

2011 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2205

2011 SENATE STANDING COMMITTEE MINUTES

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

SB 2205
January 18, 2011
Job Number

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to attorney representation in a request for workforce safety and insurance reconsideration.

Minutes:

2 testimonies attached

Chairman Senator Klein: Reconvened the meeting on Senate Bill 2205.

Senator Nodland: Was a co-sponsor of the bill for the motor carriers association.

Anne Green, Staff Counsel with Workforce Safety and Insurance: Testimony Attached (1).

Chairman Senator Klein: It was the Supreme Court's decision to have them bring an attorney in order to bring this discussion forward. Asked if what they were doing is clarifying that it could work now.

Anne: The Supreme Court found a corporation has to be represented by an attorney. This gives the individual employer of a smaller business the opportunity to first go to an informal hearing with WSI.

Tom Balzer, North Dakota Carriers Association: Brought the bill forward as a result of a case. Their intent is to give everyone a shot to appeal the decision at an informal hearing. This was meant to be an informal process.

Senator Schneider: Asked if Tom had a chance to review WSI's amendments.

Tom: Yes and he agrees with it.

Senator Schneider: Would a request for reconsideration that was completed with help from an out-of-state attorney, would that not be valid?

Tom: My understanding under the new law that particular request would be valid. In this case the out-of-state attorney erred in not requesting a license for temporary bases.

Chairman Klein: So lawyers must be licensed in all the states they are working?

Tom: There is a methodology in which they can get a temporary license.

Discussion continued

Jeb Oehlke, North Dakota Chamber of Commerce: Testimony Attached (2).

Chairman Klein: Closed hearing.

Senator Murphy: Moved to adopt the amendment.

Senator Laffen: Seconded the motion.

Roll Call Vote: Yes-7 No-0

Senator Andrist: Moved a do pass as amended.

Senator Schneider: Seconded the motion.

Roll Call Vote: Yes-7 No-0

Senator Schneider to carry the bill

FISCAL NOTE

Requested by Legislative Council
01/21/2011

Amendment to: SB 2205

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.*

	2009-2011 Biennium		2011-2013 Biennium		2013-2015 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.*

2009-2011 Biennium			2011-2013 Biennium			2013-2015 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 provides that an employer is not required to file a request for reconsideration through an attorney and clarifies that an employee may request assistance from the decision review office.

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
2011 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: Engrossed SB 2205

BILL DESCRIPTION: Attorney Representation

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

The engrossed bill provides that an employer is not required to file a request for reconsideration through an attorney and clarifies that an employee may request assistance from the decision review office.

FISCAL IMPACT: No fiscal impact is anticipated.

DATE: January 21, 2011

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:	01/21/2011

FISCAL NOTE

Requested by Legislative Council
01/14/2011

Bill/Resolution No.: SB 2205

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.*

	2009-2011 Biennium		2011-2013 Biennium		2013-2015 Biennium	
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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
2011 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

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The proposed legislation provides that an employer is not required to file a request for reconsideration through an attorney and clarifies that an employee may request assistance from the decision review office.

FISCAL IMPACT: No fiscal impact is anticipated.

DATE: January 14, 2011

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:	01/14/2011

PROPOSED AMENDMENTS TO SENATE BILL NO. 2205

Page 1, line 3, replace "appeal a decision of" with "file a request for assistance from"

Page 1, line 19, overstrike "date of service of an" and insert immediately thereafter "day the"

Page 1, line 19, after "order" insert "was mailed"

Page 2, line 3, overstrike "specifically"

Page 2, line 3, overstrike "alleged"

Page 2, line 4, replace "reasons" with "reason"

Re-number accordingly

Date: 1/18
Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2205

Senate Industry, Business and Labor Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By _____ Seconded By _____

Senators	Yes	No	Senators	Yes	No
Chairman Jerry Klein	✓		Senator Mac Schneider	✓	
VC George L. Nodland	✓		Senator Murphy	✓	
Senator John Andrist	✓				
Senator Lonnie J. Laffen	✓				
Senator Oley Larsen	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Senator Schneider

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

REPORT OF STANDING COMMITTEE

SB 2205: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2205 was placed on the Sixth order on the calendar.

Page 1, line 3, replace "appeal a decision of" with "file a request for assistance from"

Page 1, line 19, overstrike "date of service of an" and insert immediately thereafter "day the"

Page 1, line 19, after "order" insert "was mailed"

Page 2, line 3, overstrike "specifically"

Page 2, line 3, overstrike "alleged"

Page 2, line 4, replace "reasons" with "reason"

Renumber accordingly

2011 HOUSE INDUSTRY, BUSINESS AND LABOR

SB 2205

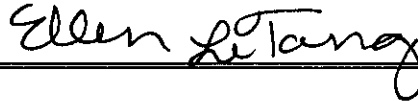
2011 HOUSE STANDING COMMITTEE MINUTES

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

SB 2205
March 7, 2011
15042

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Attorney representation in a request for WSI reconsideration, who may file a request for assistance from the decision review office and service of an employer

Minutes:

Chairman Keiser: Opens the hearing on SB 2205.

Tom Balzer~NDMCA: We asked Senator Nodland to put in on our behalf from an issue that arose from a Supreme Court decision. There was a trucking company in Fargo who had an owner/operator get injured and then filed for employee status. It went through the process, the agency originally agreed that this individual was an employee and sent out a notice to the employer. The employer, through their attorney, who happened to be an out-of-state attorney, germane to this discussion, filed the request for reconsideration for them. The request for reconsideration in our mind is treated as an informal process. The employer filed the request for reconsideration, the agency reversed its decision and filed a notice that this person was an independent contractor. It went through the remainder of the legal process all the way to the North Dakota Supreme Court. The North Dakota Supreme Court handed down a ruling that I didn't understand and now that I've been in and out of this, understand it completely and agree with the court's decision 100%. As they read through the law, they looked at it as two things, one was which was the request for reconsideration, the way the language was written, is very legal and it requires that in the request reconsideration, they ask for specific relief sought, which is a legal term. The Supreme Court said that requires legally used to complete, therefore a corporation, because it is not a person, cannot represent itself and have to be represented by an attorney that is legally authorized to practice law in North Dakota, which this attorney was not. Because of that, the request for reconsideration was null and void and had to start the process over again. What this bill does is allow for an officer of a corporation to file a request for reconsideration. This is the one-step not having to get attorneys involved to debate the merits of the decision. We did have discussions with the state bar association and our draft included that an officer of a corporation didn't need representation at any point. They brought to light that this is something that they were not comfortable with. So we went with this option, us as an industry, the one shot, what we were looking for. Give us one chance to file our reasons for.

What you will see in the bill on the first page starting on line nine, says that an employer is not required to file this request through an attorney. They may, but the attorney has to be licensed in the state of North Dakota, but for this one particular opportunity, they do not have to use an attorney for this. Eleven and twelve gets rid of the alleged errors in the decision and the relief sought and uses more layman's terminology to suffice the decision of the Supreme Court. The second and third section is purely a technical correction.

Representative Ruby: This is only when the employer disagrees and wishes to challenge?

Tom Balzer: That right.

Chairman Keiser: Anyone else here to testify in support of SB 2205?

Anne Green~Staff Counsel with WSI: (See attached testimony 1).

Representative Amerman: Are you saying the employer always gets notice of decision but not necessarily the claimant if we take away the notice of decision?

Anne Green: In bill 2114 we are permitting the agency to skip over that decision and go right to an administrative order. Here we are saying that if an employee requests a reconsideration of a notice of decision, any injured worker can do that without the benefit of an attorney at any stage of the proceeding. In fact, WSI considers that initial request for reconsideration to be a very informal affair. On the employer side, however, there is case law that developed in the state of North Dakota, which says that a corporation or limited liability partnership or company is an artificial entity. It calls it a person and is done so by statute. These entities are created so that the business owners, who own these corporations, are protected from losing their personal assets if the business goes south. So what the Supreme Court said in the Carlson case, if an artificial entity is the owner of the business, the artificial entity can't represent itself. That artificial entity has to be represented by an attorney and can't represent itself. WSI thought process of that early request for reconsideration stage is to make it accessible. We changed some of the language in statute and proposed here to respond for that need to interact informally with WSI to resolve issues without counsel at that point.

Representative Ruby: How that case law was established, I don't see in the language that an attorney was required. Was it because of the legal terms, the alleged error and relief sought that it was determined that it had to be an attorney?

Ann Green: It was the Supreme Court in their decision that came down and said, an artificial entity cannot represent itself. When the Supreme Court says a corporation being represented by an out of state attorney, they said that you can't do that. Furthermore, they have to be represented by someone in this state.

Representative Ruby: In the fiscal note, it mentions that the engrossed bill says that the employer is not required to file a request through an attorney and clarifies that an employee may request assistance from the decision review office. How is that clarifying it when it seems clear that they can request assistance through that office that is in section 2?

Ann Green: When SB 2205 was put together, it actually affects two statutes, 65-01-16 and 65-04-32. 65-01-16 is the appeal process for claims for an injured worker filing claims for benefits and 65-04-32 is the appeal process for employers. Section two of this particular bill comes out of 65-01-16, so you will see the over struck language "a party" in its original form, it only addresses injured workers. As we addressed the need for an employer to have or not have counsel because, remember, an employer can address and appeal issues on both the money on the outside of the organization premiums and he can also appeal rights of any claim for which one of his workers files. A party under 65-01-16 addresses potentially anybody. A party could have contemplated both an injured worker and an employer and only the injured worker has the right to appeal to the decision review office.

Chairman Keiser: Although it doesn't sound much, this language that is struck, it's very technical and lawyer like.

Ann Green: You are absolutely right and the language that we have replaced it with really reflects practice.

Chairman Keiser: That's how we could now word it without having to cite sections of the code.

Chairman Keiser: Further questions.

Representative Kreun: You said in practice, you were actually doing what we are suggesting to put in the bill, is that correct?

Ann Green: That's correct.

Bill Shalhoob~North Dakota Chamber: We are also in support of this bill.

Chairman Keiser: Anyone else here to testify in support, in opposition, in the neutral position of SB 2205. Closes the hearing. What are the wishes of the committee?

Representative Kreun: Moves a Do Pass.

Representative Ruby: Second.

Chairman Keiser: Further discussion.

Roll call was taken for a Do Pass on SB 2205 with 13 yeas, 0 nays, 1 absent and Representative Ruby is the carrier.

Date: March 7, 2011

Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2205

House House Industry, Business and Labor Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment

Motion Made By Kreun Seconded By Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	✓		Representative Amerman	✓	
Vice Chairman Kasper	✓		Representative Boe	Ab	
Representative Clark	✓		Representative Gruchalla	✓	
Representative Frantsvog	✓		Representative M Nelson	✓	
Representative N Johnson	✓				
Representative Kreun	✓				
Representative Nathe	✓				
Representative Ruby	✓				
Representative Sukut	✓				
Representative Vigesaa	✓				

Total Yes 13 No 0

Absent 1

Floor Assignment Rep Ruby

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

REPORT OF STANDING COMMITTEE

SB 2205, as engrossed: Industry, Business and Labor Committee (Rep. Keiser, Chairman) recommends DO PASS (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2205 was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

SB 2205

SB 2205
Attachment
(1)

**2011 Senate Bill No. 2205
Testimony before the Senate Industry, Business, and Labor Committee
Presented by Anne Jorgenson Green, Staff Counsel
Workforce Safety & Insurance
January 18, 2011**

Mr. Chairman, Members of the Committee:

My name is Anne Green, Staff Counsel with Workforce Safety & Insurance (WSI). I am here to testify in support of Senate Bill 2205.

Injured workers and employers alike have the right to appeal a decision of Workforce Safety and Insurance. There are several steps in this appeal process which begins with an informal request for reconsideration to WSI, and ultimately may conclude with an appeal to the North Dakota Supreme Court.

At the beginning of this appeal process, WSI conducts an internal, informal review of a matter and issues a document called a "notice of decision", outlining its decision and the reasons for the decision. These notice of decisions are generally brief, and rarely exceed one page in length. If an employer or injured worker disagrees with WSI's decision, they may request reconsideration of the decision. WSI will then reconsider the matter and conduct an internal, informal review of the request for reconsideration. The goal of WSI at this initial stage in the appeal process is to provide a forum for appeal which is accessible, easy to understand, and not burdensome to an individual or entity without legal training.

In 2009, The North Dakota Supreme Court held that a request for reconsideration of an informal decision by WSI submitted by an attorney not licensed to practice law in the state of North Dakota was void. The Court also found, following North Dakota common law principles and precedent, that a corporation must file a request for reconsideration with WSI through an attorney. The Court further held that the preparation of a request for reconsideration "necessarily requires the

application of legal skill and knowledge of the facts of the case and constitutes the practice of law....” Carlson v. Workforce Safety & Insurance, 2009 ND 87, 765 N.W.2d 69.

In response to the Supreme Court decision, WSI adopted internal procedures to ensure any appeal of a notice of decision by an employer, who is also a corporation, limited liability company or limited liability partnership, is submitted through a licensed North Dakota attorney. Our experience shows that the impact of the Supreme Court decision and WSI’s corresponding procedure is felt most pointedly by small employers who, while making the tactical decision to incorporate their business, are now faced with the financial burden of hiring an attorney to appeal any decision of the agency, even at the very early, informal, notice of decision stage.

The procedure’s practical effect is illustrated vividly when considering an employer’s right to appeal a \$250 medical expense assessment. An employer may be liable for the first \$250 of medical expenses on a claim, unless the claim is reported within 24 hours of its occurrence. There may be simple and meritorious reasons for an employer to fail to report an injury within 24 hours of its occurrence, reasons which might support waiving the assessment. Under current law, the employer, whose business structure is an artificial entity, must secure an attorney to appeal a notice of decision of WSI that assesses the \$250 to the employer’s account.

Senate Bill 2205 balances the necessity for access to the WSI appeal system with the ruling of the Supreme Court, and an employer’s legitimate need to efficiently and informally resolve conflicts with decisions of the agency. This is done by allowing an employer the discretion to secure counsel to appeal the informal notice of decision issued by WSI, but not requiring it. In addition, the proposed language softens the requirements for an informal request for reconsideration to WSI to address the Supreme Court’s concerns that this task

constitutes the practice of law. The more formal legal language is removed and will remain the requirement for an appeal requesting a formal administrative hearing or for an appeal to the District Court. Based on the Carlson decision, WSI agrees an employer who is also a corporation, LLC or LLP should secure the services of an attorney to appeal a decision beyond the initial request for reconsideration of a notice of decision.

Attached to my testimony are proposed amendments to the bill which reflect housekeeping issues and a clarification in the creating clause. It is more accurate for the creating clause to read "who may file a request for assistance from" the Decision Review Office (DRO), since DRO does not make appealable decisions. The remaining amendments reflect amendments intended to create consistency in language between the two sections of law contained in the Bill.

That concludes my testimony. I'd be happy to answer any questions that you may have.



Testimony of Jeb Oehlke
North Dakota Chamber of Commerce
SB 2205
January 18, 2011

Mr. Chairman and members of the committee, my name is Jeb Oehlke, Vice President of Governmental Affairs for the North Dakota Chamber of Commerce, the principal 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, economic development organizations, convention and visitors bureaus, and public sector organizations. For the purposes of this and all Workforce Safety and Insurance hearings we also represent four local chambers with over 5,000 members and seven employer associations. I have attached a list of those parties to my testimony. As a group we stand in support of SB 2205 and urge a Do Pass recommendation from the committee.

This bill addresses requests for reconsideration of informal decisions rendered by WSI. Generally speaking there is no special knowledge or skill required in the preparation or filing of these requests. We see no reason to require many of the employers of this state to spend more to hire an attorney to prepare the request for consideration than they may eventually save in the event of receiving a favorable decision.

We believe the employers of this state should have the discretion to decide whether to obtain the assistance of counsel in filing these requests.

Thank you for the opportunity to appear in support of SB 2205. I am happy to answer any questions you may have.

THE VOICE OF NORTH DAKOTA BUSINESS



North Dakota Chamber of Commerce
Groups Represented for Workforce Safety & Insurance Hearings

Bismarck-Mandan Chamber of Commerce
The Chamber Grand Forks-East Grand Forks
Minot Chamber of Commerce
Wahpeton-Breckenridge Area Chamber of Commerce
Associated General Contractors of North Dakota
North Dakota Retail Association
North Dakota Petroleum Council
North Dakota Hospitality Association
North Dakota Motor Carriers Association
North Dakota Association of Petroleum Marketers
North Dakota Grocers Association

THE VOICE OF NORTH DAKOTA BUSINESS

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#1

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