

**FISCAL NOTE**  
**Requested by Legislative Council**  
**12/21/2018**

Amendment to: HB 1073

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

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

	2017-2019 Biennium	2019-2021 Biennium	2021-2023 Biennium
Counties			
Cities			
School Districts			
Townships			

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

see attached

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

see attached

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

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

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

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

**Name:** John Halvorson

**Agency:** WSI

**Telephone:** 328-6016

**Date Prepared:** 12/21/2018

**WORKFORCE SAFETY & INSURANCE**  
**2019 LEGISLATION**  
**SUMMARY OF ACTUARIAL INFORMATION**

**BILL NO: HB 1073**

**BILL DESCRIPTION: WSI Injury Services Bill**

**SUMMARY OF ACTUARIAL INFORMATION:** Workforce Safety & Insurance, together with its consulting actuaries, The Burkhalter Group, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed legislation:

- Defines valid functional capacity examination.
- Removes one of the medical exam requirements out of the firefighter/law enforcement presumption statute.
- Allows WSI to establish pilot programs to assess alternative forms of dispute resolution.
- Provides that physicians making utilization review determinations be licensed from a state licensing agency within the United States as opposed to just being licensed in North Dakota.
- Requires healthcare providers to submit medical bills and documentation electronically by no later than July 1, 2021.
- For recurrent disability claims, provides that wages used for benefit calculation to be wages received at time of the recurrence unless the wages at recurrence were lower than at time of initial injury due to limitations from the initial injury in which case wages from initial injury will be used for calculation of benefit purposes.
- Amends the combined benefit threshold for partial disability benefit recipients to a percentage of gross wages rather than net wages.
- Establishes parameters for medical non-compliance and a process for when disability and vocational rehabilitation benefits can be discontinued for medical non-compliance.
- Repeals statute requiring WSI to have an organizational seal.

**FISCAL IMPACT:** No significant impact to premium rate and reserve levels is anticipated.

**DATE: December 21, 2018**

**FISCAL NOTE**  
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**12/21/2018**

Bill/Resolution No.: HB 1073

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see attached

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see attached

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**DATE: December 21, 2018**

**2019 HOUSE INDUSTRY, BUSINESS AND LABOR**

**HB 1073**

# 2019 HOUSE STANDING COMMITTEE MINUTES

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

HB1073  
1/7/2019  
30475

- Subcommittee  
 Conference Committee

Committee Clerk: Ellen LeTang

### Explanation or reason for introduction of bill/resolution:

Pilot program to assess alternative forms of dispute resolution & electronic submission of medical billings.

### Minutes:

Attachments-1, 2

**Chairman Keiser:** Opens the hearing on HB 1073.

**Tim Wahlin**~Chief of Injury Services for WSI. Attachment 1. Goes over section 1.

**Chairman Keiser:** Any questions?

**3:00**

**Rep M Nelson:** I'm having trouble finding in the statute, "if the person is cooperative, we use this one, only if they are not cooperative, we can do that other one". I don't find that in the text.

**Wahlin:** I don't believe that the text describes non-cooperation. It gives 2 options. Is it a fully valid functional capacity exam or other observations, which would allow the determination of functional capacity. It's not a description.

**Chairman Keiser:** In the example you give, we can have a professional do an examination & they find nothing. Therefore, it's considered valid & they should be able to go through vocational rehabilitation or we can look at them performing outside of an examination & see them perform functions that they say they can't do, but we see them do. So that is evidence that requires them to go in the vocational rehabilitation. What about pain, which I can't do on a repetitive basis in a work environment? The description is so general; it doesn't take in the consideration the frequency in issues that would have to be part of the observation. Would you respond to that?

**Wahlin:** During the functional capacity examination, that will be duration limits that the examiner will prescribe based on those tests. Both levels will be tested. We are looking at incomplete or conditionally valid. They will look at what I can measure & not measure. It gives the system a safeguard for manipulated exams.

**Chairman Keiser:** I agree that the first way to do the assessment is with a health care professional but on the observation, you would have to follow them for a period of time. How do we make sure that we are not doing a disservice to an injured worker, especially the second part?

**Wahlin:** Ultimately there are safeguards. The medical profession, we look for their opinion on what they believe is the safe, effective release level. They have to justify why it is that they are placing the injured worker at the levels they need to stay on. We are still ultimately relying on the professional medical judgment.

**Chairman Keiser:** It doesn't say that. It says that we can do A or B. It doesn't say that if we use B, we can then refer to the medical professional for a follow up exam.

**Wahlin:** I don't believe a follow up exam would be necessary.

**Rep Kasper:** During an examination, stoop & bend is in the bill. To me that's a big difference. Do you see a difference you see between bending & stooping?

**Wahlin:** No.

**Rep Kasper:** How long does this professional have to observe to get to the conclusion?

**Wahlin:** Ultimately, we are going to looking to them for the judgement to the extent that they believe that they observed enough for a determination. We rely on that determination.

**Rep Kasper:** You don't know how long the observation occurred, it's just a report they write.

**Wahlin:** No, even though the tests can be repeated, they can be done over multiple days. We are going to be looking at the conclusion to determine whether or not it is baseless. There are rules for all the different set of testing. Each one is a little bit different. Ultimately we do rely on what that medical professional tells us.

**Rep Kasper:** If the injured worker does not agree, do they have an appeal process to have another opinion?

**Wahlin:** Absolutely.

**Rep M Nelson:** Don't you use currently, private investigators to do this?

**Wahlin:** That is 2 different issues. We are looking at this to be a report of the medical professional capabilities. The rare circumstance that a private investigator does observe & report back, that is not a medical basis by which we are going to rely on their determinations. It needs to be a medical determination.

**Rep M Nelson:** Didn't you have one case go after workers, simply, the private investor saw them pouring coffee for his friends in a coffee shop? Then you concluded that he was faking his disability?

**Wahlin:** I can't comment on that because of confidentiality.

**Chairman Keiser:** You can't by law unless we have a release signed by the injured worker.

**Rep M Nelson:** Do you take away benefits away from workers based on what the private investors say?

**Wahlin:** There is 2 areas where benefits cease under fraud. If they are earning money & not reporting or if they are intentionally misrepresenting the physical capacities.

**Rep M Nelson:** Isn't that the very thing you are going at with our second type of observation for the disabilities?

**Wahlin:** No, I view it as the flip side of that coin. We are seeking to determine what their physical abilities actually are & not whether or not they have made a fraudulent misrepresentation. They sound the same but they are two different aspects within our code.

**Chairman Keiser:** There are 2 different issues. There is fraud but this is for vocational rehab. Can we get people into the vocational rehab program if we can't document that there is medical condition preventing the vocational rehab? This is specifically vocational rehab, correct?

**Wahlin:** Correct.

**Rep Adams:** How many cases do you have that you actually say no?

**Wahlin:** I don't have those currently.

**Chairman Keiser:** Further questions.

**Rep Kasper:** Are there current numbers of cases like this that you are concerned about?

**Wahlin:** It have been growing & it's at a point for concern.

**Rep Kasper:** Can you generate numbers?

**Wahlin:** We can generate that.

**17:40**

**Wahlin:** Continues testimony. Sections 2 & 3.

**19:20**

**Rep Ruby:** In the last section, the money & the workforce safety insurance fund concerns me. It doesn't say how much or if there is a cap. My concern if there is a cost to other appeals processes & this could be potentially saving, why do we need a separation appropriation?

**Wahlin:** Give us the ability to extent funds to possibly built the program, hire outside resources & track the results.

**Rep Ruby:** Do you have any idea about the amount?

**Wahlin:** I don't have an amount.

**Chairman Keiser:** Would you ask the organization to come back with a number?

**Vice Chairman Lefor:** Would you have some potential savings, if you don't have to litigate. What would be the net number be?

**Wahlin:** Hopefully there would be a net savings. That is the intent, but we have no projections.

**Vice Chairman Lefor:** Do you have data from other states that have done this? The practical effect & outcomes?

**Wahlin:** There are numerous systems of dispute systems & each is different. We don't have any data because it's so systematically different.

**Rep Ruby:** This makes me believe that there are some options for dispute resolution that you don't have the ability to do?

**Wahlin:** I foresee that there are things that we would not be able to do without some out an expense line item & budget to handle those.

**Chairman Keiser:** For example?

**Wahlin:** Hopefully bring that in prior to issuance of an order to determine some middle ground early on.

**Rep Ruby:** You can't do that now & you need an appropriation to do that?

**Wahlin:** The organization believe that they would be able to build our program that would have some cost to it. It is in morphism & we are looking for the authority to go forward & put something together. We have a similar process over in the vocational system. We have the authority to start pilot programs.

**Rep Ruby:** Basically what I would hope to avoid is having another step/layer to add to more confusion. Now there is another step to go through.

**Chairman Keiser:** Do we need to add language that makes voluntary selected their outcome, binding?

**Wahlin:** When we do reach an agreement with an injured worker, that precipitates a settlement agreement in which those items are waived.

**Chairman Keiser:** It seems a shortcut to a dispute resolution. It adds another layer of dispute resolution rather than a shortcut because if it's not binding. That doesn't make sense.

**27:25**

**Wahlin:** Continues testimony. Section 4.

**31:00**

**Chairman Keiser:** Now we are saying we don't have to have an expert. Is that a problem for you?

**Wahlin:** Utilization review is something that manage care uses to analyze certain type of procedures that have risk. Utilization review category, which we will review & ok prior to service taking place. Ultimately, that is the basis of utilization review & management care. That is how the medical system is working currently.

**Rep Schauer:** What is the process to find an instate expert?

**Wahlin:** We have them on staff, in state, under a contract.

**Rep Schauer:** As far as analyzing the data, these outstate experts, are they the ones taking the data?

**Wahlin:** No, that is compiled by other services.

**35:45**

**Wahlin:** Continues testimony on section 5, 6, 7, 8.

**42:12**

**Rep M Nelson:** I don't find a definition for medically noncompliant other than the agency determines that they are noncompliant.

**Wahlin:** It's simply a restatement.

**Rep M Nelson:** You're not considered in compliance until you have been compliant for 60 days. If the period for medical noncompliance continues for 60 days, you're not considered for at least 60 days, but your period of noncompliance continues over 60 days, you never get any benefits. What is the 60 day period considered?

**Wahlin:** There are 2 different 60 day measures. If you are out of compliance for more than 60 days, you may not receive any further wage loss benefits. However, once you have gone out of compliance, you must be in compliance for 60 days for us to restart those payments.

**Rep M Nelson:** It says the period of noncompliance must be deducted from the period for which compensation is payable. That period, if they are not getting payments, is that included in the 60 days or not include the 60 days?

**Wahlin:** To the extent that an injured worker is out of compliance for 14 days, that's the period that they will not be receiving. Then if they come back into compliance, we would end up starting payment.

**Rep M Nelson:** The injured worker has to effectively pay for his vocational rehab for 60 days & then if you decide that if he's been in compliance, then you will pay for it?

**Wahlin:** That's correct.

**Chairman Keiser:** Do we have a buffer for the noncompliance? What do we do if the WSI feels, if I'm not compliant? Do you give me notice & have two weeks to straighten out or do you just arbitrarily say "you out of compliance" & the clock starts?

**Wahlin:** The ceasing of benefits doesn't happen for 21 days of payments.

**Chairman Keiser:** If they get into compliance in 21 days?

**Wahlin:** That's correct.

**Rep Schauer:** The 2 strikes system. Is that something that is new? You said something about without good cause.

**Wahlin:** Good cause, whatever that is, they are noncompliant. The 2 strike system is the being copied from the vocational noncompliant system of our code.

**Rep Kasper:** What are items that make an employee to be out of compliance.

**Wahlin:** Gives examples.

**Rep Kasper:** When does the out of compliance period starts.

**Wahlin:** When the notice is sent.

**Rep Kasper:** You get the 21 days back?

**Wahlin:** No.

**48:45**

**Wahlin:** Continues testimony Section 9 & 10.

**49:29**

**Rep M Nelson:** How many claims from past years do you think this is going to effect?

**Wahlin:** Are you referring to section 8.

**Rep M Nelson:** No. What is the purpose of retroactive?

**Wahlin:** That would not be retroactive effect. We would not be ending claims based on two strikes because that law didn't exist at the time. When this law becomes effect, it will apply to all claims regardless of date of injury. It will only have application moving forward.

**Chairman Keiser:** Anyone else to testify in support, opposition to HB 1073?

**Walyon Hedegaard~President of the North Dakota AFL-CIO:** Attachment 2.

**Chairman Keiser:** Questions? Tim Wahlin, could you come back? The employee is responsible to demonstrate that these are the wages capacity. I'm assuming that is because they can provide documentation of jobs that they interviewed for & not received; those that they interviewed for & received where they can show some history. Is that why we are putting the burden on the employee?

**Wahlin:** That is correct & throughout the entire system, someone seeking benefits has the requirement to show entitlement to those entitlements. It tracks both of those.

**Rep Kasper:** What happen is an injured worker who gets addicted from opioids? Do you make exceptions for the injured worker who missed the deadline?

**Wahlin:** That would be a case for good cause.

**Rep P Anderson:** How often & when do treatment with WSI for depression?

**Wahlin:** That would be risk. We look at the physical injury & also look at the injures are in the code; what are mental injuries, what are physical injuries. How they are compensated in the system.

**Rep M Nelson:** For the medical non-compliance, for example a car accident with head injuries, how is WSI managing that now? HIPPA makes it difficult to help people. Are they being told routinely given access to someone else so that they can help comply to WSI, is that being done?

**Wahlin:** HIPPA, the state workmen's compensation systems are exempt. We have the ability to comply with out of state privacy laws. We train staff for those head injuries. That's an argument for good cause.

**Rep M Nelson:** How is the worker who is injured so severely that they are non compliant, supposed to be in good enough condition to make a case that they have good cause for noncompliance?

**Wahlin:** That's a due process done on the front end.

**Chairman Keiser:** Page 11, subsection B, the functional exam, it doesn't make sense. Either the functional exam is a legitimate & valid. Would the agency object in taking subsection B & saying, if we observe a behavior that we think is questionable, then we can require the functional exam? We will still base the decision on the valid functional examination not the observation.

**Wahlin:** That puts us back into the case of where we were.

**Chairman Keiser:** I'm saying, we will give you the authority under those circumstances to require a valid functional exam by a medical provider.

**Wahlin:** If the injured worker doesn't comply, we will never get a valid exam.

**Chairman Keiser:** Then we need to say, if they don't comply with it, then we have the option of not honoring the claim. The way I read part B is; we have 2 options. One, we do the exam, it's valid & reliable & you can do it. Two, we can observe something & say, we observed this, the medical people have looked at this & it's a valid exam, but then it goes on that it's unreliable. Either the observation is unreliable or the exam is unreliable. The way I read it is the exam is unreliable. That doesn't make any sense. If we are going to deny benefits, we need better footing than just the observation.

**Chairman Keiser:** Anyone else here to testify in opposition, neutral? Closes the hearing on HB 1073

**Chairman Keiser:** What are the wishes of the committee? I'm not comfortable with this & we need more in depth discussion. Appoints Rep Louser-Chair, Rep Ruby, Rep M Nelson to a subcommittee with WSI to prove what we have or don't have in this bill.

# 2019 HOUSE STANDING COMMITTEE MINUTES

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

**HB1073**  
1/14/2019  
30767

- Subcommittee  
 Conference Committee

Committee Clerk: Ellen LeTang

## Explanation or reason for introduction of bill/resolution:

Pilot program to assess alternative forms of dispute resolution & electronic submission of medical billings.

## Summary of Subcommittee:

## Subcommittee members:

- ~ Chairman Louser, Rep D Ruby, Rep M Nelson.
- ~ Attending-Tim Wahlin

## Summary:

- ~ Section 3-The wide open, continuing appropriation, Rep D Ruby was not comfortable with that.
- ~ Response back was "if we set a gap of \$50,000", will that be ok & we will certainly cap that.
- ~ Rep D Ruby, I comfortable with that. I don't want to restrict it so much that we can't run a valid pilot program.
- ~ Tim Wahlin-We will put together an amendment together to meet in front of the board on Tuesday.

**Chairman Louser:** Closes the subcommittee discussion.

# 2019 HOUSE STANDING COMMITTEE MINUTES

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

HB 1073  
2/4/2019  
32054

- Subcommittee  
 Conference Committee

Committee Clerk: Ellen LeTang

### Explanation or reason for introduction of bill/resolution:

Pilot program to assess alternative forms of dispute resolution & electronic submission of medical billings.

### Minutes:

Attachment 1

**Chairman Keiser:** Reopens the hearing on HB 1073.

**4:30**

**Chairman Keiser:** Rep Louser was on the subcommittee & he said he's ready to go.

**Rep Louser:** Attachment 1. This is the pilot program for the alternate dispute resolution. We have an amendment that would cap money at \$50,000 per biennium.

**Rep Louser:** Moves to adopt the amendment.

**Rep Kasper:** Second.

**Chairman Keiser:** Further discussion on the amendment.

**Voice vote ~ motion carried.**

**Rep Louser:** Moves a motion for a Do Pass as Amended.

**Rep Schauer:** Second.

**Chairman Keiser:** Further discussion?

**Roll call was taken on HB 1073 for a Do Pass as Amended with 13 yes, 0 no, 1 absent & Rep Louser is the carrier.**

19.8016.01001  
Title.02000

DA 2/4/19  
Adopted by the Industry, Business and Labor  
Committee

February 4, 2019

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1073

Page 12, line 23, replace "Money in" with "No more than fifty thousand dollars per biennium  
from"

Renumber accordingly

Date: Feb 4, 2019

Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES

BILL/RESOLUTION NO. 1073

House \_\_\_\_\_ Industry, Business and Labor \_\_\_\_\_ Committee

Subcommittee

Amendment LC# or Description: 19.8016.01001

Recommendation

- Adopt Amendment
- Do Pass     Do Not Pass     Without Committee Recommendation
- As Amended     Rerefer to Appropriations
- Place on Consent Calendar

Other Actions  Reconsider  \_\_\_\_\_

Motion Made by Rep Louser    Seconded By Rep Kasper

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser			Rep O'Brien		
Vice Chairman Lefor			Rep Richter		
Rep Bosch			Rep Ruby		
Rep C Johnson			Rep Schauer		
Rep Kasper			Rep Adams		
Rep Laning			Rep P Anderson		
Rep Louser			Rep M Nelson		

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment voice vote - motion carried

Date: Feb 4, 2019

Roll Call Vote #: 2

2019 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES

BILL/RESOLUTION NO. 1073

House \_\_\_\_\_ Industry, Business and Labor \_\_\_\_\_ Committee

Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation

- Adopt Amendment
- Do Pass     Do Not Pass     Without Committee Recommendation
- As Amended     Rerefer to Appropriations
- Place on Consent Calendar

Other Actions     Reconsider     \_\_\_\_\_

Motion Made by Rep Louer    Seconded By Rep Schauer

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	x		Rep O'Brien	Ab	
Vice Chairman Lefor	x		Rep Richter	x	
Rep Bosch	x		Rep Ruby	x	
Rep C Johnson	x		Rep Schauer	x	
Rep Kasper	x		Rep Adams	x	
Rep Laning	x		Rep P Anderson	x	
Rep Louer	x		Rep M Nelson	x	

Total (Yes) 13    No 0

Absent 1

Floor Assignment Rep Louer

**REPORT OF STANDING COMMITTEE**

**HB 1073: Industry, Business and Labor Committee (Rep. Keiser, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1073 was placed on the Sixth order on the calendar.

Page 12, line 23, replace "Money in" with "No more than fifty thousand dollars per biennium from"

Renumber accordingly

**2019 SENATE INDUSTRY, BUSINESS AND LABOR**

**HB 1073**

# 2019 SENATE STANDING COMMITTEE MINUTES

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

HB 1073  
3/5/2019  
Job # 33234

- Subcommittee  
 Conference Committee

Committee Clerk: Amy Crane / Carie Winings

### Explanation or reason for introduction of bill/resolution:

Relating to a pilot program to assess alternative forms of dispute resolution and the electronic submission of medical billings; relating to functional capacity examinations, medical examinations for full-time paid firefighters and law enforcement officers, licensing required for allied health care professionals, average weekly wage upon recurrence of disability, combined partial disability benefits, and medical noncompliance; relating to the organization seal; to provide a continuing appropriation; and to provide for application.

### Minutes:

Att. #1

**Chairman Klein:** Opened the hearing on HB 1073. All members were present.

**Tim Wahlin, Chief of Injury Services at WSI:** See Attachment #1 for testimony in support of the bill.

**(15:25) Chairman Klein:** So, this is the work we've done in the interim to, what you believe, is clarify and clean-up to make sure everyone understands what is going on here?

**Tim Wahlin:** This is what we refer to as our injury services clean-up bill, since it is injury services that deals essentially with all the areas that would impact an injured worker. They start right after session, and when we see there is confusion or gray areas we go back and look at statute and decide whether to tweak it or not. This is the sum total of those changes.

**Senator Piepkorn:** In section 8, page 15, on line 24; when it says the injured employee is medically noncompliant, what does that mean? I don't understand exactly what that means.

**Tim Wahlin:** This isn't new language; to the extent that WSI deals with noncompliance. We also use the term noncompliant over in the vocational rehabilitation section. Ultimately, in this particular area, an injured worker would be noncompliant if, without good cause, they are refusing to follow up with required medical care requests, missing employment, missing pt or any of those items a physician or treating person handling their medical care is telling them that they need to do. They become noncompliant when they refuse to follow through with

those directions. Again, without good cause. Obviously, good cause would arise if for example we have a blizzard and they can't get there.

**Senator Burckhard:** I have a constituent who sent me some information about this bill and he specifically refers to Section 3, on page 12. Then he has highlighted in Century Code 65-02-27 regarding decisive review office, and he says something about redundancy.

**Tim Wahlin:** Decision review office is a branch of WSI that is off of our premises and they will essentially act as an ombudsman type program. They step in when an injured worker requests following the issuance of administrative order. It means that we are significantly down the road. We have already issued, now the second time, restating that we are not changing our mind, and it is our decision. To the extent that they both can act on behalf of an injured worker, there is some redundancy. The difference is, ultimately, I think the pilot program is targeted for far earlier in that process. When we are talking to an injured worker, and we are indicating that we are looking at doing this, is there a way we can step in there earlier on – before people get upset and emotions are heightened? That is more of what we envision this to do.

**Senator Piepkorn:** Going back to Section 8, Line 27, “efforts by the injured employee to come into compliance are not considered successful in compliance until the injured employee had been compliant for a period of at least 60 days. If the period of medical noncompliance continues for 60 days following the date of disability and occasional rehabilitation benefits are discontinued, or a second instance of noncompliance occurs without good cause, the organization may not pay any further disability and vocational rehabilitation benefits”. Is that ever, or just for this particular case?

**Tim Wahlin:** That would be for this particular claim. That is language taken directly out of the vocational rehab statute. If this is a second instance of noncompliance or if your noncompliance is continued for 60 days, it becomes a final decision and you are not able to receive any further disability benefits. Irrespective, the injured worker will continue to receive the medical benefits for the extent of that injury for their life, but if you don't remain compliant with your medical treatments there is an end time and you will not receive any further disability or vocational rehabilitation.

**Chairman Klein:** And this happens?

**Tim Wahlin:** It happens, but realistically it is fairly infrequent. The concern is that it is really expensive. It is really an act for manipulation, because that is ultimately what it is. It is an affirmative manipulation, because I don't really want to resolve this issue. That is a rare circumstance in North Dakota, but when it does happen it is very destructive. Not only is it expensive, but it certainly is not helping that injured worker's family.

**Chairman Klein:** Closed the hearing on HB 1073.

# 2019 SENATE STANDING COMMITTEE MINUTES

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

HB 1073  
3/5/2019  
Job # 33254

- Subcommittee  
 Conference Committee

Committee Clerk: Amy Crane / Carie Winings

### Explanation or reason for introduction of bill/resolution:

Relating to a pilot program to assess alternative forms of dispute resolution and the electronic submission of medical billings; relating to functional capacity examinations, medical examinations for full-time paid firefighters and law enforcement officers, licensing required for allied health care professionals, average weekly wage upon recurrence of disability, combined partial disability benefits, and medical noncompliance; relating to the organization seal; to provide a continuing appropriation; and to provide for application.

### Minutes:

No Attachments

**Chairman Klein:** Opened HB 1073 for committee discussion. I don't think there were any changes to the bill, however it was somewhat complicated. It is a big clean up.

**Senator Vedaa:** Moved a Do Pass.

**Senator Roers:** Seconded.

**Chairman Klein:** Asked if there was any discussion.

**Senator Burckhard:** I am going to vote against this bill. I have a constituent that rode me hard on this one.

**Chairman Klein:** Was the explanation poor from WSI?

**Senator Burckhard:** No.

**Chairman Klein:** So you understood how we got there?

**Senator Burckhard:** Yes.

**Chairman Klein:** Did you ask for a release so that you could look into his situation further?

**Senator Burckhard:** No, I do not think this came from someone that was actually injured.

Senate Industry, Business and Labor Committee  
HB 1073  
03/05/2019  
Page 2

**Chairman Klein: OK.**

**A Roll Call Vote Was Taken: 5 yeas, 1 nay, 0 absent.**

**Motion Carried.**

**Senator Vedaa will carry the bill.**



**REPORT OF STANDING COMMITTEE**

**HB 1073, as engrossed: Industry, Business and Labor Committee (Sen. Klein, Chairman)** recommends **DO PASS** (5 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1073 was placed on the Fourteenth order on the calendar.

**2019 TESTIMONY**

**HB 1073**

HB1073  
1-7-19  
Attachment 1

**2019 House Bill No. 1073**  
**Testimony before the House Industry, Business and Labor Committee**  
**Presented by Tim Wahlin, Chief of Injury Services**  
**Workforce Safety and Insurance**  
**January 7th, 2019**

Mr. Chairman and Members of the Committee:

My name is Tim Wahlin. I am the Chief of Injury Services at WSI. I am here today to provide testimony regarding HB 1073. The WSI Board supports this bill.

**Section 1**

North Dakota Century Code section 65-01-02 codifies the definitions for terms used in North Dakota's workers' compensation law. Besides standardizing the terms "injured employee," the amendments in this section propose to define "valid functional capacities examination."

This phrase is used in the vocational rehabilitation chapter of workers' compensation law. At NDCC section 65-05.1-01(6)(c), the terms "valid functional capacities examination" are used to describe the measure of an injured employee's capabilities to safely return to work, not only in duration but in exertion. When originally drafted, the "valid" was intended to require an injured employee to exert full effort thereby creating a true measure of capacity.

In practice, an injured employee reticent to return to work and giving less than consistent maximum effort would not be deemed to have completed a "valid" examination. However, rather than disqualifying them from benefits, the invalid exam has become a way to frustrate the vocational rehabilitation process and allow injured employees to receive benefits the employee would not otherwise be entitled to if full effort was given.

To address this deficiency, the definition cannot only be satisfied by fully cooperating, but in instances of less than full cooperation, if a trained expert can obtain similar measures in other non-testing circumstances, those observations will also fulfill the requirement and support the assignment of capabilities. For instance, if during a test an injured employee is unable to bend and retrieve an item, but the examiner observes the same individual stoop and retrieve a purse, the examiner would be able to rely on those independent observations to assign physical capacities.

**Section 2**

In this section, WSI proposes to remove the "papanicolaou smear exam for women" from the periodic medical examination required of full-time paid firefighters and law enforcement officers. This is an unnecessary exam in this context, which more times than not, does not have any connection to occupational cancers. According to the *The*

*Guide to Clinical Preventative Services* (2014 Edition), the human papillomavirus (HPV) infection is associated with nearly all cases of cervical cancer.

### **Section 3**

The purpose of the proposed changes in this section is to provide WSI with the ability to develop alternative forms of dispute resolution for disputes with injured employees. Currently, WSI is subject to the state's Administrative Agencies Practices Act to formally resolve legal disputes. We also have the advantage of the Decision Review Office to assist in resolving issues with injured employees prior to the formal litigation process. Overall, WSI has an extremely low litigation rate when compared to its peers in other states. Nonetheless, WSI desires to continue to explore ways to better resolve disputes that preserves the relationship with injured employees, is less time-consuming and more economical, occurs earlier in the appeal process, and avoids the stressors associated with formal litigation. An injured employee's participation in any pilot program is voluntary and the formal appeal process would still be available if participation in the pilot program did not resolve the dispute.

### **Section 4**

This proposed amendment in this section will alter requirements for medical professionals with whom WSI contracts to perform medical utilization reviews (UR).

Since the early 1990s, WSI has operated as a managed care provider. This requires the agency to "effect the best medical solution ... in a cost effective manner." NDCC section 65-02-20. Since this statute was implemented, there has been a continuous evolution in this process. As medicine has evolved, so has the type of reviews conducted. Initially, medical solutions were reviewed by the existing community standards. With the advent of big data and the ability to measure outcomes, the process has changed to evaluate treatments by balancing the likelihood of quality outcomes versus poor outcomes, all while considering the costs.

Large compilation groups will analyze data regarding outcomes and publish guidelines to assist in the analysis. The organization has adopted a number of these guides which have become the basis for its utilization reviews. Currently, WSI uses its physician reviewers to analyze treatment requests and determine whether the treatment is one that may present special circumstances which require separate consideration should a denial occur.

The statute limiting reviewers to only those holding North Dakota licensure, restricts not only the specialists WSI can utilize, but also increases the costs of these reviews by eliminating numerous options, such as engaging multistate contract service providers.

Currently, WSI is out of compliance with NDCC section 65-02-21.1. The organization recently lost a physician reviewer who had sufficient background to handle a majority of the more complicated requests involving neurology, neurosurgery, and spinal fusions and injections. Even though he was not a specialist in these areas, his background

allowed him to discuss with specialists why certain requests did not satisfy WSI's managed care requirements.

While searching for a replacement, the organization was forced to turn to a multistate utilization review group to conduct higher level reviews and was able to access the expertise not only WSI required but the expertise treating specialists could meaningfully engage with—at an acceptable price. Interestingly, this was precipitated by complaints from in-state specialists seeking reviewers with similar qualifications. As a result, the organization has received no complaints and is able to timely meet request demands. The current process is working well but the search for an in-state expert to assist us did not.

Ultimately, the organization has concluded having the option to turn to out of state consultants, is in the long-term best interests of everyone involved.

### **Section 5**

The proposed changes in section 5 create a requirement for WSI to accept, and healthcare providers to submit, medical bills and supporting documentation electronically. This proposed change mandates electronic submission no later than July 1, 2021.

Currently the organization receives approximately 40% of its medical billings in electronic form. It will take additional resources and a concentrated effort to make this change occur, but in the long-term it is a necessary process and requires this section's amendment to accomplish.

### **Section 6**

This amendment concerns the wages used to calculate the disability benefit for an injured employee who reapplies for wage loss benefits. Currently, NDCC section 65-05-09(1) states if an employee suffers disability but can return to work for 3 consecutive months or more and subsequently requires disability benefits again, the benefits will be based upon the wages earned at the time of recurrence of disability or the wages received prior to the injury, whichever is higher.

An argument is being made this section requires WSI to pay an injured employee disability benefits based on the wage the employee earned prior to the injury at the time of a reapplication, regardless of the reason the injured worker might be earning less at the time of the reapplication. The proposed amendments make clear WSI may review the reapplication and use the employee's wage at the time of reapplication if that wage is lower, and this lower wage is not due to the physical limitations of the injury.

As an example, in the context of oil field injuries, the scenario plays out like this. An employee is injured while earning a high wage, let's say \$2,000 per week. His disability at the outset of the claim is based on that wage. Then when he recovers from his injury, he is released to return to work and his disability ended. As with many of the out of state workers, he returns to his home state where the wages are lower, and he takes a

job that does not pay as much as his oilfield job, let's say \$500 per week. This lower wage has nothing to do with his injury, just his preference to change careers or to be closer to home. Later, he needs a surgery and requests disability benefits again, He makes the argument the statute requires WSI to pay him at the \$2,000 per week wage because it is higher than his current wages. This is inconsistent with the theory behind wage loss benefits given his lower wage has nothing to do with the work injury.

### **Section 7**

This proposed amendment corrects a drafting error that inadvertently occurred in 2015 HB 1102. This bill added a ninety percent cap to temporary partial disability benefits. Upon application, it was discovered inserting "ninety percent" changed the meaning of the statute to in essence require duplication of the deductions for social security and federal income tax. To apply the law as currently written reduces or disqualifies a majority of injured employees from receiving temporary partial disability benefits or reduces the amount of benefits received. This is completely contrary to what WSI represented in the testimony provided on 2015 HB1102. The inadvertence and the sweeping negative affects required WSI to continue the historic administration of this benefit and come with this proposed change to seek correction.

### **Section 8**

These amendments will alter the way WSI will address medical noncompliance. The changes are intended to make medical noncompliance more closely resemble vocational rehabilitation noncompliance found in NDCC chapter 65-05.1-01.

These changes are predicated on the studies which have definitively shown prompt, continuous medical care leads to the quickest recoveries and the shortest periods of disability. Not only is the rapid healing and return to work the least disruptive to our North Dakota employees, it is also by far the most economical approach to a workers' compensation system.

Currently, the law attempts to discourage medical noncompliance by limiting an injured employee's ability to collect wage loss benefits during the period of noncompliance. This approach fails to provide a remedy in the event no wage loss benefits are being paid. Additionally, WSI must give a 21-day notice of its intention to discontinue benefits before doing so. During the 3-week notice period, an injured employee may briefly come into compliance to prevent the discontinuation of benefits, and then immediately becomes noncompliant again. In these rare but expensive cases, it allows an injured employee to determine when and how often medical treatment is sought, thereby manipulating the healing process.

The proposed changes create a two-strike system where in the event an injured employee falls out of medical compliance twice, without good cause, disability benefits will cease. Or, in the situation when an injured employee is noncompliant for sixty days, the discontinuation of disability benefits also becomes permanent. WSI submits the proposed changes are a more effective way to facilitate the recovery of injured employees.

**Section 9**

Currently, NDCC section 65-02-07 requires the agency to have a seal for the purpose of authentication of various documents. The law requiring WSI to have a seal was passed in 1919. This section proposes to repeal this requirement as WSI does not have, nor does it use its own seal, but rather seeks permission from the Secretary of State for use of the State Seal when necessary.

**Section 10**

To avoid any confusion in the application of the law, this section clarifies sections 1, 2, 4, 6, 7, and 8 of this bill apply to all claims regardless of the date of injury.

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

#2 Attachment  
HB1073  
1-7-19

**NDLA, H IBL - LeTang, Ellen**

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**From:** Waylon Hedegaard <whedegaard@ndaflcio.org>  
**Sent:** Monday, January 07, 2019 10:20 AM  
**To:** Waylon Hedegaard  
**Cc:** Waylon Hedegaard; NDLA, H IBL - LeTang, Ellen  
**Subject:** WSI hearing testimony for HB 1073

**CAUTION:** This email originated from an outside source. Do not click links or open attachments unless you know they are safe.

**Testimony for 2019 House Bill 1073**  
**House Industry, Business and Labor Committee**  
**Presented by Waylon Hedegaard**  
**President of the North Dakota AFL-CIO**  
**February 8th.**

Good morning. My name is Waylon Hedegaard, and I am President of the North Dakota AFL-CIO.

There are a couple of issues I have with the changes outlined in this bill.

First, the potential pilot programs outlined in Section 3 on page 12 make me a little nervous as does any change that alters the way injured workers can find an acceptable resolution to issues they may have. So many people feel powerless in this system and change doesn't often help. But as participation is voluntary for workers, I'll leave it there.

My second issue stems from the changes to the legislation affecting those injured workers deemed medically non-compliant. I understand that there is an issue with some workers refusing, or missing treatments and that these issues seriously affect the recovery of those workers, but this seems unnecessarily harsh.

People make mistakes. People are not perfect. How many people in here have missed a doctor or dental appointment in the last couple years? Is forgetting willful? Religious differences with treatment? Are these refusals without good cause?

But what I am most concerned with, are the effects that serious injuries can have on workers ability to choose. Major injuries can result in depression. Painkillers can cause a lack of focus. Worker's entire ability to make choices is often detrimentally affected by their injuries. How are these dealt with under the changes listed here?

If you've ever watched someone under recovery for a serious medical condition, their choices and attitudes about treatment are not just willful obstructions. They are a direct result of that condition. Though not related to a workplace injury, I watched my best friend go through several massive recoveries and watched as his mental state rose and collapsed sometimes daily. I would seriously hesitate to hold an injured worker in a similar condition to the level of accountability this bill implies.

People not completing needed treatments is certainly a problem, but I see this change not so much dealing with that problem, rather it gets those people out of the system, without full treatment and without full recovery. People who could recover fully and return to the workforce 100% may not. So I see the changes here resulting in some workers back in the workforce with less recovery than they could have gotten, and in the long run, North Dakota will bear the cost of this.

Thank you

Attachment 1  
Feb 4, 2019

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1073

Page 12, Line 23, remove "Money in" and immediately thereafter insert "No more than fifty thousand dollars per biennium from"

Renumber accordingly

**2019 Engrossed House Bill No. 1073**  
**Testimony before the Senate Industry, Business and Labor Committee**  
**Presented by Tim Wahlin, Chief of Injury Services**  
**Workforce Safety and Insurance**  
**March 5, 2019**

Mr. Chairman and Members of the Committee:

My name is Tim Wahlin. I am the Chief of Injury Services at WSI. I am here today to provide testimony regarding Engrossed House Bill 1073. The WSI Board supports this bill.

**Section 1**

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