

FISCAL NOTE
Requested by Legislative Council
01/14/2019

Bill/Resolution No.: HB 1456

- 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: 01/22/2019

WORKFORCE SAFETY & INSURANCE
2019 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION

BILL NO: HB 1456

BILL DESCRIPTION: Mental-Mental; Pre-existing Conditions; Disputes; Fraud; Benefit Calc and Pres for Vol Responders; Appeals; Atty Fees; Treating Physician

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.

Based on our understanding, the proposed legislation:

- Makes a mental injury arising from a mental stimulus compensable.
- Provides for the compensation of pre-existing conditions.
- Allows health insurers to dispute a workers compensation claim denial and for the insurance commissioner to hear any appeals relating to these types of disputes.
- In cases of employee fraud, requires WSI to establish by clear and convincing evidence an employee was not entitled to benefits and that any work performed must be paid labor.
- Alters the average weekly wage coverage for volunteer firefighters and other emergency volunteers.
- Creates a presumption of compensability for volunteer firefighters and other emergency volunteers for certain conditions.
- Allows injured employee's to appeal managed care decisions through the administrative hearing process and allows an injured employee to request the insurance commissioner to review an order issued by WSI and issue an opinion before filing a subsequent appeal.
- Alters injured employee attorney fees to an average rate paid by WSI for WSI's attorney in the three most recent appeals.
- Establishes that a treating physicians opinion or medical determination is presumed correct.

FISCAL IMPACT:

Section 1 (Part 1)—Mental-Mental Injuries

Not quantifiable due to insufficient data to permit a comprehensive evaluation of the potential rate level and reserve impact of this proposed legislation. However, WSI anticipates that, if passed in its present form, the legislation will act to significantly increase both rates and reserves. Currently, workplace psychiatric injuries are compensable only if caused by a physical injury and the physical injury is determined to be 50% of the cause of the condition and the condition did not pre-exist the work injury. Further, a mental injury arising from a mental stimulus is not a compensable injury. The proposed legislation eliminates all the above criteria.

Prior to the 2015 legislative session, Sedgwick was selected by the State Auditor's Office to conduct the 2014 Performance Evaluation of WSI. Element Eight of this study was a review of providing coverage for Post-Traumatic Stress Disorder (PTSD). The analysis was limited to three scenarios: (1) first responders; (2) victims of violent crimes; and (3) witnesses to sudden and extraordinary events in the workplace. The range of the annual additional costs of providing coverage in these circumstances was very broad, ranging from a low of \$1.2 million to a high of \$56.6 million.

As detailed in the interim study, approximately one-half of the states do not cover mental injuries where there is no physical injury or cover mental injuries where there is no physical injury in very limited number of specific exceptions. The other half of the states cover mental injuries with fewer restrictions. The only example of very broad mental health-

related workers' compensation claim experience we could locate was some anecdotal information from Australia, specifically Victoria. It was reported that \$273 million was paid out in 2013-14 in Victoria alone for workplace related stress claims. The mental health-related complaints have become Victoria's third leading workplace injury.

Section 1 (Part 2)—Pre-Existing Conditions

Not quantifiable. The proposed change to the terms under which pre-existing conditions are compensable will add to the cost of the bill. WSI does not have an appropriate base of historical experience to permit an actuarial evaluation of anticipated costs associated with this change. Impact to future premium rate levels would likely be significant.

The proposed legislation removes the statutory language regarding "pain" enacted by the Legislature in 2013 following the *Mickelson v. WSI*, 2012 ND 164, decision. Absent the enacted language, it was estimated by WSI's consulting actuaries at that time that rates would have increased in the range of 5.4% to 12.6%. This legislative change appears to broaden the application even further, so it is anticipated the range would be even higher.

Section 2—Health Insurer Claim Disputes—Insurance Commissioner to Hear Appeals

Creating a separate dispute and appeal process for health insurers to ultimately be heard and decided by the Insurance Commissioner may ultimately serve to delay claim decision making and increase overall administrative costs. Likewise, maintaining parallel litigation systems increases the likelihood of uncertainty which increases costs.

Regarding the proposed responsibilities of the Insurance Commissioner within Sections 2 and 6 of this legislation, the Insurance Department submitted that the Department would need an additional FTE at a cost of \$256,000 per biennium in order to conduct the hearings and provide the underlying legal support the Commissioner would need to perform the duties required by this bill.

Section 3—Employee Fraud

We do not have access to an appropriate base of historical experience to use in quantifying the anticipated impact of Section 3 of the proposed legislation on premium rate and reserve levels. However, to the extent the legislation hampers WSI's ability to terminate future benefits when fraud is involved as well as diminish the degree to which the current statutes deter fraud, losses will increase, and future premium levels will be adjusted accordingly.

Section 4—Wage Calculations for Volunteer Emergency Responders

The fiscal impact of establishing a base wage cap for volunteer firefighters and other emergency volunteers in Section 4 of the bill is not quantifiable. However, the fiscal impact on the volunteer firefighter and emergency volunteer classifications will result in future upward rate modifications as this increase in benefit is evidenced in the data.

Section 5—Presumption of Compensability for Certain Conditions of Volunteer Emergency Responders

We do not have access to sufficient data to permit a comprehensive evaluation of the potential rate level impact for Section 5 of this proposed legislation. However, WSI anticipates that, if passed in its present form, the legislation will act to increase costs for the volunteer firefighter and emergency volunteer classifications. To the extent that such costs increase, local governmental entities will be faced with higher workers compensation premiums.

Section 6—Injured Worker Appeals/Insurance Commissioner Review of Orders

Section 6 provides for injured employees to file an appeal in relation to treatment methods and testing methods recommended by their treating physician and proceed through the administrative hearing process versus the existing expedited binding dispute resolution process. The administrative hearing process is much more prolonged, predominantly attorney driven, and would serve to prolong treatment decisions and increase legal and administrative costs associated with the prolonged hearing process.

Regarding the proposed responsibilities of the Insurance Commissioner within Sections 2 and 6 of this legislation, the Insurance Department submitted that the Department would need an additional FTE at a cost of \$256,000 per biennium in order to conduct the hearings and provide the underlying legal support the Commissioner would need to perform the duties required by this bill.

Section 7—Injured Worker Attorney Fees

Section 7 alters the manner in which the rate for an injured employee's attorney fees would be determined when the employee prevails. While, as written, the formula would create some administrative complexity, we are unable to determine the impact of the proposed section although it is likely increases would not be significant.

Section 8—Presumption of Treating Physician Opinions

It would be extremely difficult to determine the rate and reserve level impact of Section 8 of the proposed legislation because Workforce Safety and Insurance does not have an appropriate historical base of experience to make an actuarially based estimate possible. However, the proposed change presuming a treating physician's opinion is correct is likely to increase overall claims costs and result in higher workers compensation premiums.

DATE: January 22, 2019

2019 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1456

2019 HOUSE STANDING COMMITTEE MINUTES

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

HB 1456
1/29/2019
Job # 31626

- Subcommittee
 Conference Committee

Committee Clerk: Ellen LeTang typed by Mary Brucker

Explanation or reason for introduction of bill/resolution:

Presumption of the treating physician & compensability. Disputing the denial of a claim. Definition of a compensable injury, how compensation benefits are determined & the cost of an appeal.

Minutes:

Attachments 1-4

Chairman Keiser: Opens the hearing on HB 1456.

Rep M Nelson: Attachment 1. Ended testimony at 17:57.

Rep Schauer: You call this a significant problem. Do you have any information on cases where there was a problem?

Rep M Nelson: That's almost impossible because WSI won't talk to you about a patient unless you get a signature. I don't know the number of people and there is no way to know.

Rep D Ruby: In section 1, the concern of mine is that it completely removes the requirement of pre-existing conditions. Why would we remove it in that area and retain it in all other areas?

Rep M Nelson: Section 1 is in the general area of WSI. I would argue whether it actually removes it. We still have injuries when the employment acts against them. We are not removing pre-existing conditions nor are we expecting WSI to treat a pre-existing condition. Sometimes you have a pre-existing condition when the work aggravates it so we're treating that part and not the entire pre-existing condition.

Rep D Ruby: Subsection 7 seems to read differently to me. In the volunteer emergency personnel there is already coverage listed. Can you give me some examples of where coverage was not handled right? The other question is where are the premiums coming from that are going to compensate or pay into the fund to secure this?

Rep M Nelson: The volunteer first responders are put in their own pool so they pay a low rate. That's where the premiums come from. If people in that pool start to get higher claims

that pool will get higher premiums. We used to carve out where volunteer first responders were supposed to get paid on what they were making even when it wasn't covered by WSI. Even though that was the law WSI wasn't paying on that and was going back to the general law on how you figured benefits. When a first responder sued and won in the North Dakota Supreme Court they came to us and we took that special compensation away. Instead of trying to figure out all this here is a quick and simple solution of covering based on a state average weekly wage. We want to make sure and cover all of them at a reasonable cost. They earn this for what they give to the state of North Dakota.

Chairman Keiser: In section 5 is there a change to the presumption clause on the smaller political subdivision? We have the presumption clause for full-time emergency workers but they have to take a physical and be in good health. The workers would rather not have the coverage if they have to have a physical. Has there been a change to this political subdivision?

Rep M Nelson: I don't know if there was one change. You have the costs of doing the physical which could be more than the cost of the actual coverage. The volunteers give their time while some may not be in the best physical health. When they get an injury at work they may not be covered. Let's just provide them with some coverage.

Chairman Keiser: Is there further support?

Waylon Hedegaard~President of the ND AFL-CIO: Attachment 2. Ended testimony at 33:12.

Rep Schauer: Do county and cities have employee assistance programs that can help some of these mental and emotional issues that come up?

Waylon Hedegaard: I don't know, there are people here that can answer that better.

Rep D Ruby: The question always comes back if this should be opened up to all people; nurses, doctors, etc. If it's a good idea for some people but not all, why is it limited?

Waylon Hedegaard: I'm all for opening it up. Some jobs are considerably more stressful. I'm just picking out the worst of them.

Rep D Ruby: If you're working as a truck driver there are things you see that could be disturbing. Are you saying that since it isn't directly related to their job then WSI wouldn't cover that?

Waylon Hedegaard: I'm in favor to opening it up for more worker protections. An argument against this is the cost and that it's too open-ended. We need to cover the people who suffer the most first that would be fine. It's the worker who is bearing the whole burden, it's not the political subdivision or WSI.

Rep D Ruby: The problem we have dealt with in the past is that mental illness based on a mental trauma is very rarely not a pre-existing condition. Mental injury and mental stress is covered if it's related to the injury. How do we get around that pre-existing issue?

Waylon Hedegaard: This is the fundamental question here. It's impossible to divorce the conversation from everything that has led up to this point. At some point we have to make a decision to help these workers. I err on the side that we need to cover the people who protect us.

Darren Schimke~President of the Professional Firefighters of North Dakota: The issue of mental illness is real. It could happen from one bad incident or after many. You can't put a specific to one incident; it's accumulative for some people and not for others. You have to remember that generations are different; old school kept everything inside. The International Association of Firefighters comes out with articles about these issues of mental illness and PTSD all the time. It's such a wide range issue. It's a real thing.

Rep D Ruby: Do your health benefits cover treatments for counseling and those types of things?

Darren Schimke: We are afforded with three sessions with a counselor from the Employee Assistance Program. The health insurance that I have does not cover that. I would imagine that changes from company to company.

Chairman Keiser: We want to pay for an injury associated with an event but we don't want to pay for a pre-existing condition. On the mental- mental side the challenge we asked an expert in the field of psychiatry/psychology on how you treat PTSD. His response was that an event triggered it but he would have to go back in time to see what went wrong psychology. How do we discriminate between a pre-existing and an outcome that is a result of an event? What should we do with the mental- mental given that expert said it's really a pre-existing condition? Should we pay for it for you and who else should we pay for?

Darren Schimke: That's a tough question, especially to be fiscally responsible. With these psychological issues I think we need to throw out the rule book on pre-existing. I'm trying to be objective. One event can trigger or it can be accumulative. With mental issues we need to start somewhere. It's in a controlled environment where there can be a difference as opposed to being out in the field.

Chairman Keiser: Anyone else here to testify in support? Is there opposition to HB 1456?

Tim Wahlin~Chief of Injury Services at WSI: Attachment 3. Ended testimony at 1:07:27.

Rep M Nelson: How many times in the last five years has WSI paid the additional attorney fees in complex cases?

Tim Wahlin: I don't have that number. We can get that for you.

Rep M Nelson: Why did your WSI board decide not to cover the mental- mental? Why does WSI not want to cover all work related injuries?

Tim Wahlin: There was concern about taking and accepting an unknown. Often times an undetermined amount of injuries becomes a fiscal risk.

Rep M Nelson: The fiscal risk is taken by other people. We get into health insurance versus WSI. Should we just as a state go to health insurance then health insurance will cover all the work injuries as well as sicknesses? You're saying we can't determine this. The worker ends up paying the bill. Should we opt out of WSI and go to insurance so the worker has coverage? The worker needs coverage.

Tim Wahlin: Ultimately that's your discussion and we'll follow what you tell us to do.

Rep M Nelson: Why are you opposed to this bill? WSI is taking a position that the legislature should not take on that coverage and shouldn't cover that cost. Why is WSI against that?

Tim Wahlin: I think there is a distinction between what an executive branch agency is and what their board is making a recommendation on. Our board is against this legislation.

Rep Schauer: I think an important area we talked about this morning is the Post Traumatic Stress that happens with emergency workers. Has you board talked about extending coverage beyond the three visits to help the people that go through that period of suffering in their life?

Tim Wahlin: There was talk about proposing coverage on a limited basis for limited groups with caps in place but they all failed.

Rep Schauer: Why?

Tim Wahlin: Why are we going piece by piece when ultimately the proponents want this much broader. The concern is that if it goes much broader we begin taking all those conditions no matter whether they happened at work or not and we start moving to the realm of healthcare rather than work related injuries. That gets blurred very quickly.

Rep D Ruby: When there is an injury and a mental condition is 50% caused by the physical injury how are you making that determination? Would that determination translate into coverage for mental-mental type injuries?

Tim Wahlin: The application of the current physical injury causing at least 50% is difficult to apply. Ultimately we present that to the treating physicians and if their opinion is supported we pay/

Rep D Ruby: How many of those do you cover in a year?

Tim Wahlin: Very few.

Chairman Keiser: What kind of coverage does the volunteer and the full-time emergency workers receive?

Tim Wahlin: The volunteer responders have the same coverage that I have and that everybody has other than a full-time paid fire or law enforcement. They have a presumption. The conflict arises when there no covered wages then there is no disability because it's paid based on your lost wages. The second group, the full-time paid fire and law enforcement have a presumption. The presumption is if it's a heart or lung related condition it's presumed to be work related. WSI then pays unless they can rebut the presumption which is next to impossible. We then start paying for the issues that arise from a result of that.

Chairman Keiser: Are the volunteers in their own pool?

Tim Wahlin: Yes. They are in their own risk pool. The volunteer risk pool is the only risk pool we have that's not paid for by wages or wage caps; it is set by the political subdivision and the number of people there. It's more of a population rate.

Chairman Keiser: Is it actuarially sound?

Tim Wahlin: Yes it is. Every year it's reviewed. Every year the losses to that pool flow through. We figure what we need to charge that pool so it stays actuarially sound.

Chairman Keiser: You charge the political subdivision whatever the experience rating is?

Tim Wahlin: That is right.

Chairman Keiser: How many times when WSI has denied a claim as not work related has the health insurance refused to cover it?

Tim Wahlin: That is extremely rare. Every health insurance policy that I've ever seen exempts out work related injuries. If we deny they end up paying unless the reason for our denial is something that doesn't adjudicate the underlying injury; not timely filed, fraud, etc.

Chairman Keiser: The one potential problem is that many volunteers may not have health insurance. Do you have a breakdown of how often that works to the detriment and how often it works to the benefit of the injured worker? We are using the average weekly wage. Do we have a breakdown to what degree there is actually a benefit from using the average weekly wage?

Tim Wahlin: I don't believe we've ever run a breakdown. You're right, the way we calculate average weekly wage there will be a cap and anybody earning above that is not going to get the benefit. As you go down towards the bottom there is a point where the net is higher than 66 2/3% so your lowest wage earners are going to be getting an additional benefit that the higher wage earners are not. The scale is slightly tilted in favor of the lower wage earners.

Rep M Nelson: By law workers suffering injuries from mental-mental type on the job have no coverage in North Dakota. What is your solution so this workplace related injury could be covered?

Tim Wahlin: I am here representing WSI and the board. That is not something that I have the ability to advocate on.

Matt Gardner~Representing the Greater ND Chamber: Attachment 4. Ended testimony at 1:23:47.

Rep Richter: Gives a scenario of a trauma event where one person is a nurse who has a mechanism to deal with mental issues and the other person is a financial planner who doesn't have that mechanism to deal with it. Can you help me understand what we could do where there is just that one event that caused the mental issues and be able to help these people?

Matt Gardner: I wish I could answer but EAP was mentioned earlier where some of those cases are allowed so some of the solutions may lie there. We're here today from a WSI and an employer perspective.

Rep M Nelson: The mental-mental injuries are not covered by WSI and they are not covered by insurance, and you can't buy workers compensation coverage legally outside of WSI. Why does the Greater North Dakota Chamber think that the only legal recourse a worker should have is to sue their employer?

Matt Gardner: I think we are all looking at this from the WSI fund although it is very important and is built to care for the injured worker. It needs to be focused on the work related injury that happens on the job. Mental injuries can spawn from when you're a child. You need to determine if it's a work related injury or not.

Rep M Nelson: Would you support it if we make it mandatory that insurance covers all these mental-mental problems? Who's going to pay for this because it needs to be covered?

Matt Gardner: This is the debate that needs to happen, but it's not in this bill.

Rep Schauer: What do you base the fraudulent case on?

Matt Gardner: Did it truly happen on the job?

Rep Schauer: Do your members have an extended EAP program for your workers that suffer from Post-Traumatic Stress?

Matt Gardner: I would say they're across the board. Individual employers can have different programs.

Jeff Uben~Deputy Insurance Commissioner and General Counsel for the North Dakota Insurance Department: HB 1456 requires the insurance department to very quickly become experts in an area that we have no experience with and have no resources to address. We

don't determine if the injury arose out of the course of employment or if treatment methods from the treating physician is correct. We have some concerns being thrust into this roll. Secondly we are concerned with the lack of procedures and ground rules around the hearing process that the insurance commissioner would be required to perform. Also the costs and the effect of the insurance commissioner's decision are all unanswered items at this point. This legislative body has had the opportunity to consider whether or not it's a good public policy for the insurance department to have some sort of regulatory authority or oversight over WSI. Each of those times this body has responded with an overwhelming no. They believe it's appropriate to keep the insurance department and the affairs of WSI separate. In regards to the FTE we put on the bill. I don't know what resources it would take the insurance department to carry out the duties of this bill. Our attorneys are currently at maximum capacity. We would need extra resources as well to address that.

Rep M Nelson: Do we spell out in century code the hearing process for all the different types of insurance?

Jeff Uben: That's handled by the OAH code.

Rep M Nelson: This wouldn't be handled by the OAH code?

Jeff Uben: The way the bill reads it says that the insurance commissioner shall hear it and oversee it so I don't know that it was the intent to allow us to delegate that to OAH.

Russ Hanson~Associated General Contractors of North Dakota: The insurance department being involved with WSI in the past, in current code is the proper one and we support that. If you open this up there would be many deserving people on an equal playing field. How do you define who suffers first and the most and at what cost? Those are difficult decisions which is why we have the current policy we have.

Chairman Keiser: You raise an important point. If we go in this direction should it be the job or the event that dictates coverage? If the exposure of the event causes it shouldn't we try to figure out a way to do that?

Russ Hanson: You raise a good question, but how do you determine that? We need to focus on workforce safety and work related injury.

Chairman Keiser: Is there further opposition? Is there neutral testimony on HB 1456?
Closes the hearing.

2019 HOUSE STANDING COMMITTEE MINUTES

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

HB 1456
1/29/2019
Job # 31677

- Subcommittee
 Conference Committee

Committee Clerk: Ellen LeTang typed by Mary Brucker

Explanation or reason for introduction of bill/resolution:

Presumption of the treating physician and compensability. Disputing the denial of a claim. Definition of a compensable injury, how compensation benefits are determined and the cost of an appeal.

Minutes:

No attachments

Chairman Keiser: Reopens the hearing on HB 1456.

Rep D Ruby: MADE A MOTION FOR A DO NOT PASS

Rep Lefor: SECONDED

Chairman Keiser: Is there discussion?

Rep Richter: There seems to be an arbitrary overruling of physicians' opinions. The burden of proof for fraud is placed on WSI saying it's fraud and the worker has to prove it's not instead of WSI proving that it is. That is a piece of the bill I like.

Rep P Anderson: We struggle to put our arms around behavior health in our state. How do you define behavior health and mental illness? I struggle with that.

Rep D Ruby: This doesn't have anything to do with behavior health. The attempt is to identify a mental injury and have that mental injury attributed to work. The fraud cases are really not that significant. What they have has been working.

Rep M Nelson: People are struggling because we put them into that position. There is fraud. The assumption is being made that the fraudulent people should control the benefits that non-fraudulent people receive. There is a problem and nobody wants to pay the bill. The workers in North Dakota, in a fraudulent setup, says you have sure and certain relief but that's the fraud here. The state of North Dakota is committing fraud. There are real problems and these problems are killing people. I'm tired of this.

Chairman Keiser: Is there further discussion?

House Industry, Business and Labor Committee
HB 1456
January 29, 2019
Page 2

ROLL CALL VOTE: 6 YES 5 NO 3 ABSENT

MOTION CARRIED

Rep D. Ruby will be the bill carrier.

2019 HOUSE STANDING COMMITTEE MINUTES

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

HB 1456
2/4/2019
Job # 32099

- Subcommittee
 Conference Committee

Committee Clerk: Ellen LeTang typed by Mary Brucker

Explanation or reason for introduction of bill/resolution:

Presumption of the treating physician and compensability. Disputing the denial of a claim. Definition of a compensable injury, how compensation benefits are determined and the cost of an appeal.

Minutes:

No attachments

Chairman Keiser: Reopened HB 1456. We need to reconsider our actions to get it back to the floor.

Rep Louser: MADE A MOTION TO RECONSIDER

Rep Bosch: SECONDED

Chairman Keiser: Is there further discussion?

ROLL CALL VOTE: 12 YES 2 NO 0 ABSENT

MOTION CARRIED

Chairman Keiser: We now have HB 1456 before us. Is there discussion? There were three people not here the day we voted and they wanted an opportunity to vote.

Rep Bosch: MADE A MOTION FOR A DO NOT PASS

Rep D Ruby: SECONDED

Chairman Keiser: Is there further discussion?

Rep Nelson: There are at least three major problems here that we're dealing with; one is the volunteer first responders that we do not assure them of having reasonable coverage for disability. They are their own pool. They are doing a highly valued and difficult job. They fall in the cracks where some of them don't have a lot of WSI wages so they don't have a lot of WSI coverage. We're trying to correct that problem. The other problem are the mental-

mental injuries which are real and under North Dakota law an injured worker doesn't get compensated under WSI, he can't access his insurance because they exclude work related injuries, and so they're left either covering it themselves or suing their employer. The third problem is civil asset forfeiture. A worker can be judged by their medical providers to be disabled. Someone can see the worker doing something so an allegation is made then they take away their wages. What asset of a worker is more important to them and their family than their wages? I would ask members to resist the do not pass. We need to close these loopholes.

Chairman Keiser: Is there further discussion?

ROLL CALL VOTE: 9 YES 5 NO 0 ABSENT

MOTION CARRIED

Rep D Ruby will be the bill carrier.

Date: Jan 29, 2019

Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. 1456

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 Ruby Seconded By Rep Lefor

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

Total (Yes) 6 No 5

Absent 3

Floor Assignment Rep D. Ruby

Date: Feb 4, 2019

Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. 1456

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 Louser Seconded By Rep Bosch

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	x		Rep O'Brien	x	
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 Louser	x		Rep M Nelson		x

Total (Yes) 12 No 2

Absent 0

Floor Assignment voice vote - motion carried

Date: 2-4-19

Roll Call Vote #: 2

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. 1456

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 Bosch Seconded By Rep Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	X		Rep O'Brien	X	
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 Louser	X		Rep M Nelson		X

Total (Yes) 9 No 5

Absent 0

Floor Assignment Rep Ruby

REPORT OF STANDING COMMITTEE

HB 1456: Industry, Business and Labor Committee (Rep. Keiser, Chairman)
recommends **DO NOT PASS** (6 YEAS, 5 NAYS, 3 ABSENT AND NOT VOTING).
HB 1456 was placed on the Eleventh order on the calendar.

REPORT OF STANDING COMMITTEE

HB 1456: Industry, Business and Labor Committee (Rep. Keiser, Chairman)
recommends **DO NOT PASS** (9 YEAS, 5 NAYS, 0 ABSENT AND NOT VOTING).
HB 1456 was placed on the Eleventh order on the calendar.

2019 TESTIMONY

HB 1456

Chairman Keiser and members of the House IBL committee

HB 1456 works on many of the areas in WSI where people are experiencing problems.

Let's just follow the fiscal note actuarial information.

Section 1 mental-mental injuries. North Dakota has not covered workplace injuries leaving employers subject to lawsuit since they are left without immunity and either insurance picks up the cost of these workplace injuries or workers are denied since it is a work related injury.

When Deputy Cody Allery was killed, counselors were brought in because the other deputies were mentally injured, though not physically. WSI didn't of course cover it.

WSI recognizes that a significant number of these injuries are occurring in their fiscal note. Though why they use another country instead of a state as their example, they will have to explain.

Preexisting conditions. A worker is fine for his work, he gets injured, then WSI says the injury is preexisting, and how is the worker to prove otherwise? If the injuries are preexisting, then they should be documented, in that absence the worker should be covered.

Section two. This deals with a problem. The worker is covered by WSI, the worker has health insurance, neither pay. Clearly, it is one or the other, but they are treated separately with separate burdens of proof. This says if WSI turns the worker down, the insurance company cannot say it is a work injury. It gives the insurance company the right to challenge WSI with the Insurance Commissioner being the agency in charge of that process. The Insurance Department recognizes the significant problem that is taking place in the fiscal note.

Section 3 Fraud. Here is an example of civil asset forfeiture. There should really be a criminal conviction to terminate benefits for fraud. Fraud is claimed and it becomes the responsibility of the worker to prove otherwise.

Section 4 Volunteer First responders. These valuable people are often not covered significantly for disability while they rescue us, they save us millions, keep us alive, and reduce the costs of insurance. Many are self-employed. When injured, they are often only covered for the minimum or potentially not covered at all. Departments with sufficient funds are often buying private insurance.

Section 5 uses the same criteria for whether an injury like a stress induced heart attack is work related or not. Time. It makes things understandable and manageable.

Section 6 allows appealing the methods and testing methods by the treating physician, and allows the worker to appeal to the insurance commissioner just like other insurances.

Section 7 just sets injured worker attorney fees at what WSI is paying, though the worker's attorney has to win to get paid and WSI's does not.

Section 8 makes the treating physician's opinion the prevailing opinion but it is rebuttable with clear and convincing evidence. I should note this is an exception to the preponderance of the evidence proof that is the standard for all other disputes.

**Testimony for 2019 House Bill 1456
House Industry, Business and Labor Committee
Presented by Waylon Hedegaard
President of the North Dakota AFL-CIO
January 29th.**

Mr. Chairman, Members of the Committee:

My name is Waylon Hedegaard, President of the North Dakota AFL-CIO. I am here today to provide testimony on House Bill 1456.

The House IBL has two bills before it today that will affect North Dakota's police and firefighters, this bill and the collective bargaining bill at 2:30. They are both very important to our public safety workers, and I ask that the committee give these both serious consideration.

Our emergency responders do a job that is critical to our society. They are expected to run into burning buildings to save our children, confront threats to public safety and perform dozens of other dangerous activities in the course of their jobs. I've worked in heavy industrial construction my whole life. My job is considered dangerous. But the chance of anyone shooting at me is basically zero, and if my workplace starts on fire, the only thing I am expected to do is run out of it, not in.

It's difficult to argue against the fact that these jobs are special and unlike any other job. In taking these jobs, these working people have every right to expect to be covered in those cases where the situations were too much for their physical but also for their mental health. And mental health among our public safety officers is a growing concern.

The Ruderman Family Foundation recently did a study and found, "that first responders (policemen and firefighters) are more likely to die by suicide than in the line of duty. In 2017, there were at least 103 firefighter suicides and 140 police officer suicides. In contrast, 93 firefighters and 129 police officers died in the line of duty. Suicide

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is a result of mental illness, including depression and PTSD, which stems from constant exposure to death and destruction.”

I don't know how many legislators got a chance to talk to some of the officers in Memorial Hall during Law day about this issue, but I did. The one I talked to at length was in complete agreement that some PTSD protection was absolutely needed. In a 20-year career in law enforcement, you exposed to a lot of terrible things.

These people are doing their best to keep us safe. We need to offer our them coverage for emotional trauma caused by some of the horrific events that they may go through in their careers. We expect amazing things out of our first responders, and they are justified in expecting basic protections.

I urge the committee to vote yes on HB-1456, and if not, figure out a way of helping these workers. They deserve it.

Thank you for hearing me, and I would stand for any questions.

2019 House Bill No. 1456
Testimony before the House Industry, Business and Labor Committee
Presented by Tim Wahlin
Workforce Safety and Insurance
January 29, 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 1456. The WSI Board does not support this bill.

Section 1

This section alters the definitions of what injuries are considered compensable in two ways. Both would significantly expand what is currently covered.

Currently, N.D.C.C. section 65-01-02(10)(a)(6) allows for the payment of claims for mental injuries only when the mental injuries are caused by a compensable physical injury, the physical injury is at least 50% of the cause of the mental condition, and the mental condition did not preexist the physical injury. North Dakota law specifically excludes mental injuries arising from mental stimulus. N.D.C.C 65-01-02(10)(b)(10). These are commonly referred to as “mental-mental” claims.

The bill proposes to cover any mental or psychological condition that arises out of employment. The bill would remove the requirement that a physical injury must be at least 50% of the cause of the mental condition in order for the mental condition to be compensable.

Mental-mental claims are expansive because there is often neither an objectively viewable stressor nor injury. There may be no physical manifestation of the claimed injury, nor may there even be an objectively viewable stimulus or cause of the claimed injury. The lack of any physical symptom in mental-mental claims is troublesome. People who claim mental-mental injuries could also be suffering stress at home or financial problems, interpersonal problems, or simply existing mental illness. For these reasons, in 1995, legislation was enacted eliminating mental-mental claims. If the physical injury requirement is eliminated, we expect a significant expansion of injuries which would be work related.

The second change alters compensability for preexisting conditions. Currently, preexisting conditions are not covered unless work substantially accelerates the progression of the underlying condition or substantially worsens the severity of the underlying condition. If work simply produces symptoms in an underlying condition, it does not qualify as a compensable injury.

This bill makes “preexisting conditions” compensable injuries. As a result, compensable conditions under this definition would include essentially all chronic and degenerative health conditions that become symptomatic or are triggered by work. In many respects it would shift many health conditions into the realm of work-related injuries.

These two definitional changes of work-related injuries would create sweeping changes to North Dakota's workers' compensation landscape and would likewise have significant impacts on the costs of coverage.

Section 2

This section appears to allow a health insurer to dispute a denial of a WSI claim on the basis the injury did not occur within the course of the injured employee's employment. This dispute is apparently filed with WSI. If WSI does not change its determination, the health insurer is required to pay benefits pursuant to the terms of the health insurance policy. The Insurance Commissioner is then authorized to hear appeals regarding the dispute.

We are not clear what problem this proposed language is intended to solve, but observe it will add a new party, health insurers, to the WSI appeal process. In addition, it requires the Insurance Commissioner, an official that does not have regulatory authority over WSI, to serve as a hearing officer in the appeal process. However, this section does not provide how the hearing is to be administered, the standard of proof required, or how costs for the appeal process are determined. Specifics of this nature should be addressed if this proposal moves forward.

It is worth noting that under the proposed language, an injured employee could appeal a WSI determination stating the injury did not occur in the course of her employment, in the administrative hearing process. And, at the same time, a health insurer could appeal the same determination in the process outlined in this section. This could result in conflicting determinations by two separate hearing officers on the same issue. This should also be addressed if this bill proceeds.

Section 3

This section heightens the standard of proof in WSI injured employee fraud cases and will make it more difficult for WSI to prove fraud. In fraud cases, WSI is required to prove by a preponderance of the evidence or more likely than not, the elements of fraud. Generally, these elements include the following:

1. A false statement or claim was made;
2. The statement of claim is willful;
3. The false claim or statement was made in order to obtain benefits; and
4. The false claim or statement was material or meaningful.

The preponderance of the evidence standard is the primary standard used in North Dakota worker's compensation law. The proposed language will raise the standard of proof to clear and convincing evidence. This standard is between a preponderance of the evidence and proof beyond a reasonable doubt, used in criminal cases.

In addition, this section proposes to limit fraudulent conduct to only those injured employees who engage in paid labor. An injured employee is guilty of fraud if she is receiving disability benefits and willfully fails to report work performed, the receipt of income from work, or an increase in income from work. Currently, the law requires both paid and unpaid work to be reported to WSI. This is for a reason. If a person is capable of performing unpaid work, the person is likely capable of performing paid work and may no longer be eligible for disability benefits.

Moreover, it has been our experience some individuals who commit work fraud get paid cash or through other nonconventional means. The net effect of this provision is to allow fraudulent people to continue to receive disability benefits.

Sections 4 and 5

These sections will change portions of the law in chapter 65-06. This chapter deals with volunteer emergency responders.

The change in Section 4 will use an alternative calculation of wages for this subset of employees. When WSI pays disability benefits, or wage replacement benefits, they are based on the wages they replace. In other words, if my wages are \$2,000 a week my benefit will be greater than if my wages are \$500 per week.

Currently the definition of average weekly wage found in N.D.C.C. Section 65-01-02(5). The wages must be earned in employment for which WSI coverage exists in order to be included in the calculation of an injured worker's average weekly wage. This definition is consistent for all North Dakota employees.

This amendment proposes to pay volunteer firefighters disability benefits based on an alternative calculation method. The change will place a floor on the wage level volunteers will be paid. That floor would be the state's average weekly wage in the event their wages from covered employment are lower than the state's average weekly wage. Currently North Dakota's average weekly wage is \$960. This creates a base average weekly wage for volunteers. No other injured worker receives the benefit of this type of base average weekly wage. That wage would be the base irrespective of the injured employee's loss. In the event a volunteer is retired or unemployed, this would be considered the wages lost.

The change in Section 5 to the volunteer chapter will make heart attacks and heart related diseases, strokes, and physical injuries caused by mental stimuli presumed to have been caused by work if they occur within 24 hours of a response or training.

Currently, volunteer firefighters, emergency or disaster volunteers, community emergency response team members and volunteer health practitioners are covered by WSI in the same way other workers in North Dakota are covered. To the extent they are injured in a work-related accident, they are entitled to the same benefits as other injured employees in North Dakota. Under N.D.C.C. 65-01-02(10)(a)(3), if an employee suffers a heart attack or other heart related disease, stroke or physical injury caused by mental

stimulus, those conditions may be compensable if the employees employment caused the condition and only when unusual stress is at least 50% of the cause of the injury or disease as compared with all other contributing causes combined. The statute goes on to define that unusual stress means stress greater than the highest level of stress normally experienced or anticipated in that position or line of work.

These changes would significantly expand coverages for volunteers. Ultimately, the rates charged the class will increase to cover those costs.

Section 6

This section adds two additional subsections to the WSI administrative appeal process. The first proposed change appears to allow WSI managed care decisions to be appealed in the administrative appeal process found in N.D.C.C. Chapter 28-32. There is currently a separate appeal process for managed care decisions found in section 65-02-20. This process applies to WSI's review of medical necessity for proposed medical care and treatment of an injured employee. This is an expedited process designed to process thousands of managed care decisions each year. The adequacy of this appeal process has been considered and upheld by the North Dakota Supreme Court. To allow for the inclusion of these types of decisions into the traditional administrative appeal process will delay treatment decisions.

The next proposed change allows the Insurance Commissioner to issue an opinion on a WSI disputed decision, prior to the filing of an appeal in the formal administrative hearing process found in chapter 28-32. Under the current process, an injured employee can request free assistance from the WSI Decision Review Office prior to an administrative appeal. Upon completion of the Decision Review Office, an employee can also have a WSI disputed decision reviewed by a private attorney. WSI will pay up to \$500 in attorney fees for this outside attorney review. This section will add an additional step to the pre-administrative hearing review process.

Like Section 2 of this bill, this section will require an additional review by the Insurance Commissioner, a regulator that provides no oversight of WSI operations and with which WSI has no current connection. The proposal does not provide how the hearing is to be administered, the standard of proof required, or how costs for the appeal process are determined. In addition, what is the effect of the Commissioner's decision? Is it binding? Is it appealable? Specifics of this nature should be addressed should this proposal move forward.

Section 7

This section proposes changes to the attorney fees paid to an injured employee's attorney, if the injured employee prevails in a judicial appeal. It also eliminates language allowing for additional attorney fees in unusually complex cases.

Injured employee attorney fees are governed, in part, by administrative rule. The current rate is \$160.00 an hour. These rates are increased about every two years through the

administrative rule process and are generally kept commensurate with WSI litigation counsel attorney fees.

WSI's litigation counsel fees are set by contract. The rate an attorney receives depends upon the experience of the attorney. Rates currently range from \$140 to \$170 per hour with two lead counsel from the primary litigation firms receiving \$190 and \$205 per hour to compensate for additional liaison and administrative contractual duties. As a result, the average rate paid to WSI litigation counsel is \$162.80 per hour.

This proposed language may decrease the amount paid to an injured employee's counsel in some cases, depending upon the experience of the attorney who represents WSI in the matter. An inconsistent fee structure and an increase in the administrative burden to process attorney bills will be created by this section.

Section 8

This amendment will create a presumption in favor of a treating physician's opinion in medical determinations. This would represent a fairly significant change to a long-standing precedent established by the North Dakota Supreme Court in 1981 and was recently codified in 2009 and clarified in 2013 by this body. N.D.C.C. 65-05-08.3.

Currently, law in this area establishes that no presumption of correctness exists, rather, when there is conflicting medical evidence, it must be resolved by the organization after considering the following factors:

- a. The length of the treatment relationship and the frequency of examinations;
- b. The nature and extent of the treatment relationship;
- c. The amount of relevant evidence in support of the opinion;
- d. How consistent the opinion is with the record as a whole;
- e. The appearance of bias;
- f. Whether the doctor specializes in the medical issues related to the position;
- and
- g. Other relevant factors.

WSI has the responsibility to weigh the credibility of medical opinions. When confronted with diverging medical opinions, a factfinder must resolve conflicts between medical opinions. This authority to place more credibility on one over the other does not permit WSI to pick and choose in an unreasoned manner. WSI must consider the entire record, sufficiently address the evidence, and adequately explain its reasons for disregarding the evidence presented. Swenson v. WSI, 2007 ND 149.

This proposed change will significantly alter medical analysis in the administrative process and reverse a standard that has been in place almost 40 years.

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

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Greater North Dakota Chamber
HB 1456
House – Industry, Business and Labor
Representative Keiser - Chair
Date of Hearing - January 29, 2019

Mr. Chairman and members of the committee, my name is Matt Gardner and I am here today representing the Greater North Dakota Chamber. The Greater North Dakota Chamber is the largest statewide business advocacy organization in the state. We stand in opposition of bill 1456 and ask for a do not pass.

Our first responders; paid or volunteers are critical to North Dakota. We stand in opposition to this bill today not because of our first responders but because of the unknowns and the increased potential for fraudulent claims.

Our work life and home life are so intermingled that it sometimes can be indiscernible. But the statutory requirements of Workforce Safety and Insurance are very clear; they are here to provide insurance and safety training for the workforce in their place of work.

This bill would do more to muddy the waters for WSI and employers. It would be very difficult to determine if the mental injury was triggered from the myriad of issues that may arise at home and brought to work or if the issue was truly triggered work. This is also true for the pre-existing condition portion of the bill. How do we know where this injury was triggered? An employee may have come to work with this injury. This would open the state to more risk and fraudulent claims. In practice what would the employee's insurance cover and the State's reserves through WSI? There are just too many unknowns and many of these unknowns are pointed out in the fiscal note of this bill

GNDC supports the current law. If an injured worker's mental injury was caused by a physical injury while working, this would institute a claim. This is measurable and should be upheld.