2 level. After Five and a half years of working for Plante Painting & Drywall, I developed a very serious problem in my cervical spine. I think that Dr. McDaniels, who did the surgery on me, saw the damage that had been done and is in a lot better position then

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anyone else to give an opinion. I would like to tell you what Dr. Peterson said in his medical report. I had ongoing neck findings between March 2000 and June 2002. All this is telling me is that after I started going back to a chiropractor because of the kind of work that I was doing. I had not BEEN TO A CHIROPRACTOR SINCE 1995 FOR TREATMENT OF ANY KIND. And EVERY ONE OF THOSE REPORTS FROM DR. MINDT, THE CHIROPRACTOR WHO TREATED ME IN 1995, HIS ASSESSMENTS, DIAGNOSIS, IS TO THE LOWER BACK, WHICH HE SAID IN ALL 29 OF HIS TREATING REPORTS.

Page 24 line 3-12 Judge Wahl Mr. Dopson, will you make an opening statement at this time ? Mr. Dopson Yes, I think I will just so it's clear where we're coming from. As you know, there are Three bases initially in WSI's order. We have abandoned--definitely abandoned one, may have abandoned the other, leaving the only issue is whether Mr. Voigt suffered suffered a new work injury, a compensable work injury. Dr. McDaniels has given Clarence an opinion that it is a substantial aggravation.

Page 25 line 13-24 Mr. Dopson Because degenerative conditions move along at their own pace, they can deteriorate to the point Mr. Voigt's did without any outside involvement, just on their own. They could have deteriorated from other things he was doing. Clarence this is not in the minutes and is something that I'm saying now. Mr. Dopson is not a medical expert so he can not say what he did. Mr. Dopson Dr. Peterson will testify that the epidemiological studies show that the type of work Clarence was doing does not contribute, does not accelerate degeneration, it may cause symptotmatology. Off the mintues and now Dr. Peterson can not say this or can he show me this report.

Page 29 line 8-14 On July 5th, 1991, Dr. Ron Tello felt that I could lift 50 pounds. On August 6th, 1991, Dr. Tello noted that I had worked as an electrician's helper and was not having any neck or arm problems. Having been able to work for four hours with a drill positioned over my head, I was released to work without restrictions

Page 34 line 2-7 On November 24th 2003 I saw Medcenter One physician Dr. A.T. Johnson for a second opinion. He noted I had a severe degenerative change throughout the neck, most likely brought on through work for many years.

Page 37 Line 23-25 By Mr. Dopson: Mr. Voigt, a few questions based on your recently completed testimony and the exhibits here. W3 is the-- I don't know if this is the CT scan or MRI or what, but it's a report from following your injury in 1990 that evidenced that you had a degenerative problem in your cervical spine at the time. My question is; Had you had any pain or any problems with your neck prior to the 1990 work injury ?

Page 38 Line 1-10 A. No, not whatsoever. Q. You had no medical treatments for your neck previously to that? A. No. Q. So if we went back and found all your medical records prior to 1990, there wouldn't be anything where you had gone in for treatment? A. Not a thing. Q. This was the first time? A. Yes.

Page 44 Line 9-16 Mr. Dopson: So you knew that after you had been painting for several years that that type of work made your symptoms worse? A. Actually, no, that's not true. I just started noticing after I went back to work in '98 -- '97.

APR 04 '08

WSI

Page 45 Line 1-25 Mr. Dopson: And was this record then, WSI, is that the first time you saw a doctor or a chiropractor for your neck problems after 1990? A. For my neck problems, yes. Q. And you put into evidence other chiropractic records from 1995 which appear to be mostly for your lower back. Are there any other chiropractic records out there between 1995 and 1998? A. They're not available. Q. Who did you see? A. Dr. Oldenburg. Q. And what was he doing for you in that period? A. Treating the lower back. Q. Was he doing anything for your neck, any neck manipulations at all? A. No.

Page 46 Line 7-16 Did you treat with anybody between Dr. Mindt and Dr. and Dr. German? A. No. Q. That's why you couldn't find them. A. For my neck you're talking? Q. Right. But you did for the rest of your back, you continued to see another chiropractor? A. No. Q. After 1995? A. No.

Page 63 Line 9-25 Dr. Peterson's testimony: And in Mr. Voigt's case, he had the injury in 1990 and he did have some complaints of some neck pain following that, but most OF HIS COMPLAINTS WERE RELATED TO HIS LOWER BACK. Overall my sense in looking over the record is that that 1990 injury RESULTED IN AN UNDEFINED, BUT PROBABLY MINOR CONTRIBUTION TO THE LIKELIHOOD THAT HE WOULD HAVE THE CONDITION THAT RESULTED IN -- LATE 1993. Off the record and on 4-1-08 the above date of 1993 is wrong I'm sure that Dr. Peterson meant to say 2003 as this is the date of my last injury. Dr. Peterson: Dr. Martire saw him a number of times after that for LOW BACK PAIN WITH NO MENTION OF ANY NECK SYMPTONS DURING THAT TIME, SO IT WOULD BE HARD FOR ME TO MAKE A BIG DEAL OUT OF THAT 1990 PREVIOUS INJURY.

Page 61 Line 11-14 Dr. Peterson: The cause is multifactorial, and primarily is attributed to the aging process, the wear or degeneration of the discs and the joints between the vertebrae. (Dr. Peterson is not qualified to make this statement.)

Page 64 Line 1-25 Dr. Peterson: One of the things I was asked to look at is, well, is his current condition a result of the 1990 injury? And I don't recall what I said at that time, but my opinion at this point is that 1990 injury PROBABLY IS NOT A SIGNIFICANT CONTRIBUTOR TO HIS -- TO MR. VOIGT'S CURRENT CONDITION. Mr. Voigt's injury doesn't fit very well into the WSI definition of an injury because it's not a specific incident that results in a change. (here again Dr. Peterson is not qualified to make this statement.)

Page 65 Line 4-25 Dr. Peterson: The question for me is, did the work over time cause this condition or make it worse? And ultimately my opinion was, based on a reasonable degree of medical certainty, that the work was not a substantial cause for your neck condition and that that the factor that contributed to that opinion was the complaints of some neck pain that had occurred in 1991, in 1998 that were prior to your work with Mr. Plante. (Here again this is only the opinion of Dr. Peterson and is not backed up with any medical proof.) Dr. Peterson: The next thing was-- what I tried to do to figure out is whether or not your work caused this does your condition occur in an increased frequency in other painters? Do painters have an increased incidence of cervical spondylosis, cervical degenerative disc disease or cervical myelopathy, and I tried to dig around a fair amount to find some medical opinions on that. There are no studies that show that painters as a group have more of these kinds of

Page 65 Line 23-25 Dr. Peterson: Problems. (This last statement is not based on an medical evidence or does Dr. Peterson have anything in writing to back up his statement, and is the only one to make an opinion on this statement.) The next thing I looked at is, do people that extend their neck for prolonged periods of---

Page 66 Line 1-25 Dr. Peterson: Time or repetitively, are they at increased risk for cervical spondylosis or cervical myelopathy? And from my understanding, having done -- seen lots of spine patients, Is I've never seen that. The above statement means nothing, is not backed by any medical evidence, and is only the opinion of Dr. Peterson.) And I went through the medical literature and tried to find out whether or not that association had been made, and I couldn't find that in the literature. So that was a second factor that led to my opinion that it was not a work-related condition. (Here again Dr. Peterson could not find any medical literature on this, so in other words he is saying I don't really know. His statement is that of his and no one else and is not any medical evidence to back up this statement.) JUDGE Wahl;

The witness: The next reason -- Judge Wahl No. That's the Third factor. Your first factor that you considered was Mr. Voigt's prior complaints in '91 and '98 before he began working with Plante. THE WITNESS: Okay. JUDGE Wahl: You second was whether there was an increased incidence in the industry, that is, among painters, and you don't have any evidence of that.

Page 67 Line 8-25 THE witness: Okay. And my fourth is the timing of the onset of Mr. Voigt's symptoms. And that he had been laid off for the zone in late October (Wait a minute here what is (laid off for the zone) Could someone explain this to me. Back to the witness: And then two or three weeks later, in early November, he has the acute onset of these symptoms. So time wise it doesn't tie well into an injury model, anyway. (what is an injury model could someone please tell me.?) Dr. Peterson: Those are my reasons. What I'm stuck with is a responsibility to justify my opinion in comparison with Mr. Voigt's treating physician. JUDGE Wahl: Exactly. The witness: Dr. McDaniels. I hasten to add that Dr. McDaniels, I respect his opinion. He's a neurosurgeon. I'm not a neurosurgeon. He took care of Mr. Voigt. I didn't take care of Mr. Voigt. He uses the language in his letter that clearly gives the medical information that supports the relationship of Mr. Page 68 Line 1-13 Dr. Peterson: Voigt's work to his neck condition. So how do I justify differing from Dr. McDaniels' opinion? Dr. McDaniels' opinion I believe, is not supported by the medical literature. (This is the most outrageous statement that Dr. Peterson has made so far. Dr. McDaniels is the neurosurgeon and the expert here so his opinion should not be a question at all after all Dr. Peterson is not a neurosurgeon.) THE witness: I believe that it's based primarily on hearsay from Mr. Voigt that he believes it resulted in this, and I believe that Dr. McDaniels made the reasonable step of advocating for his patient within reason (I can't believe what I have just read. To say something about Dr. McDaniels like what Dr. Peterson has just said sounds to me like Dr. Peterson has his head up his . . . If Dr. McDaniels would have been at this hearing I think that he would surely have disagreed with Dr. Peterson on this.



Page 70 Line 13-18 Q. (Mr. Dopson continuing) To summarize then your opinion based on your examination of the records and your study of the other documents is, to a reasonable degree of medical certainty, that Mr. Voigt's condition of 2003 that led to his surgery is not work related? A. That's correct. (Here again Dr. Peterson is working for WSI and is going to say just what he has said. There is no way that Dr. Peterson could come into a meeting and say I think that Mr. Voigt's injury of 2003 is worked related something like this will never happen. I have been fighting this for over four years now and can not believe what WSI has done to the injured worker. I find it very hard to believe that some of the people at WSI have not been hurt bad over all what they have done.) That's Dr. Mindt that' why -- that is, you -- C1 is all of your lower back. Page 71 Line 13-19 Judge Wahl: And my second question is, even though Mr. Voigt's neck problems, to refer to them generally, were not work related the work would nonetheless have produced the symptoms, would have triggered the symptoms, which Mr. Voigt complained of? The Witness: Undoubtedly.

Page 72 Line 23-25 Mr. Voigt: Okay. well, it's just very -- I don't understand, I'm not a doctor, I'm not an attorney, but Dr. Peterson seems to be the only one that can

Page 74 Line 1-25 Mr. Voigt: I don't think that you'll find a Dr. in town that will say, yeah, you have a new injury or you didn't, you knew. There must be -- for what reason, I don't know. As my chiropractor records show in 1995, I had no treatment for any neck problems at that time up until '98, '99 when I went back to work painting. That's the only reason I pushed this thing or gone through with this thing as far as I have. Judge Wahl: Well, but didn't you have complaints in '91? Mr. Voigt: Oh back then, yes. Judge Wahl: All Right. Mr. Voigt: But not when I went to see a chiropractor in '95, I had no complaints of any neck problems. Judge Wahl: Who did you see in '95? Is that German?

Page 75 Line 1-25 Mr. Voigt: No. You have that. Dr. Mindt. Judge: Wahl: Oh, that's Mindt. That's why -- that is, you -- C1 is all of your consultations with Dr. Mindt, and if I go through those, all of the pages of C1, I won't find in there any reference to any complaints of neck pain; Mr. Voigt: That's right. Judge Wahl: Okay. So then you had no -- during all of your treatment, for example, with Dr. Mindt beginning in, it looks like, February of '95 -- I guess that's February Mr. Voigt: That is correct. Judge Wahl: I can't read the good---

Page 76 Page 1-25 Judge Wahl: Doctor's handwriting. So beginning in February of '95, you had no -- you had no problems with your neck as evidenced by the fact that you were seeing Dr. Mindt for what, lower back pain Mr. Voigt: That's right: Judge Wahl: And you never complained about any neck pain during that time. Then, as I recall your testimony, you began having problems with your neck in -- about sometime in '97? Mr. Voigt: That's correct. Judge Wahl: All right. And then it's your -- you believe -- you contend that after that time you began experiencing problems in your neck? Mr. Voigt: They got worse. I had problems and they got worse? Mr. Voigt: Yes.



Page 77 Line 1-23 Judge Wahl: And then what is your experience? How -- did -- what happened with your neck condition after '99? Mr. Voigt: Well, I just got a lot more stiffness in it, you know, and like the doctor said, you really can't notice anything before something happens, you know, to complain about it so all I had was a lot of stiffness and and usually took some aspirin or something for it.

Page 73 Line 1-25 Mr. Voigt: Dr. Peterson seems to be the only one who can determine whether or not I have a new injury or not after I've seen a neurosurgeon, chiropractor, Dr. Martire. They're not able -- for what reason I do not know, he examined me and looked at the x-rays and he says, I can't give you an answer. Judge Wahl: An answer to what? Mr. Voigt: Whether or not I have a new injury. Judge Wahl: I see. Mr. Voigt: This is the question I presented to Dr. Martire and this chiropractor Chuppe over here. Anyway -- Judge Wahl: Chuppe, Chuppe, whatever it is. Mr. Dopson: Right. Mr. Voigt: He examined me on two different periods and all the x-rays and he says I can't honestly -- can't give you any opinion on whether or not I have a new injury. So I'm just wondering how Dr.

Page 78 Line 14-25 Mr. Dopson question to Mr. Voigt; You spoke -- you talked about you tried to get opinions from Drs. Jacobson, Dr. Martire and Chuppe. Was that recently? that's in the last few months? You're not talking about years and years ago? A. No. Q. You went to them after you got the order and said, here's my medical records, what can you tell me? A. Yes, this is in the last couple months. Al knows how much I've been trying to find a -- get

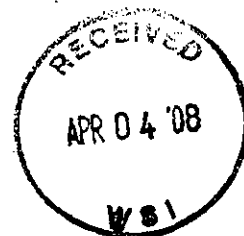
Page 79 Line 1-25 an opinion. Q. Did you give Dr. McDaniels' records and his opinion? A. Yes. Q. Did you give these to Martire, Chuppe and Jacobson? A. Yes, that's correct. Q. So they knew the question was, was there a substantial aggravation of this degenerative conditon? A. Yes. Judge Wahl: Now, let's be very clear about this. Is Jacobson an M.D.? Mr. Voigt: He is a neurosurgeon. Judge Wahl: He is. Is the one that did the surgery on your neck? Mr. Voigt McDaniels is the one.

Page 89 Line 12-25 Judge Wahl: Dr. Peterson, I will submit, has more reasoned and thoughtful opinion because he read the literture. (This is not a medical opinion and is baseless.) And this really isn't a case where the treating physician looking at the records. (This has got to be the worst example of a medical opinion that I have ever heard. To say that Dr. Peterson knows as much about what went on or can even give a medical opinion on this.) You really can't see anything in there. His history is as reported. Dr. Peterson has access to all the same facts that Dr. McDaniels did. (here again Dr. Peterson is not qualified to give an opinion here.) He says in my review -- my experience in the 20 or so years I have been in the business and my review of the records is that that type of work does not alter the underlying degenerative condition. (once more Dr. Peterson is just an M.D. and not a neurosurgeon and can not make a medical opinion in this case.)

Dated this 2nd day of April, 2008


Clarence Voigt

P.7



October 2, 2008
Clarence Voigt
1907 Constitution Drive
Bismarck, ND 58501



COPY

Bruce Furness (ACEO)
Workforce Safety & Insurance
1600 East Century Ave Ste. 1
Bismarck, ND 58506

Dear Mr. Furness:

Ref. My application for continuing jurisdiction Claim Number 2003-687605 that was filed on April 2, 2008. As it is six months since that date WSI is long over due in providing me with any kind of information on this claim all that I have been told is that it is going to be a very, very long time Im not even told how long it will be or anything.

Under N.D.C.C. 44-04-18.10. A public entity may not deny a request for an open record. If WSI does not provide me with the information that I request they must tell me why and to what part of the Century code that tells me the reason for denying my request.

I hereby make the following request for information on the above claim.

- (1) How many claims for continuing jurisdiction has WSI received ?
- (2) I want to see my file on this claim for continuing jurisdiction.
- (3) I want to know by law how WSI has put a date of June 2008 for the time that a claim has to be filed.
- (4) How many claims under continuing jurisdiction has WSI processed.?
- (5) What is the time frame for the completion of this process.?
- (6) How long will it take WSI to process my claim.?
- (7) I want to see the records on the way these claims are processed.

Dated this 2th day of October 2008


Clarence Voigt

2003-724-0005

Bruce Furness
Interim CEO



North Dakota
**Workforce Safety
& Insurance**

Putting Safety to Work

www.WorkforceSafety.com

1600 East Century Avenue, Suite 1
PO Box 5585
Bismarck ND 58506-5585

Clarence Voight
1907 Constitution Ave
Bismarck, ND 58501

October 16, 2008

Dear Mr. Voight,

The attached information request was routed to me for a response.

We are able to provide documents to you that answers a few of your questions under Open Records.

Your first and fourth questions are answered in the attached e-mail from Linda Mertz.

And your fifth question is answered in the attached proposal that serves as the basis for WSI's continuing jurisdiction procedure.

If you have additional Open Records' request, please route them to my attention.

Sincerely,

A handwritten signature in black ink that reads "Mark Armstrong". The signature is written in a cursive, flowing style.

Mark Armstrong
WSI Communications Liaison

Armstrong, Mark A.

From: Mertz, Linda L.
Sent: Wednesday, October 08, 2008 1:43 PM
To: Armstrong, Mark A.
Cc: Wahlin, Timothy J.
Subject: Continuing Jurisdiction Committee totals

Good afternoon Mark!

Here are the totals you requested:

427 claims received

295 reviewed

131

If you have any questions, please call.

Thank you!



WSI Proposal

- WSI may exercise continuing jurisdiction on any claim at any time.
- Several assertions have been made that WSI has denied legitimate claims thereby denying injured workers benefits.
- Therefore, I am asking WSI management to consider creating a review process to reconsider closed claims to determine if the original decision should be reaffirmed or to modify the original decision and thereby provide benefits to the injured worker.
- I am suggesting that WSI management establish a six month "Reconsideration Period", beginning January 1, 2008 during which injured workers that believe they have been denied legitimate benefits can request that WSI reconsider their case to determine if the original decision was correct.
- Emphasis should be given to cases where injuries were denied due to normal degeneration of the body versus the degeneration with a substantial progression as a result of the work related incidence. However, all other areas of concern should be addressed during the reconsideration period.
- WSI would create case review teams composed of one person from OIR, one claims supervisor, two claims analysts and a WSI attorney. However, any person directly involved with the original decision must be excluded from the review team for that claim.

- WSI would review not less than 250 requests for reconsideration within the six month period. (Assuming that 250 or more requests for reconsideration are filed)

- WSI would report their findings to the WSI Interim Legislative Committee at the end of the six month reconsideration period.

- **Scope of review**
 1. Any decision that resulted in denial of benefits would be allowed.
 2. Cases which are (1) currently active-open, (2) currently being considered by OIR, OAH or the courts, and (3) cases where the District Court or the Supreme Court have upheld the WSI decision, are excluded from the review process.
 3. Any case filed after 7/1/1995 to the present and is closed may be considered.
 4. WSI must develop a simple application form that must be completed prior to reconsideration.
 5. Any person requesting a review must sign a release of information form limited to the WSI Interim Legislative Committee members. This allows WSI to share information on which they based their decision with committee members, and provides committee oversight over WSI to make certain that the worker's request for reconsideration is properly addressed by WSI.

- I will be meeting with WSI management following the press conference to review the proposal. I will ask WSI to review the proposal outline and respond, if possible by Monday, December 17, 2007.

2009 Senate Bill No. 2435
Testimony before the Senate Industry, Business, and Labor Committee
Presented by: Tim Wahlin, Chief of Injury Services
Workforce Safety & Insurance
February 2, 2009

Mr. Chairman, Members of the Committee:

My name is Tim Wahlin, Chief of Injury Services with WSI. I am here on behalf of WSI to testify in opposition to SB 2435 and to provide information to the Committee to assist in making its determination. WSI's Board of Directors voted unanimously to oppose this bill.

SB 2435 is functionally identical to 2009 HB 1427. The House IB&L Committee has heard and acted on their version, voting 8-4 do not pass.

North Dakota law currently provides that every benefit determination is appealable. The law has been crafted to provide due process to all North Dakota participants as guaranteed by our Constitutions. As a result, each time WSI grants or denies any benefit, all parties may challenge that determination and receive full review up to and through our State's Supreme Court.

As with every judicial proceeding, upon completion and following the expiration of any applicable appeal deadlines, that determination is final. This finality is necessary to prevent the relitigation, potentially without end, of any issue. To allow unlimited appeals would likely cripple our system and render meaningless any final determination.

In order to relieve the harshest effects of this necessary finality, the organization has been granted the power of Continuing Jurisdiction to review any award, in order to ensure fairness and compliance of law. The refusal to reopen a claim under this

provision is currently not appealable. This is necessary in order to maintain finality of litigation on issues that have been previously resolved.

This bill would require the organization to provide reasons for refusing to reopen a claim for review under certain circumstances. More importantly, by removing the provision that states there is no appeal from a determination not to reopen, the organization submits all determinations under this statute would become fully appealable.

This alteration would dramatically alter the current litigation structure and appeal processes. In effect it would eliminate all statutes of limitations. It would allow all final claims, both past and future, to be litigated and relitigated without end. The potential costs are difficult to overstate.

WSI would respectfully urge this committee to vote "do not pass" on SB 2435.

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



Testimony of Bill Shalhoob
North Dakota Chamber of Commerce
SB 2435
February 2, 2009

Mr. Chairman and members of the committee, my name is Bill Shalhoob and am here today representing the ND Chamber of Commerce, the principle business advocacy group in North Dakota. Our organization is an economic and geographical cross section of North Dakota's private sector and also includes state associations, local chambers of commerce development organizations, convention and visitors bureaus and public sector organizations. For purposes of this hearing we are also representing seven local chambers with total membership over 7,000 members and ten employer associations. A list of those associations is attached. As a group we stand in opposition to SB 2435 and urge a do not pass from the committee on this bill.

The appeals process at WSI has various steps and safeguards built in with the last appeals being district court and the Supreme Court. Your committee added an additional step earlier in the session by allowing a WSI paid attorney's consultation for every claimant who has gone through the IMR office and is not satisfied with the outcome. This bill unnecessarily adds to that process by effectively allowing a second go round if not satisfied with the first decision. The establishment of "relevant, material evidence" in line 18 is subject only to the applicant's naturally prejudices and cannot be held to a consistent standard. We foresee a never ending appeals process based on "new" evidence and disputed claims becoming open ended files that are an actuarial nightmare.

Thank you for the opportunity to appear before you today in opposition to SB 2435. I would be happy to answer any questions.

THE VOICE OF NORTH DAKOTA BUSINESS