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WORKERS' COMPENSATION
ADVISORY COUNCIL MEETING

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KNEIP BUILDING
700 GOVERNORS DRIVE
PIERRE, SOUTH DAKOTA

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WEDNESDAY, MAY 30, 2007

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Reporting

224-7611.

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WEDNESDAY, MAY 30, 2007

late. I'll

2

CHAIRMAN DAUGAARD: I apologize for being

would you

3

call the meeting to order. Will you call the roll?

4

do that?

following

5

(Whereupon, roll call was taken and the

Secretary Pam

6

members were present: Chairman Dennis Daugaard,

Glenn

7

Roberts, Secretary Paul Kinsman, Carol Hinderaker,

Haase

8

Barber, Randy Stainbrook, Guy Bender, Chris Lien, Jeff

9

and Paul Aylward.)

item on

10

CHAIRMAN DAUGAARD: We have a quorum. First

minutes.

11

the agenda is approval of the August 1st, 2006 meeting

12

Are there any questions or corrections on the minutes?

13

MR. BARBER: I so move.

14

CHAIRMAN DAUGAARD: Glenn moves approval.

15

MR. AYLWARD: Second.

comments?

16

CHAIRMAN DAUGAARD: Any questions or

17

in favor say "aye."

18 (whereupon, the motion passed unanimously.)

19 CHAIRMAN DAUGAARD: Motion carried. Are
there any
20 additions or corrections to the agenda? Anything on
the agenda
21 or anything that we want to add to the agenda? If
not, I'd
22 like to open this year's meeting of our council with a
reminder
23 that the council was established by statute as a forum
through
24 which interested parties might vet proposals to change
the
25 workers' compensation law in South Dakota, and I think
that
□

3

1 historically it's been shown that those who bring
their
2 proposals through the council and have them vetted or
measured
3 by the council and testimony taken and proposals
supported or
4 opposed by the council had at least a hearing at the
5 legislative level, either for or against.
6 If, on the other hand, people brought forth
7 legislative proposals without coming first through the
council,
8 I think it was a very typical reaction of the
legislature that
9 they would not countenance those proposals and those
folks were
10 sent here. So I think it's incumbent upon us to act

11 responsibly basically and keep an open mind about all
12 proposals, and yet it will be our duty, then, to
handle any
13 proposals brought forward, make our recommendations as
a
14 council to the Governor and then those proposals will
rise or
15 fall based upon what the legislature chooses to do.
But
16 certainly with our input the legislature generally
will
17 consider and countenance proposals. So I just thought
that
18 would be a good opening reminder to us all about what
is our
19 charge and why we formed. Any other opening remarks?
Madam
20 Secretary?

21 MS. ROBERTS: I would like to just take a
minute and
22 introduce to you my fellow cabinet member, Paul
Kinsman is the
23 new Secretary of Revenue, who replaced Gary Viken on
the
24 council as a result of Gary's retirement, and so
welcome, Paul.

25 MR. KINSMAN: Thank you.
□

4

1 CHAIRMAN DAUGAARD: Thanks for that reminder.
Glad to
2 have you, Paul.

3 MS. ROBERTS: Connie Halverson said she will
be in
4 attendance so I'm assuming she will be on her way and
we will
5 have everybody in attendance.
6 CHAIRMAN DAUGAARD: Great. Anything else
before we
7 move down on the agenda?
8 MS. ROBERTS: Unless Paul has a speech of
some kind.
9 MR. KINSMAN: No. I'm looking forward to it.
10 CHAIRMAN DAUGAARD: The next item on the
agenda is a
11 review of the draft of our state of the workers'
compensation
12 review for the annual report, and James, will you lead
us
13 through that?
14 MR. MARSH: Thank you. Council members have
received
15 a copy of the report already, hopefully had a chance
to review
16 it. I'll just give you the Readers Digest version so
to speak.
17 Section one, I just note that it looks like our
workers'
18 compensation environment right now in the state is
pretty good.
19 Premium rates are remaining fairly stable, tracking
what things
20 are happening in other states. I provided as part of
that
21 report an Oregon premium rate study they do every
couple years

selected 22 to compare us with how other states are doing in
as 44th 23 occupations. In that report, South Dakota was listed
around us in 24 in premiums. Most of our neighboring states are
looking 25 terms of our premium rate on the average. So that's
□

5

1 good.

Council of 2 As far as the report from the National
today, 3 Compensation Insurers, which we may go into further on
continues to 4 one of the prime trends that came out of that that
the 5 apply to our state, and I think other states around
they are 6 country, is the fact that we can keep these rates as
population at 7 because our population, frankly, our working
come from 8 least continues to age. The frequency of claims that
on the 9 older workers is less, so that keeps our costs down.
older 10 other hand, the severity of claims that comes from
workers, 11 workers tends to increase over time. So for those
claims are 12 there are fewer of them that make claims but their

13 more expensive, so it tends to be a balance.

premium 14 CHAIRMAN DAUGAARD: James, is the average

15 rates per hundred, is that per \$100 of wages paid?

we were 16 MR. MARSH: Yes. So for us, in that report

rate. I have 17 listed as \$1.83 per hundred, which is a favorable

database 18 also included information from our database, our web

19 as appendices to our report. The data show, generally

five 20 speaking, a trend toward fewer injuries over the last

reports by 21 years, that benefit costs are broke out in those

they are 22 body part injured, cause of injury, by industry, and

any 23 just for general information. I'm not sure there are

24 particular trends from that I need to point out. That

25 information is for your use.

□

6

medical 1 The last chart, however, in that relates to

that it 2 costs paid by category. I would point out in that

about 3 appears that medical costs are, by our data anyway,

4 two-thirds of our overall costs in the system. It's a

increase, and 5 significant cost driver. Those costs continue to

6 most of the cost increase over the last three, four
years has
7 been attributable to hospital costs, at least in our
view.
8 About half of overall costs as we categorize them are
9 attributable to hospitals. And we only use a discount
system
10 for those, we don't use a fee schedule system at the
moment.
11 So we may have to revisit that.
12 And at this point I also want to go briefly
into
13 several Supreme Court decisions that have been issued
just to
14 give you kind of the state of things as we understand
them.
15 First of all there is a case called Orth vs. Stoenner
and
16 Permann Construction Company, which was issued last
fall. In
17 the Orth case, the Supreme Court found that work need
only be a
18 contributing factor to a person's injury in order to
be -- for
19 that injury to be considered work-related. That is
somewhat
20 different from what we understood the state of things
to be.
21 We understood a major contributing cause test was
supposed to
22 be applied in those cases. They limited the
application of the
23 major contributing cause test to conditions resulting
from an

24 injury as opposed to the injury itself. we don't know
what the

25 ramifications of that will be for our system as we
haven't seen
□

7

1 any cases since that try to interpret it, but that
maybe is

2 something that this council needs to address.

3 Also in Orth the Court broadened the
definition of an

4 employer's actual knowledge for purpose of a notice

5 requirement. In other words, the general rule is that
the

6 employee has three days to provide written notice of

an injury,

7 unless the employer has actual knowledge of it or

there's a

8 good reason for not giving the report in the three

days. In

9 the Orth case, essentially the person had degenerative

disk

10 disease, reported that to his employer and said, I'm

not going

11 to continue to be able to work here after a while and

12 contributed that to the degenerative disk disease.

13 conscientious

The Court then noted a reasonably

14 manager would ask, worn out from what, closed quote,
and so

15 they would provide -- that would be actual knowledge

to this

16 employer there was a workers' compensation injury, so

the

17 notice period is satisfied. Again, that's something
that

18 broadens the definition of actual knowledge as we
understand it

19 and may need to be visited.

20 In the Wise vs. Brooks Construction Services
case, the

21 Court held that an insurance company that denies
medical

22 benefits on the basis of work relatedness or some
other ground

23 is not entitled to use the fee schedule if they are

24 subsequently held responsible for the claim. That can
make a

25 difference in some cases as much as 40 percent in how
much they
□

8

1 have to pay. So that is an additional burden that we
did not

2 expect and something that again we will be asking the
council

3 to review to see whether that should be continued or
not.

4 A couple of other notes for you. We did
establish a

5 couple of working groups with attorneys to review some
of these

6 issues and others to give you an idea of legislative
proposals.

7 The results of one group's work is in front of you
now. We

because 8 have about three -- I guess all there is is six pages
potential 9 it's both sides of the page, but about six pages of
talked 10 legislative proposals, along some of the lines we have
attorneys, Jeff 11 about. The group involved with that were four
Mike 12 Shultz from Sioux Falls, Rick Orr from Sioux Falls,
in Pierre, 13 Mcknight from Sioux Falls and Rob Anderson from here
practice. 14 who do a considerable amount of workers' compensation

consisting of 15 I organized a similar attorney group
who was in 16 Dennis Finch, Margo Julius, Jim Leach and Jeff Maks,
about 17 Dennis Finch's firm, also participated in that to talk
about in a 18 some of the issues that we are going to be talking
reach a 19 minute related to delays and the need for a panel for
lines. So 20 independent medical examinations. We were not able to
some 21 consensus about any specific proposals along those
22 we won't be suggesting anything for you today. Maybe
23 ideas come out today that need to be pursued.

announced that 24 Yes, the only other item is the AMA has
Edition, will 25 the Permanent Partial Impairment Guide, the Sixth
□

9

2007, 1 not be coming out in print until at least November of
change for 2 making it impossible for us to introduce a proposed
or 2009, 3 that until at least we will be looking at it in 2008
you, that we 4 but at the moment I just wanted to pass that on to
is 5 are kind of in a limbo as far as a change in the guide
concerned. That's all I have.

6
7 CHAIRMAN DAUGAARD: Thank you, James. Any
questions 8 of James on his report?

9 MS. ROBERTS: Mr. Chairman, a clarification
for the 10 committee. He actually covered five, eight and a
little bit of 11 nine in that report on our agenda list, just to keep
you on 12 track here. Maybe as we go down the agenda, I know on
nine we 13 want to get into details. But eight is covered, in
the agenda 14 item eight, the update on impairment rating manual,
that's the 15 end of the report.

16 CHAIRMAN DAUGAARD: Thank you. Any questions
or 17 comments from any of the council members? Paul.

18 MR. AYLWARD: This from James is for what
Page 12

purpose,

19 just for information to us?

inform the

20 MR. MARSH: That was my intention, is to

21 council of the state of things.

your

22 MR. AYLRWARD: I guess I take exception with

decisions

23 opening remark. You say several recent Supreme Court

exception

24 threaten to unfairly increase future costs and I take

unfairly, I
□

25 to that kind of comments. We don't know that, and

10

1 mean, are we saying the Supreme Court was not right?

want the

2 MR. MARSH: That's strictly my opinion and I

to adopt

3 council to understand certainly they are not obligated

point of

4 any opinions that I have. It's again strictly my own

research and

5 view and as we go into the issues following in

detail.

6 discussion, I would go into my points of view in more

the

7 MR. AYLRWARD: Then my other comment is why is

propose

8 Department of Labor charged with forming groups to

9 legislation?

respond.

10 MS. ROBERTS: Mr. Chairman, I'll certainly

package 11 The Department of Labor comes up with a legislative
as other 12 every year and so we feel like the department, as well
about to 13 entities, need to bring things that they are thinking
work 14 the council, so that's the purpose of it. We formed a
policymakers 15 group as a result of input that we had gotten from
package 16 and others around the state and have come with this
package. 17 just like any other individual would come with a

about 18 CHAIRMAN DAUGAARD: Any questions or comments
the 19 James's report? Well, we will get into the details of
let's just 20 proposals that the work group came up with. For now
discussion on 21 set this aside and move on to agenda item six,
morning. 22 the NCCI report. Some of us were present this
to get 23 discussion on what we heard at the NCCI? I was able
there. 24 there for about half of it. I know, Jeff, you were
25 Paul, you were there. Glenn was there.

□

11

1 MR. STAINBROOK: I was there.

2 MR. BARBER: Randy and Paul.

3 CHAIRMAN DAUGAARD: Anything that you
observed for the

4 good of the council you want to bring out?

5 MR. AYLWARD: I guess one of the things that
really

6 stuck out to me is that the medical costs in South
Dakota are

7 so much more than the region and the national average,
where

8 ours are almost 70 percent of the total cost, where
the

9 national average is 60, so we are 10 percent higher
and that to

10 me really stood out.

11 MS. ROBERTS: And in follow-up, it was our
trend line

12 was higher than the nation's, too, so I guess I'd like
to maybe

13 put together another work group but a work group to
look at

14 that issue, because I think that that was kind of --
it was a

15 statistic that also hit me and I asked James about it
and he

16 said yeah, we probably need to look at that.

17 MR. AYLWARD: If we look at our overall cost
of state

18 even, our injuries are going down, the indemnity is
down or at

19 least level, yet our costs, that is 10 percent and
that's a big

20 chunk to me.

21 CHAIRMAN DAUGAARD: And part of that, I

noticed that

rest of 22 it used to be South Dakota hospital costs trailed the
now we 23 the nation, the average elsewhere in the nation, and
per day 24 have caught up and slightly exceeded the national cost
□ 25 of hospital stay, which was interesting to me.

12

the fact 1 MR. BARBER: Something else that came up was
reflected 2 that South Dakota, because of its low general wages
way, 3 in some of the reports, some of the statistics in a
like you 4 because of our low wage, whereas the medical costs,
now we 5 say, we used to be lower nationally in that area, but
costs on 6 have exceeded and gone way beyond it, so those medical
areas 7 that side, they are creeping up where the rest of the
8 haven't.

NCCI? I 9 CHAIRMAN DAUGAARD: Anything else from the
can to try 10 guess I would encourage all the council members who
scheduling this 11 and make, I think it was two years ago we began
meets, and I 12 first meeting of the year on the same day as NCCI

13 would encourage those of you who continue on the
council in the
14 future to try and fit that into your schedule if you
can,
15 because it's helpful and gives us a look at our
workers' comp
16 environment as compared to the rest of the nation,
which is, I
17 think, helpful. Anything else on the NCCI report from
those
18 who were there this morning? Jeff, anything?
19 MR. HAASE: No.
20 MR. BARBER: One thing it did show us is that
in
21 states where things are allowed to run rampant like
Montana,
22 you see the other side. Here it is at the top of the
list
23 where they actually seem to be giving away everything
they can
24 offer and it shows what happens to you when compared
to the
25 rest of the nation. Montana kind of leads the way in
that. So
□

13

1 we should be cautious and remind ourselves that we
need to be
2 adamant in what we are doing here.
3 MS. ROBERTS: I was going to ask if any
members of the
4 council would like to volunteer to be on that work
group. I

5 suggestion or

think we should come back with some kind of a

6 maybe take

proposal maybe at the next meeting on steps we can

7 that's

to look at that medical slash hospital inflation rate

8 volunteer to

just really out of control here. Anybody want to

9 sit on that?

10 now. Not

CHAIRMAN DAUGAARD: Any takers? Settle down

11 everyone at once.

12 We

MS. ROBERTS: We will come back to something.

13 might have a staff group.

14 agenda item

CHAIRMAN DAUGAARD: Let's then go on to

15 James, we are

seven, overview of the 2007 legislative session.

16 back to you.

17 were

MR. MARSH: There were several bills that

18 think nine

introduced in the legislative session this year, I

19 one, were

all together. Most of them, with the exception of

20 and

rejected in committee. There was one bill that passed

21 original form,

ultimately was signed by the Governor. In its

22 with a

it was stricken, it was hog housed, but was replaced

23 a couple

bill put together by I believe Senator Heidepriem and

concern 24 of attorneys. The gist of the bill is to address a
address 25 that came up actually before the council last time to
□

14

awarding 1 situations where a department has issued an order
covering other 2 benefits and say medicals and disability, maybe
after the 3 issues. The order is not disputed by the parties
on 4 order is issued, at least in part, but when it goes up
nothing 5 appeal, the portion that is not disputed, basically
addressed. 6 happens with it. That was the problem that was

as to the 7 In the revised legislation, it now says that
undisputed 8 undisputed portion of the department's order, the
judgment, 9 part can be submitted to Circuit Court, the issue of
point 10 which would then be binding on the parties from that
law, it's 11 forward, and it's essentially a clarification of the
support in 12 62-7-31, and it was received with basically strong
change that 13 both of the houses. That's the only legislative
time. 14 came through the workers' compensation area this last

15 CHAIRMAN DAUGAARD: Any questions or comments
from any
16 of the council members? I guess we have heard about
the update
17 on the impairment rating manual coming out in
November, too
18 late for the '08 session. So we will probably take
that up in
19 '08 for the '09 session. Let's revisit item nine now
and go
20 through those bullet by bullet. James, you want to
lead that?

21 MR. MARSH: Sure. The first issue that's
presented is
22 related to permanent total disability claims and the
23 eligibility standards for that. I think we have
discussed this
24 as a council previously. No formal recommendations
were made.

25 It has been requested by the insurance industry. I
think you
□

15
1 have seen some of the notes and correspondence that
were
2 supplied to us that we should revisit this issue and
it's
3 entirely up to you of course. But just to revisit the
issue,
4 in the Scheid case was an individual who worked as a
mechanic
5 in Capital Motors, was injured to the point where he
could not

6 continue to perform that particular job. About two
years after
7 he was injured, they offered him an additional
position as a
8 service examiner, but that job paid less than what he
would
9 have received in workers' compensation benefits at his
10 two-thirds gross earnings rate. Not much less, but it
was
11 less.

12 The department held, and was supported by the
Supreme
13 Court, that given the way the law is written now at
62-4-52 sub
14 2 and 53, that even if this regular work were
available, that
15 it shouldn't change Mr. Scheid's eligibility for total
16 disability benefits, so he could work full-time,
receive this
17 disability benefit in addition to his earnings. When
the case
18 came out, there was a bill that was introduced, Senate
Bill
19 129, which was intended to address this apparent
double dipping
20 type of a situation. And what you are seeing in front
of
21 you --

22 MS. ROBERTS: Section seven it looks like.

23 MR. MARSH: Yes, section six is intended to
-- I'm
24 sorry, section seven, last page, section seven is
intended to

the
□
16
any issue
employer
equal to
that the
wage that
by an
earning.
on in
what they
that they
wage, it
a
of
the table
additional

25 address that. It establishes a formula by which when
1 employee is eligible for permanent total, there isn't
2 about that, they continue to be eligible. Then the
3 can take an offset based on the wages they receive
4 two-thirds of their return to work wage or the wage
5 employee is capable of earning. So it's either the
6 they are earning in the job they have or what is found
7 expert opinion that this person would be capable of
8 But again, it's intended to address what goes
9 the Scheid decision, where a person earns close to
10 would have received in disability benefits, enough
11 are earning a substantial wage, a regular full-time
12 just doesn't happen to meet the formula definition of
13 sufficient wage or a substantial wage for the purpose
14 permanent total disability benefits. So I put it on
15 and I guess I'll defer to other people in terms of

16 comments.
17 CHAIRMAN DAUGAARD: Let me ask the council,
would you
18 like to take up this matter and hear pros and cons on
this
19 matter at this time or do you want to look at all of
our issues
20 in brief and then take them up one at a time or what's
the
21 wishes of the council? Anybody have any druthers?
22 MS. ROBERTS: Mr. Chairman, I guess I was
thinking
23 that maybe this meeting we would just talk about every
issue
24 and then not really get into -- then maybe ask for
people to
25 send written comments if they would like and then
maybe at the
□
17
1 the
2 next meeting we could get into the pros and cons and
might be a
3 determinations. That's I guess what I was thinking
4 good process.
5 CHAIRMAN DAUGAARD: I have to admit I would
like us to
6 not take any action on any of these proposals at this
meeting.
7 I think we need to have them out on the table for not
only this
8 council but interested others to see what these
proposals are

8 and then we can take some limited testimony, if you
want to do
9 that, have time to do that, but I would say in terms
of taking
10 any kind of action approving or disapproving any
proposal, I'd
11 like to suggest that we do that at another meeting,
again, so
12 everybody has a chance to offer their thinking,
whether on the
13 council or from someone off the council. Does that
sound
14 agreeable to everyone?
15 MS. ROBERTS: And to further clarify, we will
also put
16 this on the web site so anybody that wants to see it
and
17 comment, you would have time to really look at it and
study it
18 and talk to people and send your comments in. So we
will make
19 sure this sheet gets on the web site, too.
20 MR. MARSH: The second issue, then, that we
wanted to
21 put on the table, if you will, is the matter of
employer
22 notice. Going back to the Orth case that was
mentioned in the
23 division's report, the proposed language in section
five is
24 intended to address the concern about the actual
knowledge
25 requirement. And section sub one of 62-7-10 would be
added to
□

18

need of
was
of is the
disease
here,
employer
there was a
the
know
reasonable
there is a
asked,
actual

1 language that actual knowledge does not require the
2 additional inquiry, and there needs to be some kind of
3 information in front of the employer that the injury
4 actually work-related, as opposed to a simple injury.
5 Again, in the Orth case, what was complained
6 fact that the person had received a degenerative disk
7 and said, I don't know how long I can continue to work
8 and that was held sufficient information that the
9 would know or at least have reason to suspect that
10 potential work place injury here that needed to be
11 investigated.
12 So by way of change, it is suggested that if
13 employer has enough information in front of them to
14 without having to inquire any further that this is a
15 likelihood of a workers' compensation injury, that
16 work connection there and that nothing more need to be
17 then that should be -- it should still satisfy the
18 knowledge requirement. After all, if a coworker comes

to the

19 supervisor and says, this person had a work-related
injury, the

20 employer is obligated to step up and find out what
went on,

21 file the necessary paperwork and pursue it. But to
try to

22 guess or to put employers on that kind of
responsibility to

23 guess seems to be beyond what anything has been said
in

24 previous cases concerning the actual knowledge
requirement.

25 So that's the reason why it's not so much --
I suppose
□

19

1 on the surface it might seem as if this is a pro
employer

2 suggestion. That's not the department's intention in
putting

3 this on. The idea is to clarify what we understood to
be the

4 existing state of the law on notice already and to
bring it

5 back to that. Certainly I put it out there for the
council's

6 consideration.

7 CHAIRMAN DAUGAARD: Does anybody on the
council want

8 to talk or discuss this further at this point?

9 MR. LIEN: And section seven is obviously the
new

10 section. We are talking about permanent total
disability, the

11 previous one. This next one in section five looks
like you

12 have made an addition in subsection one.

13 MR. MARSH: Yes.

14 MR. LIEN: So in its truest sense, when you
are truly

15 doing the additions, it's underlined, you have the
deletions,

16 but you have tagged in the new section when it is the
whole new

17 section as opposed to underlining the whole section,
just so

18 I'm following.

19 MR. MARSH: That's true, yes.

20 CHAIRMAN DAUGAARD: Thanks for clarifying
that, Chris.

21 If it's amending an existing section, any of these
pieces, if

22 it's an amendment to an existing code section, then
the added

23 language is underlined. The omitted language is
interlined,

24 and if it's a completely new section, then it's
labeled as such

25 and everything in that section is completely new.
□

20

1 MR. KINSMAN: When I look at subsection one,
how does

2 that help the department or the employer? How does
that

3 language help them in terms of both what they knew or
should
4 have known? when I look at the without need of
additional
5 inquiry, isn't that pretty subjective as well?
6 MR. MARSH: It is subjective, and it would be
7 difficult I think in the case of notice, because it's
a case by
8 case sort of thing to be able to come up with an
objective
9 standard when actual knowledge should be attained.
The reason
10 it's worded this particular way is to avoid the
problem that
11 occurred in the Orth case where they said, this person
had
12 degenerative disk disease and a reasonable employer
would ask
13 from what. It shouldn't be necessary for an employer
to ask
14 from what. It should simply be a matter if it's in
front of
15 them and it's clearly understood that this person is
engaged in
16 a work activity, ow, they get injured, then they have
a
17 responsibility to address it. But they shouldn't have
to
18 guess.
19 MR. KINSMAN: Is the standard in that case
before the
20 Orth case actual knowledge?

21 MR. MARSH: Yes.

22 MR. KINSMAN: That's the way the department
ruled and
23 the Orth case came down and said actual knowledge is
really
24 constructive?

25 MR. MARSH: Actually, an interesting thing
happened in
□

21

1 the Orth case. The department did not address notice
at all.
2 when it went up on appeal, the Circuit Judge that
heard it
3 added notice as an issue and made a ruling, even
though the
4 department didn't go there, basically. The Supreme
Court then
5 took -- on the appeal took the Circuit Court's ruling
and said,
6 well, ordinarily the department didn't address this
and it is
7 factual, so we would defer to them, but we are not
going to do
8 that this time, we are going to go ahead and review it
now
9 because we think we have enough information to do
that. And so
10 they made a ruling on notice without giving us the
benefit of
11 even making a factual finding on it. It was strange.

12 CHAIRMAN DAUGAARD: Any other questions on
the Orth
13 case, section five in the act or proposal? If not,

Let's keep

14 going, then.

15 MR. MARSH: On the causation issue as
addressed in

16 section one, where it talks about the definition of
injury,

17 starting at sub seven on the second page of the draft
you have,

18 first of all, just for housekeeping, the group
basically

19 concluded the subsection talks about injury or
personal injury.

20 well, I don't know of anyone who refers to the term
personal

21 injury in a workers' compensation case, so it's just
confusing

22 and it was felt just for clarification it was
appropriate to

23 strike it. But in any case, the meat of it is in
subsections A

24 and B.

25 Just to back up to give you the background
again of
□

22

1 the Orth case, again this was a person who had
degenerative

2 disk disease and he received an opinion from his
doctor that

3 said work is 50 percent of the problem, nonwork is
also 50

4 percent of the problem. And they concluded, and we
don't take

5 any great issue with their conclusion in that regard,
that work
6 was there for a major contributing cause to this
person's
7 resulting condition, Mr. Orth's condition. That is
not the
8 concern we have.
9 The concern we have comes in some prefacing
notes at
10 the beginning of the decision where it says that in
order for a
11 work injury to be considered work-related, work need
only be a
12 contributing factor to it in order to be considered
13 compensable. For 12 years we have had a law on the
books that
14 said, at least we thought it said that work had to be
a major
15 contributing cause to an injury in order for workers'
16 compensation to be responsible for it. And this poses
a major
17 change in our landscape.
18 So with the consensus of the group, we felt
this
19 needed to be addressed, that the Supreme Court cited
an
20 authority which, in all candor, I consider to be
wrong. When
21 you look at the authority that they used to support
that
22 decision, it was based on law that was written before
a major
23 contributing cause language was adopted by the
legislature. So

24 it seems to clearly contravene what our law is
intended to do.

25 So rather than wrangle over it through the litigation
process,
□

23

1 we propose instead to clarify it and simply say that a
major

2 contributing cause test is intended to apply both to
an injury

3 and to the condition that results from it. So you
will see in

4 sub A and sub B it refers to the fact that
employment-related

5 activities are a major contributing cause of the
injury and

6 condition complained of.

7 And we wanted to make sure and distinguish
between

8 that situation and a situation where a person has a
previous

9 workers' compensation injury or work-related injury
followed by

10 a subsequent one. And the standard of the law has
always been,

11 and that was what was written into sub C in your law,
that the

12 new work injury need only be a contributing factor to
the

13 former one in order to be compensable. So we make the

14 distinction in the last paragraph under sub C, as to

15 subsections A and B above, employment that's proved as
a

16 contributing factor to an injury or condition is
insufficient
17 then is to meet the employee's burden of proof. The inference
18 work if you have a last injurious exposure situation, two
19 test still injuries back to back, that this contributing factor
20 work injury applies. All you have to show if you have a second
21 that's is that it independently contributed to the first one,
22 the law all. Again, the purpose behind the proposal is to get
23 years. to the state we understood it was for the last 12

24 from any of CHAIRMAN DAUGAARD: Questions or comments
25 wonder if the council members? One question I would have, I
□

24

1 words the work group or you did a search to be sure that the
2 statute "personal injury" don't appear somewhere else in the
3 that's that would cause a person to look back and see how
4 defined.

5 these days. MR. MARSH: That's the power of computers

6 CHAIRMAN DAUGAARD: You did that?

7 MR. MARSH: Yes. It's fairly easy to find.

though? 8 MS. ROBERTS: You have not yet done it,
appear 9 MR. MARSH: Oh, yes. The phrase does not
10 anywhere else in that title that I'm aware of.
questions or 11 CHAIRMAN DAUGAARD: Thank you. Other
12 comments of James on this one, on this section one?
again the 13 MR. AYLWARD: James, could you just tell me
quite sure 14 reasoning behind striking personal injury? I wasn't
15 what you meant.
view. It 16 MR. MARSH: Because it's superfluous in our
Personal 17 doesn't refer to anything, it just causes confusion.
or 18 injury is a court term, it's used in negligence cases
doesn't 19 intentional torts as in battery or assault. It really
tell. 20 have any place in workers' compensation law that I can
found? 21 MR. AYLWARD: This is the only place it was
with the 22 MR. MARSH: Yeah. So while we were dealing
eliminating it. 23 language anyway, we decided to clean it up by
that the 24 CHAIRMAN DAUGAARD: It would make sense to me
injury in 25 only kind of injury you compensate for is personal
□

25

would be 1 workers' comp. There's no property injury claims that
that you 2 brought in workers' comp. But I did want to be sure
statute, and 3 don't find those two words together elsewhere in
Though I 4 if you don't, then it makes no sense to define it.
define a 5 have seen people draw proposed legislation were they
law. They 6 term and the term is nowhere in the language of the
7 have just copied something from somewhere else.

that's 8 MR. MARSH: If I had to suspect, I would say
originally 9 what happened here. When this injury definition was
the 10 made, it was based on the Oregon law that talked about
kind of 11 major contributing cause, it was probably pulled over
anybody 12 copy and paste and this language slid in without
13 catching it.

comments on 14 CHAIRMAN DAUGAARD: Any other questions or
to the 15 that section? That's the third bullet. Let's go on
16 fourth bullet, delays.

pieces of 17 MR. MARSH: An issue was raised in several

18 legislation concerning the fact that medical costs
have been
19 improperly delayed in terms of how they should be paid
and we
20 felt that issue was important enough that we should
take a look
21 at it and see if some kind of potential legislation
could be
22 proposed. Again, I met with a small attorney group
out in
23 Rapid City for the purpose of trying to put some flesh
to this
24 and we struggled, in all honesty, trying to come up
with
25 language that would really work. As a result, the
only
□

26

1 consensus we reached was that the department should
make an
2 overture to go out to the medical community and try to
help
3 them to understand better how our workers'
compensation system
4 works.
5 It is very much a blend between the legal
arena and
6 the medical one and I have to think that most doctors
simply
7 get lost. They don't understand how our rules work or
how
8 procedures work and so we thought it would be of a
benefit to
9 go to them and offer to make as much clarification

there as

10 proposals, we

11 invitation I

12 to the

13 about how

14 specific

15 our views

16

17 you start

18 element that

19 just

20

21 so you

22 the

23 bill is

24 something

25 it, you get

□

possible. But in terms of specific legislative

weren't able to arrive at any. But certainly the

extended to them would be the same one I would extend

council, that if there are any ideas that they have

we can address this particular problem in terms of

language, we would certainly review it and give you

on it.

17 MR. BARBER: What would you consider, when

18 talking about delays, is there a reasonable time

19 should be considered as a legitimate time that things

20 don't happen quickly in some cases?

21 MR. MARSH: This is strictly my own view and

22 can take it for what it's worth, but in other areas of

23 insurance arena, the typical standard for reviewing a

24 30 days, for any claim it's 30 days. If you receive

25 and you have the necessary documentation to support

time line, 1 a month to look at it, and if I were looking for a
2 that would be my recommendation.

3 MR. BARBER: But this indicates there's been
4 significant delays beyond the normal 30 days.

when it's 5 MR. MARSH: Yes, we have seen some instances
6 been months and six months, nine months, longer.

-- I 7 MR. AYLWARD: Again, where is the delays and
8 mean, you say you couldn't come up with a way to deal
with 9 this, but where is the problem?

of 10 MR. MARSH: Well, it's unclear. The process
11 getting a medical bill paid can be, particularly in
workers' 12 comp, a very complicated one. Part of is it the fact
that an 13 insurance company wears two hats when they are looking
at it.

14 They have to decide not only is this appropriate
treatment, is 15 it being billed appropriately, but also is it
work-related.

16 They have to come back and revisit that, which means
they have 17 to get medical reports and documentation from a
doctor, not 18 just reports but reports that help them to understand,
is this 19 thing connected with the original injury we are
claiming or

20 not.
21 Doctors are not well-equipped to do that,
from what we
22 have seen. They are very good at saying, here is your
23 symptoms, here is your condition, here is how we treat
it and
24 here is my plan for how we treat it, but it's a whole
different
25 deal to say, I think you should do this because it's
connected
□
28
1 with a work injury. And of course we can't deny the
insurance
2 company the opportunity, if they don't agree with that
doctor's
3 opinion, to come up with a second opinion of their
own, to
4 challenge it. We just think it should be done in a
timely way.
5 That, realistically, in South Dakota that also
presents its
6 problems because trying to get a second opinion or an
7 independent medical examination can take six to eight
weeks
8 minimum. It involves considerable expense. It's
those kinds
9 of procedural, technical difficulties that I tried to
come up
10 with in terms of a bill that made sense and basically
the group
11 kind of shook their heads and said, sorry, this just
isn't

12 working.
13 MR. AYLRWARD: That's one of the biggest
complaints we
14 hear with injured workers, besides the physical part
of it, is
15 also the mental part of it of here you are without a
job or
16 with two-thirds of your pay, if you are getting the
workers'
17 comp, you are only getting two-thirds, and then
besides that,
18 you have got bill collectors and everybody else coming
at you
19 and here is these bills that aren't getting paid. And
what do
20 you do?
21 MS. ROBERTS: Frankly, this agenda item came
from
22 James and I sat down and I threw out five things that
I had
23 been hearing over the course of the year and one of
them was
24 this issue, because I'm with you, Paul, we keep
hearing this
25 medical bills are not getting paid, I've heard it from
you.
□

29

1 And I said, go out and find out if anybody has a
suggestion to
2 fix that problem, if there's a problem. And so that's
where
3 I'm struggling, because we in good faith wanted to do
something

4 if there is a problem out there, but I had him
specifically go
5 talk to claimant attorneys and see is there something
that's an
6 easy broken thing out there we need to fix, and when
they
7 struggle, then I felt better maybe as a council it's
8 understandable why we struggle with that issue because
there
9 isn't an easy answer and really not even a hard
answer. We
10 couldn't get anybody to come up with some suggestions.
11 MR. AYLWARD: I could suggest some things.
12 MS. ROBERTS: Anyway, that next issue is also
in the
13 same realm. It's like we were brainstorming and
trying to come
14 up with just things that we had heard maybe needed to
be fixed
15 and in some cases we did have substantive things that
are being
16 suggested and some not. Go ahead, James.
17 MR. MARSH: That's fine. That's all I had.
Any other
18 questions?
19 CHAIRMAN DAUGAARD: Any other questions or
comments
20 about the delay?
21 MR. LIEN: I have a quick one for James. For
my own
22 curiosity, in your work study group that looked at
this, did

23 you find any difference between ones that the workers'
24 compensation system had already identified that it was
work-
25 related and then it was expedited after that or are
you finding
□

30

1 it's a threshold issue, that it's a delay to determine
whether
2 it's work-related or not because you have medical
providers
3 doing two things, one finding it's injury and also
having to
4 determine whether it's work-related, and if that's the
case,
5 once that was determined, was it expedited from that
point on?
6 MR. MARSH: It's some of both. There are
certainly
7 delays in the initial processing of the claim, where
they are
8 making -- but some of those delays are built into the
system.

9 You have 20 days to investigate it, you have an
additional 30
10 days if you request it, so you have got a window in
there of up
11 to 50 days before they have to do anything anyway.
But what we
12 were finding in some cases is that the insurance
company had
13 that 50-day window and didn't do anything. They
didn't tell
14 anyone what was going on, they didn't inform anyone of

where

15 they were, what they were looking for. And so the
provider and
16 the claimant kind of sit out there waiting for action
to take
17 place.

18 We find them in those instances, if they are
not doing
19 anything, but a \$100 fine in a case of a \$20,000 bill
may not

20 be much relief. On the other hand, we are talking
about also
21 situations where the claim has been accepted, it's
gone on for

22 maybe even years, it might have gone through
litigation, might

23 be an agreement between the parties and suddenly we
get hung up

24 on a particular course of medical treatment that's
going to

25 cost some money and you have to go through some
machinations to
□

31

1 try to figure out, A, is it still work-related, and B,
is this

2 really necessary treatment. And that's fine in
itself, but the

3 process seems in many cases to be taking way too long
to

4 resolve.

5 CHAIRMAN DAUGAARD: was there any
consideration to

30? 6 changing any of those two time lines, the 20 and the

the 7 MR. MARSH: No. One suggestion we had was if

that 50 8 insurance company made no effort to take action in

that -- 9 days, to have the claim automatically accepted, but

receive a whole 10 apparently some states do that, but that didn't

I guess, 11 lot of warm support. It was sufficiently ambivalent,

necessarily 12 or harsh and unworkable perhaps that it wasn't

13 going to reach a consensus.

authority come 14 MR. KINSMAN: Where does your fining

15 from?

16 MR. MARSH: From law.

literally? 17 MR. KINSMAN: Are you limited to 100

18 MR. MARSH: Yep.

putting 19 MR. KINSMAN: Has there been any thought to

to 20 more teeth in it by raising the department's ability

days on a 21 penalize in situations where you find during that 50

ratchet it 22 \$20,000 claim, couldn't you set something up to

done 23 depending upon what's in dispute? If they haven't

they would 24 anything for 50 days and it's a \$30,000 claim, \$100,

anything. 25 be crazy to do anything. The \$100 doesn't amount to
□

32

be 1 But if it's a \$1,000 fine or a higher fine, you might
also have to 2 getting their attention and I think then you would
appropriate, in 3 come up with criteria where the fine would be
delay of 4 other words, no action, what constitutes unreasonable
5 the claim.

in the 6 MR. MARSH: There were proposals introduced
you will, 7 last session to increase the amount of punishment, if
came up with 8 that would be imposed on carriers. The issue that
it was 9 that was that first of all, administratively the way
because 10 written, it would be impossible for us to implement it
just to 11 we would have to like quadruple our staff at a minimum
12 be able to monitor the claims.

was issue 13 As far as the amount of the penalty, there
lesser amount 14 with that, those particular proposals. Whether a
was not 15 would work better or not, I don't know. That issue
16 approached and we didn't take it up and there it sits.

So

17 whether a different penalty system would work better
or not, I 18 guess at this point we don't know the answer to that
question. 19
20 MS. ROBERTS: well, perhaps we should put
that down as 21 an agenda item. You are the one that brought up that
maybe the 22 \$100 isn't enough. Obviously the bill from last year
was 23 unworkable, but this council and this department could
come up 24 with a bill that -- an easy bill where we would just
up that 25 number.

CHAIRMAN DAUGAARD: without changing --

□

33

1 MS. ROBERTS: without changing the statute.
2 MR. KINSMAN: Couldn't you write a bill that
would put 3 that in the plaintiff attorney quiver, so to speak, in
terms of 4 if they can prove that, there would be that monetary
penalty 5 that would go to the claimant as opposed to the
department, and 6 put it in their pocket in terms of their burden? In
other 7 words, if the plaintiff's attorney can show that the
carrier 8 unreasonably delayed or did nothing during that 50-day

period,

9 that they would be entitled to any monetary
compensation for

10 that.

11 MR. MARSH: That hasn't been considered,
other than I

12 think there was an attorney fee proposal in the last
set of

13 legislation to make the attorneys fees awarded.

14 MR. KINSMAN: That's a penalty.

15 MR. MARSH: And pretty much the consensus
view on that

16 particular proposal was that it went over the line
because it

17 created -- there has never been a situation where an
attorney's

18 fee is awarded as costs, just by virtue of prevailing
in a

19 workers' compensation proceeding. Up to now it's been
strictly

20 required to show unreasonable behavior, vexatious
conduct, bad

21 faith. It could be that a proposal like that could be

22 reworked. It would require, in my own view, more
discretion on

23 the part of the department to be able to decide
whether or not

24 the behavior involved really did step over the line,
was it

25 really undue, was it really unreasonable. But that's
something

□

1 that could be put on the table.

2 MS. ROBERTS: We will do that, we will put
together
3 something on that and bring it back to the council.

4 CHAIRMAN DAUGAARD: Any other comments from
the
5 council on that? Does anybody object to James going
back to
6 the drawing board on this? Because we really don't
have a
7 proposal to respond to the undue delay problem and it
sounds to
8 me like though the proposal before the legislature was
rejected
9 last year, there might be some middle ground between
doing

10 nothing and the proposal that was rejected. If
nothing else,

11 raising the fine amount would be considered, and it
sounds like

12 the two things that were rejected were related to the
13 administrative burden was too high upon the
department, so you

14 could have something that either had less burden or no
15 additional burden at all, and something that looked at
the

16 penalty, the fine, maybe find some middle ground
between what

17 was rejected and doing nothing at all. Is that
agreeable to

18 the council? We certainly would look at it further
and

19 consider whatever James came up with at a future

meeting.

20 MR. BARBER: I would agree.

you? 21 CHAIRMAN DAUGAARD: Randy, is that okay with

22 Paul?

23 MR. STAINBROOK: I was curious if we have got
24 statistics on all the other states. Do we have any
laws or 25 language that other states utilize to address this?
□

35

length to 1 MR. MARSH: I took a look at this in some
on this 2 try to get an idea whether they had any better handle
are 3 than we do. I don't know that I found -- and there
are 4 circumstances where they do have laws like that that
government 5 somewhat different than ours because they have a
insurance 6 fund that participates either alongside private
have a 7 carriers or on their own in a monopoly form. So they
agenda. 8 little different dynamic there, a little different

us where 9 CHAIRMAN DAUGAARD: How many states are like
10 the state does not have --

11 MR. MARSH: Any direct stake?

12 CHAIRMAN DAUGAARD: Yeah.

13 MR. MARSH: I don't know that right off the
top of my
14 head. If I had to guess, I would say around 20.
Let's see,
15 just taking a look at our neighboring states, Wyoming
and
16 Montana are monopolistic, the government runs the
whole show.
17 Montana is a split and Minnesota is a split, they both
have
18 state funds that compete with private insurers. Iowa
and
19 Nebraska are private carrier only like us. I guess we
could
20 take a longer look at Iowa and Nebraska stuff and see
if they
21 have any language.

22 CHAIRMAN DAUGAARD: I think it would be
educational if
23 we see at least what a couple of our neighbors are
doing. That
24 would be helpful maybe. Without objection, we will
just ask
25 James to relook at the delays issue and try and come
up with
□

36
1 some kind of a proposal that would at least look at
the fine
2 and maybe look at a couple other states to help us see
what
3 others are doing in this area. Any other comments or
questions

independent 4 about the delays bullet? Okay, then let's go on to
5 medical exams.

issue 6 MR. MARSH: It kind of ties into the previous
7 about medical delays, but -- or delays of medical
payments, but 8 the issue has been presented that independent medical
9 exams are
10 being ordered rather frequently lately, that the
expense to the
11 insurance company and to the claimant in reviewing
them and
12 having the examination performed and then having a
deposition
13 subsequently taken to decide what it is the doctor
concluded
14 are pretty high.

opinions 14 In the end I'm not sure, once those second
opinion 15 are produced, that we go anywhere. We have a medical
16 that says something, the employee in many cases looks
at the
17 report and says, well, this is the insurance company's
doctor,
18 so I'm not going to pay any attention to it. Or there
are
19 reasons why there is frankly a significant lack of
trust in
20 whole process and it drags on.

for some 21 Our suggestion, again presented to our group
22 ideas, was maybe we could establish a panel of doctors

that we

23 would certify so that when they do second opinions, it
would be
24 one that we had invested a certain amount of time in
and said,
25 yeah, these people know how to do an independent
medical exam
□

37

1 or they know how to do a rating exam.
2 The group basically universally concluded
that that
3 was I wouldn't say a dumb idea but not all that
helpful. If
4 anything, it would prolong the process because you
would have
5 yet another body getting involved in this and the
insurance
6 company would be obligated to pay for it. There's no
guarantee
7 that they would have to adopt anything that we would
do. If we
8 make it so that there is a presumption that those
medical
9 opinions are correct, then that creates some due
process issues
10 as far as the parties are concerned, either way,
either an
11 opinion that goes against an insurance company or goes
for a
12 claimant. Ultimately after we wrestled through the
panel idea,
13 it pretty much went down in flames.

14 I don't know that I would -- simply because
it was on
15 the agenda for you already, I wanted to at least note
for you
16 we went down that road and didn't get very far.
17 MS. ROBERTS: Mr. Chairman, I am the one that
asked
18 him to go down that road because it is frustrating
from the
19 department's perspective to have a claimant's attorney
who is
20 claiming all kinds of injuries and an insurance
company's
21 attorney who is saying there's no injuries and a court
who is
22 deciding that one is right, one of these two extremes
is right.
23 I told him that I thought the department needed a
doctor that
24 would independently look at it and not have a vested
interest
25 in either side and come up with that conclusion.

38
1 So I guess I still would like to talk about
it even
2 though you have talked to the attorneys from both
sides and
3 they don't like the idea. Do other states do anything
like
4 this? when you look at it from an administrative
hearing
5 perspective, which is the department, it's difficult
to say,

6 yeah, this doctor is absolutely right and this one is
7 absolutely wrong. If you miss it, it's not a good
thing. Do
8 other states do this?

9 MR. MARSH: There are states that have
medical panels
10 for workers' comp. Again, most of them, the
government is
11 involved to some degree in what they -- in the
insurance
12 industry, either monopoly or competing, so they again
have
13 their own reasons for being able to go to the
department and
14 say, pick a doctor. I don't know that in any of the
states I
15 reviewed it is a voluntary market, private insurance
like us,
16 that any had a panel. It was strictly where the
government has
17 involvement in it and that created one of the issues.

18 CHAIRMAN DAUGAARD: James, go down a typical
fact
19 pattern where I know, for example, there might be some
larger
20 employers where an injured worker is steered to the
employer's
21 doctor. Is it mostly the other situation where most
employers
22 don't have that sophistication to have their own
preferred
23 doctor or is it typical that an injured worker is
steered to

24 the employer's doctor or do most employees choose
their own

25 doctor to evaluate and go for treatment?
□

39

1 MR. MARSH: Well, we don't know that
statistically

2 because we don't keep track of that particular
information, but

3 I think we can make an educated guess. The way our
labor force

4 is put together, approximately 80 percent of the
employers out

5 there are 20 employees or less. Those types of
employers do

6 not tend to steer employees to particular doctors. On
the

7 other hand, about a third of the work force is
employed by the

8 other 10 percent, okay, so --

9 CHAIRMAN DAUGAARD: Big employers?

10 MR. MARSH: Yeah, big employers, at least 20
or more.

11 MR. KINSMAN: That are usually self-insured.

12 MR. MARSH: Many of them are and they employ
thousands

13 of people. So those types of employers are more
likely, in my

14 experience, to want to set up a system where they know
doctors,

15 they steer people to them. How often it therefore
happens in

16 the system as a whole, I don't know, but I would have
Page 55

to say

educated 17 probably about two-thirds of the time, just my own

other third 18 guess, you don't have any steering going on. The

on. 19 of the time the stronger likelihood it's going to go

you have 20 CHAIRMAN DAUGAARD: In what circumstance do

21 these second opinions being sought?

department 22 MR. MARSH: Typically to me, frankly in the

have 23 we use the no blood, no foul evaluation, okay. You

it's not 24 somebody who is injured on the job, makes a claim, but

where 25 like they have fingers missing or they have anything

□

40

carpal 1 immediate surgery is required. It's back strains,

subjective, there's 2 tunnel, those types of things that are very

a 3 no painometer for somebody to know if they are having

this 4 problem. No objective test shows up that says, yeah,

-- a lot 5 person blew a disk out. And as a result, those tend

frequently 6 end up getting second opinions and I think much more

7 in the last three, four years than in the past.

would have 8 MR. KINSMAN: Most of your contested cases
deals 9 a second opinion. Almost all the ones the department
opinion. 10 with in a hearing setting is going to have a second
would be 11 MR. MARSH: Yeah, but the insurance company
they are 12 foolish not to have a second opinion in those cases if
13 actually going to make a dispute.
the 14 MR. AYLWARD: Those are a small percentage of
15 cases.
hearing 16 MR. MARSH: Yeah, disputed cases that go to
claims in any 17 only constitute about one percent of our overall
18 given year.
lawyers on 19 MS. ROBERTS: If nobody has an issue, the
it's 20 each side obviously know the process and if they think
working, 21 working, I just want the general public to think it's
22 too.
basically to 23 MR. MARSH: I guess the conclusion was
24 fix it might be worse than the problem.
the 25 CHAIRMAN DAUGAARD: Again, as in the case of
□

came up 1 delays, you don't have anything that the work group
2 with to propose?

3 MR. MARSH: No.

probably 4 CHAIRMAN DAUGAARD: You have concluded there
5 wasn't anything you were supportive of proposing.

6 MR. MARSH: Yeah.

council want 7 CHAIRMAN DAUGAARD: Does anybody on the

I'm going 8 it pursued further? Okay, I'm not seeing anything.

act you 9 to call that a dead dog. We do have -- now, in your

addresses the 10 have got, as I count, we have section five, which

this act, 11 employer notice bullet, and we have section one of

other 12 which addresses the causation bullet. But there are

13 sections here, so you must be addressing other things.

wise 14 MR. MARSH: Yes. Section two talks about the

comments. The 15 case that I mentioned very briefly in my initial

benefits, was 16 situation where an insurance company has denied

responsible 17 later found by the department or elsewhere to be

allowed to take 18 for them and the insurance company was then not

medical bills 19 advantage of the fee schedule and paying of those

is 20 off. The proposed language at the end of section two
payment of 21 designed to address that and to make it so that the
to, say, 22 bills can be made directly to the provider as opposed
attorney or 23 through the insurance -- through the claimant's
guarantee 24 directly to the claimant, where the provider has no
section is 25 of ever ultimately being paid. So that's what that
□

42

that the 1 intended to address, is the ruling in the wise case
schedule if 2 insurance company cannot avail itself of the fee
3 they choose to deny the claim.

fee 4 CHAIRMAN DAUGAARD: Let's just call that the
the fee 5 schedule matter for shorthand sake. We will call that
on that? 6 schedule, I will add that as a bullet. Any questions
package. 7 That would be section two of this proposed legislative
8 Anything else?

this in, 9 MR. AYLRWARD: It would seem to me if we put
everything, 10 it gives insurance companies an incentive to deny
11 doesn't it?

12 MR. MARSH: Well --
13 MR. AYLWARD: There would be no penalty.
14 MR. MARSH: There's still the threshold issue
of bad
15 faith. They cannot engage in unreasonable behavior
because if
16 they do, the civil damages and attorneys fees that are
going to
17 be awarded against them are huge.
18 MR. AYLWARD: Is that ever proven, bad faith?
19 MR. MARSH: It seems to be a lot lately.
20 MR. KINSMAN: It's a much higher threshold
than simply
21 denying a claim and not being able to use the
schedule. This
22 is a true incentive for employers not to deny, whereas
if you
23 make a bad faith, that's still a pretty heavy burden
for the
24 plaintiff to show.
25 MR. AYLWARD: It's a hard burden to prove.

43
1 CHAIRMAN DAUGAARD: The language as it exists
just
2 above the interlined part says "the employer shall
immediately
3 reimburse the parties not liable for all payments
made," but
4 then it says "pursuant to the fee schedule," or no, is
that fee

5 schedule relating to the interest?

6 MR. MARSH: The critical --

7 CHAIRMAN DAUGAARD: Is that how the Court
ruled?

8 MR. MARSH: The critical language there is
"not liable

9 for all payments made." The Supreme Court read that
language

10 literally and said, well, payment was made at 100
percent of

11 the billing so you have to reimburse at 100 percent of
the

12 billing instead of at the fee schedule rate which is
set out in

13 the rules.

14 CHAIRMAN DAUGAARD: where did they say the
last five

15 words applied, then? Because it does say pursuant to
the fee

16 schedule. They say that related only to the interest?
Do you

17 know? It seems to me that would fly right in the face
of the

18 clear statutory language.

19 MR. MARSH: Actually, I think I have a typo
on that

20 because I'm thinking -- I don't think that language is
in the

21 law. I didn't have it underlined when I drafted it.
But it's

22 intended to be in addition.

23 MS. ROBERTS: what are you thinking?

24 CHAIRMAN DAUGAARD: Are you looking at the
Page 61

statute?

25 Paul has a copy of the statute. It's 62-1-1.3.

□

44

54-3-16,

1 MR. MARSH: I think it ends in section

2 period, then that additional language isn't there.

3 MR. AYLWARD: It ends right at 54-3-16.

after the

4 CHAIRMAN DAUGAARD: There should be a period

should

5 16 and then those words "pursuant to the fee schedule"

added in

6 be underlined, so that's what's being proposed to be

7 addition to the sentence following.

underlined.

8 MR. AYLWARD: That should have been

two

9 MS. ROBERTS: Based on the questions from the

paid

10 Pauls, the practice has always been that they have

case

11 according to the fee schedule and this Supreme Court

12 changed the practice?

13 MR. MARSH: Yes.

of like

14 MS. ROBERTS: So that was never -- the case

were

15 the incentives wasn't an issue before because they

schedule.

16 allowing them to pay before according to the fee

17 MR. KINSMAN: Even in the denial of a claim?

its 18 MR. MARSH: Yeah, when the department issued
line by 19 order, they would actually in some cases go through
the fee 20 line and determine this bill needs to be so much under
21 schedule and that would no longer be the case.

denial, you 22 CHAIRMAN DAUGAARD: Really if there is a
there bad 23 have to go to the facts behind the denial to see was
24 faith or not.

□ 25 MR. MARSH: Right.

45

go to 1 CHAIRMAN DAUGAARD: They don't automatically
sustained. 2 outside the fee schedule if the claim was later

3 MR. MARSH: Right.

underlined 4 MR. KINSMAN: Doesn't that make all the
that's the 5 language superfluous, then? Are you just clarifying
6 case?

7 MR. MARSH: Just clarifying.

practice, 8 MR. KINSMAN: It just clarifies current
9 then?

10 MR. MARSH: Right.

11 MS. ROBERTS: Until the wise decision.

12 CHAIRMAN DAUGAARD: I think I follow. Any
questions
13 by other council members or comments? Again I think
the
14 purpose of this meeting, as I see it, is to understand
the
15 reason for any proposal and the gist of what is being
proposed
16 or in one case what James will go back and try and
find to
17 propose and just get it out on the table for ourselves
and the
18 public to study further and then we will come back at
a public
19 hearing and hear additional testimony. We can take
some today
20 to the degree we have time.

21 MS. HINDERAKER: Mr. Chairman, question for
Mr. Marsh.
22 Are you suggesting that by adding this to the statute,
clearly
23 it would clarify it for the public and for the
department, but
24 the Supreme Court could still -- you are suggesting
that they
25 didn't -- that perhaps they didn't realize that they
couldn't
□

46

1 deny the use of the fee schedule in this particular
case? Or
2 did they determine bad faith?

3 MR. MARSH: No, they said the plain language
Page 64

of the

pay 100

4 law according to them, as written, required them to
5 percent of the bill instead of the fee schedule.

not

6 MS. HINDERAKER: Because these sentences were
7 clearly spelled out.

8 MR. MARSH: Right.

probably pegged

9 CHAIRMAN DAUGAARD: Like you say, they

all

10 off those words, reimburse the parties not liable for

schedule,

11 payments made, don't pay them according to the fee

can see

12 you reimburse them for the payments they make. So I

13 the basis for their thinking.

14 MS. HINDERAKER: Thank you.

Carol,

15 CHAIRMAN DAUGAARD: Any other questions?

that

16 thanks for raising that. Any questions or comments on

17 issue? Okay, there is still some sections.

be an

18 MR. MARSH: Under section three, that would

there is

19 amendment to 62-1-15. Right now it just says that if

the

20 objective -- there are objective medical findings in

types of

21 record, that they are given greater weight than other

would also

22 evidence. This would add the clarification that we

about 23 be talking beyond just injuries, we would be talking
would deal 24 disability, impairment or need for treatment and it
findings. 25 with expert opinions, not necessarily just medical
□

47

was 1 It was intended to address the opinion that
issued his 2 registered in the Orth case, because when the doctor
percent not 3 opinion in that case, it said 50 percent work, 50
response to 4 work. It was done in the form of a one-paragraph
letter was 5 an attorney's letter in the record. The attorney's
All it was 6 never seen, it wasn't even made part of the record.
percent of 7 was a doctor saying in a paragraph, gosh, I think 50
and that 8 this problem is work, 50 percent of it is not work,
9 made it part of the record.

to a 10 That kind of offhand, frankly, quick response
a proper 11 letter is not something that really should constitute
base a 12 medical opinion or expert opinion of any kind. And to
flip is 13 decision of that importance on something that almost

workers' 14 not something that I think is in the spirit of the
basically 15 compensation law, and the members of the committee
change and 16 agreed. It was actually their proposal to make this
fine to 17 I agreed with the concept. So it's the idea that it's
compensation 18 have expert opinions that should support workers'
should be 19 claims, but they should be adequately founded. They
of 20 based on a careful evaluation of the facts and a level
doctor 21 expertise instead of basically a paragraph where the
22 kind of shoots from the hip.
of the 23 MR. KINSMAN: Aren't you increasing the cost
24 claim by doing this, though?
25 MR. MARSH: Not necessarily.

□

48

1 MR. KINSMAN: These medical experts don't
come cheap.
2 MR. MARSH: That's true, but they are being
asked for 3 those opinions anyway, so they are going to charge for
them. 4 That's the reality of it. And these physicians may
very well 5 be going through the steps of reviewing the record,
making the

under the 6 opinion, none of it is documented anywhere, at least
7 standard we have now.
8 CHAIRMAN DAUGAARD: Could those opinions be
offered 9 through an affidavit?
10 MR. MARSH: Yes.
11 CHAIRMAN DAUGAARD: It's just saying that you
can't, 12 as an attorney, here is what the doctor said, write it
on my 13 attorney letterhead, send it on into the record and
suddenly 14 it's part of the record, it's a fact in evidence.
It's saying 15 if you want to offer evidence of a medical opinion
about 16 causation or coverage, then that opinion has to be
offered in a 17 formal way.
18 MR. MARSH: Right. Or at least you should be
able to 19 show that the opinion was -- that he went through the
steps 20 necessary to establish it as an expert opinion. It
could just 21 be in a letter, but that letter should have more
information in 22 it than, gosh, I think 50 percent of this is work and
50 23 percent of it isn't.
24 CHAIRMAN DAUGAARD: I'm going to call that
the medical

case and
□
49
Any
there
the
presented to me
introduce
of Labor
issued
Van
day before
their
work and
were using.
well, but the
impaired

25 opinion evidence item. It's a response to the Orth
1 it's in section three. Section three of the package.
2 other comment or question on that?
3 MR. MARSH: And the last item that we put out
4 would be section four, which would be a revision of
5 misconduct statute. This is something that was
6 by the other attorneys in the work group, we didn't
7 that and that's why I didn't have it as a Department
8 item. It relates to the Van Steenwyk case, which was
9 just very recently, about the last month or so. In
10 Steenwyk an individual was -- had used marijuana the
11 their injury, up until about 12:30 the night before
12 injury. At 8 o'clock in the morning they go out from
13 get their leg crushed by the front end loader they
14 There were some safety issues involved in that as
15 whole issue was no question but that this person was
16 by the use of marijuana at the time of his accident,

but the

17 impaired but

expert was unable to say not only is the person

18 They

also it was a proximate cause of this person's injury.

19

weren't able to establish that.

20 person

what the revision would do is to say when a

21 blood alcohol

tests positive within the criminal standard for a

22 be found

level, which I think is .08 right now, or they would

23 schedule II

to have used, have a presence of a schedule 1 or

24 through

drug, marijuana, heroin, cocaine, that sort of thing,

25 to
□

acceptable tests, or if they refused to take such test

50

1 presumption,

confirm the existence of those drugs, there is a

2 intoxication

presumption only that the injury was due to that

3 use of

from the use -- was due to intoxication because of the

4

the drug or use of alcohol.

5 that

The employee would then be able to rebutt

6 But it

presumption through medical evidence or otherwise.

7 employer

would change the balance, if you will, between the

8 being required to prove not only that the person was
using
9 substances, but that this actually caused their
accident as
10 opposed to the -- they can prove as before that this
person has
11 the substances in their body. Now the employee has to
prove
12 that it did not have anything to do with the accident,
it was
13 not a cause of the accident. Frankly, it goes to the
reaction
14 of, look, we know this person was smoking pot at the
time that
15 they were injured, why are they now drawing workers'
16 compensation benefits. It sets very bad precedent.
So that is
17 the concern they put on the table.

18 CHAIRMAN DAUGAARD: what is the last part?

19 the burden of proof. The last sentence as revised, it
It says
20 burden of proof -- at the end, the burden of proof
says the
21 the employer to prove that the employee's willfull
shall be on
22 a substantial factor in causing the injury. That's in
conduct was
23 other cases of alleged misconduct. So I guess I'm not
all
24 in what kind of cases does it create the burden on the
seeing
25 and what kind of cases -- in both cases the employee
employee
would be

□

51

only the 1 considered to have willfull misconduct. I see, it's
use. 2 willfull misconduct that's related to drug or alcohol

3 MR. MARSH: Right.

not 4 CHAIRMAN DAUGAARD: If the misconduct is, I'm
5 going to wear that safety helmet. I follow.

speeding 6 MR. MARSH: Or they violated a law, they were
7 at the time of their accident, something like that.

before I 8 CHAIRMAN DAUGAARD: I figured out the answer
myself for 9 finished my question, didn't I? I needed to talk to
10 a while and then it all came clear.

11 MR. MARSH: That's all I had.

want to 12 CHAIRMAN DAUGAARD: Other questions on this I
13 call it the misconduct item? Any questions or
comments on the 14 misconduct item?

which the 15 MR. KINSMAN: Is misconduct the only time in
16 proximate cause becomes an issue in a work comp case?

17 MR. MARSH: Right.

bound to 18 CHAIRMAN DAUGAARD: Otherwise the employer is
19 compensate?

20 MR. MARSH: Right.

21 CHAIRMAN DAUGAARD: No fault finding is at
issue?

22 MR. MARSH: Right. It was the Supreme
Court's doing,

23 they tied that in because it talks about compensation
allowed

24 for injury or death due to employee's willfull
misconduct. The

25 Court has read that for 20, 30 years as meaning it has
to be a
□

52

1 proximate cause.

2 MS. ROBERTS: What are you calling this one?

3 CHAIRMAN DAUGAARD: I am calling this
misconduct. We

4 will call it willfull misconduct. So willfull
misconduct is

5 already defined as the use of alcohol or drugs, but
this

6 defines -- maybe it's sort of a bright line, what is
clearly

7 use.

8 MR. MARSH: What is intoxication or use.

9 CHAIRMAN DAUGAARD: Any questions about this,
willfull

10 misconduct, section four? This was in response to
what case?

11 MR. MARSH: The Van Steenwyk. You are going
to ask me

12 to spell that. V-A-N-S-T-E-E-N-W-Y-K.

13 MS. ROBERTS: Section six is the last one.
14 MR. MARSH: Sorry about that. Under section
six, it
15 goes back to the issue of medical delays and this is
sort of
16 the other side's response and the attempt to try to
deal with
17 that. One of the issues that comes up repeatedly,
particularly
18 now that we have a medical privacy act under federal
law, is
19 the fact that an employee will not sign a release to
get the
20 medical information they need to disclose to the
employer or
21 insurance company and as a result, there it sits. You
could,
22 granted, go to the physician and say, you are going to
forfeit
23 payments for your benefits if you don't supply this
24 information, but it would be simpler and certainly
more
25 effective for the claimant simply to produce the
release that
□

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1 would provide this information without further ado.
If they
2 have to provide releases for medical information on
health
3 insurance claims or other types of insurance claims,
so it's
4 not significant additional burden in that regard, but
that was

5 again something that the attorneys had presented to me
as an
6 idea for how to move along the payment of medical
bills and get
7 those issues on the table and resolved.

8 MR. AYLWARD: Mr. Chairman, I have heard some
issues
9 with this and it relates to the scope of the medical
release
10 and doesn't this open that up even further? We do
have the
11 federal law to deal with and I don't know how that
would fit in
12 with this, but I've heard cases where the issue is,
that part
13 of my medical records has nothing to do with the
injury.

14 MR. MARSH: And the employee would certainly
be within
15 their rights to refuse to sign a release, in my view
anyway,
16 when it encroaches into those subjects. Our law says
now that
17 the physician/patient privilege is waived only as the
18 information is relevant to a workers' compensation
claim, and
19 as far as I'm concerned, it should stay that way. But
where we
20 run into an issue is the fact that the doctor refuses
to
21 release it even though it is within the scope of a
workers'
22 compensation claim, he refuses to release the
necessary

claimant. 23 information without a signed release from the
This

24 would help that problem get resolved.

maybe as we 25 CHAIRMAN DAUGAARD: I'm hearing Paul say
□

54

it's 1 discuss this, we would want to narrow the language as

maybe the 2 drafted, because I think you are in agreement. But

you come 3 language as written is a little broad. James, will

4 back with maybe some revised language?

5 MR. MARSH: Be happy to.

6 CHAIRMAN DAUGAARD: That's section six.

7 MR. MARSH: That's it.

8 CHAIRMAN DAUGAARD: Section seven was the --

disability. 9 MR. MARSH: That's the permanent total

So kind 10 CHAIRMAN DAUGAARD: That's the first bullet.

bullet 11 of following the bullets down from the top, the first

respond to 12 under permanent total disability, that proposal to

13 that is section seven.

14 MR. MARSH: Right.

employer 15 CHAIRMAN DAUGAARD: The second bullet,

16 notice, a proposal to respond to the Orth case as far

as actual

17 knowledge is section five.

18 MS. ROBERTS: That's right.

19 causation, in CHAIRMAN DAUGAARD: The third bullet,

20 response to the Orth case, is section one.

21 MR. MARSH: Yeah.

22 delays, there CHAIRMAN DAUGAARD: The fourth bullet,

23 take another was no legislation proposed, but James is going to

24 shot at that. Right?

25 MR. MARSH: Yeah.

□

55

1 suggestion CHAIRMAN DAUGAARD: And then there was some

2 you will in memo that the division meet with physicians, but

3 penalty. The come back with something maybe to consider the

4 fifth bullet we let die on the vine, right?

5 MS. ROBERTS: Yes.

6 going to CHAIRMAN DAUGAARD: Then we went on to I'm

7 wise case is call it the fee schedule bullet in response to the

8 section two.

9 MR. MARSH: Right.

10 medical CHAIRMAN DAUGAARD: Then what I'm calling the

11 opinion evidence item response to the Orth case,
section three.

12 And willfull misconduct in response to the Van
Steenwyk case is

13 section four. And then the last bullet, medical
release, that

14 really didn't respond to any case law.

15 MR. MARSH: No.

16 CHAIRMAN DAUGAARD: It was just something
that the

17 work group identified as something that maybe should
be

18 addressed, that was section six. You are going to
narrow the

19 language of the proposal in section six.

20 MR. MARSH: Yes.

21 CHAIRMAN DAUGAARD: It's 2:30, shall we take
a ten-

22 minute break? Now, what is the council's wishes as
far as

23 adjourning today? I would like to be in Huron by
5:30, if we

24 can get out of here by 3:30, I would like to propose
that, if

25 the council is agreeable. If not, then I could ask
somebody to

□

56

1 stand in as chair if you want to continue beyond 3:30.
what's

2 the wishes of the council?

3 MR. AYLRWARD: well, if there's people here to

testify,

they have

with you.

anybody

miss out.

let's

p.m.,

following

The

got a

American

that

written

here

4 I think we should give them a chance to do that if

5 come this far. Otherwise I can go any time. I'll go

6 (Laughter)

7 MS. ROBERTS: We do have a court reporter so

8 that has to leave, the court reporter will do verbatim

9 testimony and we can all read it.

10 CHAIRMAN DAUGAARD: So I can read up and not

11 well, let's take a break. It's 2:30 by this clock, so

12 break till 2:45.

13 (Whereupon, the meeting was in recess at 2:34

14 and subsequently reconvened at 2:47 p.m., and the

15 proceedings were had and entered of record:)

16 CHAIRMAN DAUGAARD: Let's resume our meeting.

17 next on the agenda is the public hearing and we have

18 couple of submissions of written testimony from

19 Insurance and Farmers Insurance. Is there anyone here

20 would like to offer oral testimony in support of the

21 testimony for American Insurance? Is there anyone

22 representing American Insurance? Anyone? I'll call

your

if it's 23 attention to the submission, and Monica, I don't know
it. Does 24 passed out with the agenda, but everyone should have
addressed to 25 everyone have that? It's an April 30th letter
□

57

do you 1 James. Let's make sure every member has that. Guy,
2 have that?

3 MS. ROBERTS: It's basically the one that is
4 section -- it's section seven, isn't it, of the bill
James went
5 over? James, is it the same issue?

6 MR. MARSH: Same thing.

7 MS. ROBERTS: The proposal as I'm looking at
it,
8 American Insurance, I won't be speaking for them, but
I believe
9 it was the issue that we discussed under the first
bullet

10 point, permanent total disability, the Scheid case.

11 CHAIRMAN DAUGAARD: How does our section
seven compare

12 to the language they are suggesting?

13 MS. ROBERTS: Is it identical, James?

14 MR. MARSH: I'm thinking it's the same, but
let me
15 make sure. It looks like it.

16 MS. ROBERTS: It's verbatim.

17 CHAIRMAN DAUGAARD: All right, so I guess I
just call

18 the council's attention to the letter from the
American

19 Insurance Association and it impacts -- I guess it
addresses

20 section seven under the package and the language on
the last

21 page is verbatim to the language, verbatim the same as
the

22 language in section seven. And there's no one here
that wants

23 to talk further, so I guess I would ask all the
members to read

24 the letter and be aware of the attitude of American
Insurance

25 Association. Everybody with me? Everybody got a copy
of that?

□

58

1 Randy, you are just getting it. Randy, if you look at
that

2 last page of the handout, you will see that bold
underlined

3 language, that's exactly what is section seven under
the

4 package that we have been talking about here.

5 MS. ROBERTS: She's handing out another copy
of the

6 next issue.

7 CHAIRMAN DAUGAARD: Okay, any questions about
that,

8 the American Insurance Association written testimony?
9 Everybody got that? Okay, then let's go on to the
next bullet.
10 There's written testimony from Farmers Insurance
Monica just
11 passed out. The letter was received on the 29th, so
just a
12 couple days ago. Is there anyone here from Farmers
that wants
13 to offer testimony?
14 MR. MORES: Yes, hello.
15 CHAIRMAN DAUGAARD: Give your name for Carla.
16 MR. MORES: Mike Mores with Farmers
Insurance. We
17 appreciate the opportunity to have our input put in
here. We
18 went to our claims department and asked them what
types of
19 things can we do to do away with some of these delays
and these
20 are the two topics they came up with.
21 CHAIRMAN DAUGAARD: These were responses to
delay
22 issues?
23 MR. MORES: Right. The first, and I'm
working
24 backwards here, is it would be an amendment to 62-4-45
and
25 that's just an opportunity to expedite getting medical
records
□

1 and timely. It says 10 days. As Mr. Marsh said, that
may be a
2 little lofty, maybe 30 days is more appropriate. We
just put
3 10 days in there. Also the fine is \$100 per day.
That may be
4 too much, too. We don't want to run off good doctors
because
5 of a big fine.
6 The second issue, which has to do with the
filing of
7 form LM 111, currently this forms needs to be sent to
a
8 claimant, they have to sign off on it before we can
settle that
9 portion of the claim. We think that's an extra step
that we
10 can do away with, because the treating physician
establishes
11 the permanency rating and then it's calculated through
the
12 guidelines from the South Dakota Workers'
Compensation, so
13 unless there's an error, there's no reason they should
have to
14 sign off on that and send it back. If there is an
error, the
15 workers' comp can inform us of it, we can make the
correction.
16 If they don't agree with the settlement, then they can
object
17 to it. And that's just all we have really, are those
two small
18 points that we believe will delete some of the delays.

Mr. 19 CHAIRMAN DAUGAARD: Great. Any questions of
20 Mores? Am I saying that right, Mores?
21 MR. MORES: Mores, yes.
towards 22 MR. BARBER: I appreciate somebody working
23 trying to figure out a way to slow down -- or speed up
these 24 claims.
25 MR. MORES: We think it works for everybody.
We want
□

60

want to 1 to close claims, we want to get the money out, people
2 be done with the claims. Thank you.
3 CHAIRMAN DAUGAARD: James, I wonder if, as
you produce 4 something that is responsive to the delay concern,
maybe you 5 could group some of these suggestions along with what
you are 6 going to suggest or offer it all together. If you
have any 7 response to this LM 111 suggestion, maybe say the pros
and cons 8 of that so we can air that. I think we want to be
open to any 9 ideas. Thank you, Mr. Mores. Any other questions or
comments 10 about the written testimony from Farmers? And James
will 11 gather that, along with his work that he's going to

put

12 together in response to the delay issue that we
already talked

13 about. Maybe he will simply adopt these wise
recommendations

14 from Farmers. who knows.

15 MS. ROBERTS: If you were done with that
issue, Mr.

16 Chairman.

17 CHAIRMAN DAUGAARD: Yes. Anything else on
the

18 Farmers? who did we get this from? Fern, okay. We
just

19 received some things from Fern Stanton Johnson, and
Fern, do

20 you want to come up and offer some oral testimony on
this?

21 MS. JOHNSON: I'm Fern Johnson with the South
Dakota

22 Injured Workers Coalition. And I'll just try to be
brief here.

23 A few issues, you have got a handout here, this is
proposed

24 legislation. You were talking about the delays
process. I

25 have researched this extensively and modified the bill
from
□

61

1 what we submitted last year. This basically is
consistent with

2 ERISA guidelines and Mr. Marsh was talking about the
30-day

And I'm
their
have right
physician panels
do
that is
really
Are you
one and
of the
submitted it.
with the

3 process time frame, which is consistent with ERISA.
4 sure that each work comp policy already has that in
5 policies for work comp. Or they should have.
6 Looking at these proposals, the only ones I
7 here, and I don't know who submitted them, the
8 for IMEs, I don't know if you were talking about that.
9 CHAIRMAN DAUGAARD: Yeah, we decided not to
10 anything with that.
11 MS. JOHNSON: The only thing I'll address in
12 in number two, speeding up the payment of medicals, I
13 like section three and four.
14 CHAIRMAN DAUGAARD: I'm sorry, where are you?
15 talking about the proposal you handed out just now?
16 MS. JOHNSON: No, I'm referring to the other
17 two.
18 CHAIRMAN DAUGAARD: The section one and two
19 legislative packets that James brought out?
20 MS. JOHNSON: Correct. I don't know who
21 was it the Department of Labor?
22 CHAIRMAN DAUGAARD: Yeah, the department,

23 help of this work group.

24 MS. JOHNSON: Correct.

25 CHAIRMAN DAUGAARD: Section two.

□

62

four, 1 MS. JOHNSON: Number two, section three and

defined. I 2 those are consistent with ERISA. They are pretty

details a lot 3 like that section three, four and five because it

as the 4 of what medical providers, you know, need to do as far

5 claims process again.

talking 6 CHAIRMAN DAUGAARD: Fern, I'm lost. You are

7 about section two of the legislative package?

front, it 8 MS. JOHNSON: Bill number two right on the

9 says speeding up payment of medicals.

at right 10 MS. ROBERTS: Who wrote what you are looking

11 now?

you guys 12 MS. JOHNSON: I don't know who did. Maybe

13 don't have this.

handed out, 14 CHAIRMAN DAUGAARD: We have what was just

15 it says bill one, first rough draft.

referring 16 MS. JOHNSON: That's my proposal. Now I'm

17 to this other proposal.

18 CHAIRMAN DAUGAARD: I don't think we have
that.

19 MS. ROBERTS: Could we see it may be?
Thanks, Fern.

20 CHAIRMAN DAUGAARD: We don't have that.

21 MR. MARSH: That was something that was
discussed with

22 the other attorney work group in Rapid.

23 MS. ROBERTS: Just present maybe what you
want to do.

24 CHAIRMAN DAUGAARD: Then you can give us
copies

25 afterward. How about that?

□

63

1 MS. JOHNSON: I'll just refer to number two,
sections

2 three through five, I'd like to implement that in with
my

3 proposal, okay? Do you want to go through this in
detail? I'd

4 like to have you guys digest it since you are looking
at a

5 delay and Mr. Marsh is going to address that.

6 CHAIRMAN DAUGAARD: Maybe you could just
describe what

7 the whole thing does. If it does multiple things,
maybe you

8 can describe the things it is intended to do.

9 MS. JOHNSON: well, it briefly applies to the
10 self-insurers, everybody within the process of the

insurance,

11 purpose is

12 consistent

13 specificity

14 notice,

15

16 adverse

17 though.

18

19 payment, and

20 Mr.

21 with

22 process.

23 or the

24 with

25 section
□

self-insurers, insurers, employers, et cetera. The
to -- it doesn't replace existing requirements, it's
with what's already there. It just gives you more
of the claims process, the notice, statement of the
which is consistent with the statutes. On page two it
addresses the right to a hearing, the definition of
determination. I do have that word in this language,
That definition is consistent with this proposal.

Then it goes into the commencement of the

this is -- I've addressed as far as 30 calendar days.
Marsh was talking about the 60, but this is consistent
ERISA guidelines for regular health insurance claims
Basically it details what the insurance or the insurer
employer is required to do. It is also consistent
providing what the providers are supposed to do on

64

1 eight, page three, about medical bills and records.

2 Then I get into, which you guys didn't like
Page 89

last year,

3 I have limited a lot of it as far as the prohibited
conduct,

4 and you might consider this as pro employee, but as
you have

5 already discussed, medical payments aren't getting
paid. The

6 people aren't getting treated promptly, they are not
getting

7 their medical bills paid, so this addresses that.
Clause 10

8 within that section deals with the \$100,000 fine on
9 recalcitrant insurers and employers that are

consistent with

10 not following the guidelines and holding up claims.

11 The last section on page five addresses
penalties,

12 which I was sitting here listening to you, you were
talking

13 about what are penalties or what have you would be
consistent

14 with preventing a deterrent from delays in these
claims

15 process, and this is a modification of what I
submitted last

16 year as far as the 30 percent on an award. This gets
further

17 into once it's been litigated. And then of course on
the end

18 there the interest rate, which is payment on -- or
interest

19 rate on payment of an award that's been delayed for a
long

20 time.

other 21 One other thing I wanted to address is the
and that 22 states that I've referred to, and I have researched,
Marsh 23 was in Nebraska, Minnesota and Iowa, which is what Mr.
detail of 24 is -- these are all consistent, they have a lot more
have 25 their penalties, their process of claims. We don't
□

65

have got 1 anything that's even mirror to what they do, but they
consistent 2 a lot of laws. So I tried to fine tune what was
just this 3 with our statutes and this is what I come up with,
4 one bill this year.

number 5 The last thing I -- the second to the last is
filed with 6 three, section three on the penalty for the reports
7 the department. We really hold to the \$500 penalty.

page one, 8 CHAIRMAN DAUGAARD: Just section three on
9 section three you are talking about; is that correct?

10 MS. JOHNSON: Correct.

11 CHAIRMAN DAUGAARD: Page one, section three.

monitored 12 MS. JOHNSON: Currently it's \$100. If it's
13 already at \$100, then I don't see where it would be

monitored

14 any differently with an increase in amount, as far as
15 administrative. It would help with costs to the
department, it
16 would add another 400. It would be a deterrent for
not getting
17 these claims processed on time.

18 And then last you discussed the wise vs.
Brooks case.

19 That case, from my understanding and reading it, the
department
20 made the determination initially that the employer or
the
21 insurer waived the penalty -- or the fee, the fee
schedule, and
22 the Supreme Court affirmed that, so I guess I question
why
23 there would be an issue of -- why that would need to
be looked
24 at, you know, where the department initially made that
25 determination and the Supreme Court just basically
affirmed the
□

66

1 department.

2 CHAIRMAN DAUGAARD: I don't know.

3 MS. JOHNSON: That's all I have, if you have
any
4 questions.

5 CHAIRMAN DAUGAARD: I would ask a question.

You are

6 talking about section three as an example, there's a
Page 92

penalty

7 here for failing to file any report or in a manner
provided by 8 the section, and you say these sections do not in any
way 9 conflict with existing law, this simply could be added
to the 10 existing law.

11 MS. JOHNSON: Correct.

12 CHAIRMAN DAUGAARD: Now, when James, when you
were 13 talking about the \$100 penalty for delay, is that
delay in -- 14 or delay in payment versus delay in filing a report of
some 15 sort?

16 MR. MARSH: That strictly talks about delay
in 17 accepting or denying claims, it's overall
compensability.

18 CHAIRMAN DAUGAARD: When you use the word any
report 19 required by this section, what would be an example of
a report?

20 MS. JOHNSON: First report of injury.

21 CHAIRMAN DAUGAARD: Okay.

22 MS. JOHNSON: Last year there was \$25,000
worth of 23 fines issued by the department and almost doubled from
the year 24 prior to.

25 CHAIRMAN DAUGAARD: Because of delay in
filing a

□

67

1 report of an injury?

pop, 2 MS. JOHNSON: Correct. If that's at \$100 a

timely filed. 3 that's 2500 workers that didn't get their report

medical 4 That's 2500 workers too many that didn't get immediate

to go up 5 attention, medical treatment, TTD. So our proposal is

when he 6 to 500, and as Senator Napoli addressed that issue

7 testified, other fines are at \$500, inflation rate.

statute 8 CHAIRMAN DAUGAARD: Again, let me be sure I
9 understand. Is there or is there not a section in the

filing of 10 currently that penalizes someone for a late employer

11 a report?

12 MS. ROBERTS: Yes.

13 MR. MARSH: Yes, there is.

an 14 CHAIRMAN DAUGAARD: So this is -- this is not

that 15 amendment to that statute, just simply a rewriting of

16 statute.

it to \$500 17 MS. JOHNSON: It's an amendment to increase

18 instead of \$100.

19 MR. KINSMAN: The amendment is just 500, you
Page 94

are

20 changing 100 to 500, that's all you are changing?

21 CHAIRMAN DAUGAARD: No, this says are all new
22 sections. Who drafted this for you?

23 MS. JOHNSON: I did. Like I said, this is
the first
24 draft and it's going to get through to a couple
attorneys.

25 CHAIRMAN DAUGAARD: I'll just react to you.
I don't
□

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1 in concept -- I don't propose to oppose these things
because I
2 don't know enough to make a judgment one way or the
other. But
3 I will say as a former legislator, it's very difficult
for a
4 legislator to say, I'm just going to put all these new
sections
5 onto existing law without understanding how the
existing law is
6 impacted. And you say, for example, there is a law
that
7 imposes a \$100 penalty for a late filing and yet this
is a
8 brand new section, so then there's two sections, one
says the
9 penalty is 100, and now here is a new section that
says the
10 penalty is 500 and you are not proposing to repeal the
old law
11 by what I see here.

12 So I'm just suggesting it would be in your
interest to
13 propose these in a form like James did. Now, he's a
lawyer so
14 you have got -- maybe he has that burden to bear,
maybe that's
15 the way you put it. But the legislature and this
committee,
16 it's easy for us to understand how sweeping these
changes are
17 if you take existing law and show those small parts
that are
18 impacted. For example, if you are just changing the
100 to
19 500, that's a much easier change to swallow. In fact
we have
20 already talked about that this morning, but if you are
talking
21 about a whole new section, there's lots of words in
here that
22 might be different words than are used in the old
section. I'm
23 a little bit more fearful of changing the law that's
been time
24 tested through court case after court case, do you see
what I'm
25 saying?

□

69

1 MS. JOHNSON: I do.

2 CHAIRMAN DAUGAARD: I don't propose to oppose
you on
3 these things without knowing more. I am just talking

about the

4 way you offer your suggestions. I think a different
way would

5 be more helpful to you. For what it's worth, I'll
throw that

6 out to you.

7 MS. ROBERTS: If I could, I think the council
is very

8 amenable to somebody coming forward and saying, here
is a

9 problem and here is the statute that's the problem and
this

10 council would actually take it and run with it, if
they thought

11 there was a problem, and help with the language and
things,

12 rather than I agree with Mr. Chairman, that this is
confusing,

13 and I think that was maybe an issue last year with
your bills,

14 that how they would fit together with the current law.

15 MS. JOHNSON: I submitted them last year a
month and a

16 half before and I didn't receive a response from the
Department

17 of Labor. I asked for pros and cons and I didn't get
a

18 response. So from there I went to the senator and he
submitted

19 them to the LRC.

20 MS. ROBERTS: Again, if you would bring the
issue to

21 this council and then they would decide whether or not
they

22 want to run with the issue, that's the practice.

23 MS. JOHNSON: That's what I'm doing today.

24 MS. ROBERTS: Thank you.

25 CHAIRMAN DAUGAARD: So conceptually, I see if

you want
□

70

the 1 to kind of group what your proposal does, it increases

what is 2 penalty for late reports. It requires -- it defines

creates a 3 required in a notice or statement of denial. It

adverse 4 criminal penalty for failure to file. It defines

sets a time 5 determination. It defines when payments begin. It

prohibits and 6 line for paying medical bills and records. It

creates a 7 then has a list of prohibited practices and again

practices. Is 8 civil penalty for engaging in those prohibitive

9 that a pretty good summary?

10 MS. JOHNSON: Just what it says, yep.

by the 11 CHAIRMAN DAUGAARD: Any comments or questions

thank you. 12 council? Any comments or questions? Okay, well,

13 MS. JOHNSON: Thank you.

like to 14 CHAIRMAN DAUGAARD: Anyone else who would

Anything 15 offer testimony today? Anything else? All right.
direction 16 from the committee or the council I should say? Any
17 you want us to take?
18 MR. LIEN: Mr. Chairman, just as a
suggestion, we 19 heard responses to the Supreme Court rulings we have
had in the 20 past year, which I thought was very well put together,
I 21 appreciate that, responses from the Department of
Labor, 22 responses from the private insurance, responses from
-- and 23 recommendations in the broad sense from Ms. Johnson.
I'm just 24 getting back to the purpose of this council in terms
of making 25 sure the system is operating properly, and my
suggestion may be
□

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worth. 1 impractical, but I'll throw it out for what it's
with 2 all of these going on, it seems like we have some
common themes 3 and our goal is to eat the elephant one bite at a time
and I 4 guess before we sit down to dine this year, I'd like
to define 5 what the elephant is.

6 So in addition to the response of the Supreme
Page 99

Court,

7 different recommendations, if there was a way that we
can get a
8 poll or some indication from those in the system as to
what
9 their priorities are of what we should be attacking
this year,
10 I think it would be helpful. I appreciate Secretary
Roberts
11 stepping up and saying here is five things that the
Department
12 of Labor believes are priorities. The Supreme Court,
just
13 because they ruled on things, may or may not be
priorities and
14 I'm looking for a way we can find out from those who
may not
15 either have the time nor the finances or frankly
sometimes the
16 courage to come and sit on that end of the horseshoe
to bring
17 public testimony. So I was just looking for some
assistance in
18 a way we could pull the public into the system and
say, what
19 top three things or what top five things are
frustrating you
20 that we can address this year. Just as a suggestion,
I was
21 just going to offer that.

22 CHAIRMAN DAUGAARD: I think it's a good
suggestion.

23 Any responses from other council members to that
thought?

MR. AYLWARD: Well, I think I agree with

Chris. I'm a

Supreme
□

72

some
language that
specific
knows
decisions.
to
don't go
worker
9 also.

costs and we
and we
or not
someone
things

15 completely the other way. And I see some of those

proposed

16 changes to the Supreme Court as doing that. So I
guess I'm
17 saying that we need to move slowly on some of that and
18 cautiously and make sure that they don't have
implications way
19 farther than just to kind of take care of what the
Supreme
20 Court did and what some insurance company feels is
unfair.

21 CHAIRMAN DAUGAARD: Other comments from the
council?

22 MR. BARBER: I think one thing that we need
to
23 recognize is that industry is putting a lot of money
into
24 safety prevention. These numbers that are looking
better are
25 because there's been a lot more done within individual
□

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1 companies to increase safety awareness, safety plans,
safety
2 training. There's a lot of dollars that are going
into that,
3 which help offset on the other end, but it isn't all
turning up
4 into gravy, it's being spent back to help the worker
have a
5 better, safer place to work and teach them how to work
safer.

6 So I think we need to congratulate the
industries that

7 are in South Dakota, that their efforts are frankly
showing up
8 when you are looking at the NCCI reports and things
like that
9 and improvements, it's because of all that other. I
think it
10 comes from the workers themselves and from management
and what
11 they are doing to help promote and develop safety.
12 CHAIRMAN DAUGAARD: Okay, thank you. Other
comments
13 from the council. I'm sensitive to your comments,
Chris, about
14 trying to assess the public, whether it be the
insurers or
15 businesses or the workers. It's a little more
difficult to get
16 the workers to be representative, except through
people like
17 yourself, Paul, and other labor representatives on
this
18 council.
19 I also think that to the extent that this
council
20 exists to be a filter for legislation, that
legislation really
21 could come from any source, again, whether it's from
the
22 department, because the department will, whether this
council
23 chooses to vet a Department of Labor proposal or if we
say, no,
24 we don't want to, if we don't even look at it, the
department,

And I
□ 25 just like any individual, still has the prerogative.

74

1 would say, in response to what the Governor has
charged you, is
2 the duty to bring forth legislation as the department
believes
3 should be brought forward. So I guess what I'm seeing
here is
4 that the department intends to bring this and that
this council
5 serves the Governor better by looking at those
proposals than
6 by saying, we are not sure whether it should be
considered,
7 because what will happen then is the department will
bring it.
8 Maybe the legislature will say, well, how did the
council react
9 when you go before them and you have to say, well, the
council
10 chose not to look at it. So then the legislators are
kind of
11 in the position of, well, that's what we created the
council
12 for, because we needed some expertise to be developed
around a
13 table that we don't have as the legislature
generalists.
14 I grant you, Paul, that some of these issues
are being
15 brought forward maybe with an attitude of, hey, we
need to

16 protect the employers or in our opinion, as the
Department of
17 Labor, we feel that this. That's obviously so. But
at the
18 same time, it doesn't change the fact that we should
as a
19 council take those issues up, I think, lay them out on
the
20 table for everyone to react to, labor and management
alike,
21 either at this table or through testimony at the end
of the
22 horseshoe, and then we need to react to it, I think,
because if
23 we don't react to it, it's not going to stop the
proposals from
24 moving forward. It will just prevent the legislature
from
25 having our judgment about that. And it doesn't mean
that it
□

75

1 won't have a double vetting. I think what will happen
is just
2 because the council thinks this way or that way
doesn't mean it
3 will end up that way once the legislature puts its
imprint on
4 it. All we can do is say what we think as a council
and then
5 the process will go forward anyway.
6 So I do think that it would be good, I think
it's what
7 Chris is pointing out, it's also incumbent on us to do

our best

8 to gather the public opinion from all quarters and not
be

9 dependent on the audience, which is probably made up
largely of

10 insurers and business people and there might be a few
people

11 representing labor, but not very many. So it's
incumbent upon

12 us to get both sides of the coin, and so we maybe have
to work

13 a little harder, rely upon Paul and other labor
representatives

14 to draw upon the workers to help us see it from their
point of

15 view, too, and not just count on all the insurers, who
have got

16 paid staff and lawyers that -- maybe we go to the
workers'

17 compensation plaintiffs attorneys to represent the
workers. I

18 guess that would be another avenue. Maybe I'm
rambling here a

19 little bit, but I do think it's incumbent upon us to
take up

20 these issues, even though it's a pretty big elephant.

21 MR. LIEN: To clarify, I'm not saying we are
missing

22 it as a council, I'm just -- it's an observation. I
am saying

23 if we are the clearinghouse and the way the council
does carry

24 with the legislature, I just want to make sure we are
clearing

air them
□ 25 as many issues as we possibly can. Just because you

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would like to 1 doesn't mean I necessarily agree with them, but I
2 be able to hear them.

we 3 CHAIRMAN DAUGAARD: You are saying not that
4 shouldn't consider these, but there might be others
out there 5 we are unaware of.

6 MR. LIEN: Correct.

I don't 7 CHAIRMAN DAUGAARD: I'm following you better.
8 know, is there any way we can publish some sort of
announcement 9 in a way that would be meaningfully productive?

notice 10 MS. ROBERTS: We try. We put out our public
The press 11 and we give the web site, we do the press release.
anybody 12 release went out last week with our web site that says
the web 13 can come and say anything they want or they can go on
every 14 site and look at the issues. We will definitely get
site so 15 issue that was discussed today in a form on our web
an e-mail, 16 people can look at it and allow them to either write
17 write a letter or come next meeting and give

information or

18 give their advice or opinions on the issues that we
have

19 discussed.

20 We have also -- we will clearly say in the
next

21 notice, I think we did -- we always do in our notice,
if they

22 have something else, that's not precluded by our
agenda,

23 that -- our agenda I thought was pretty good when it
just said

24 anything else anybody ever wants to say, they are
welcome to

25 come and say it.

□

77

1 MR. KINSMAN: I noticed just because I know
some of

2 the attorneys involved, the two working groups that
James met

3 with, about half of them are plaintiffs lawyers, the
other half

4 are insurer lawyers. Now, I didn't see a lot of
plaintiff

5 lawyers suggestions in the department's proposal, but
at the

6 same time maybe, James, some of the things that were
discussed

7 with plaintiffs attorneys may have been an agenda
item. I

8 didn't see much there. I know that they met and you
met with

9 them, but I really didn't hear much or see much that
came from 10 that discussion.

11 MS. ROBERTS: Those two bullet items were two
of them, 12 the last two bullet items, right?

13 MR. MARSH: I didn't feel comfortable putting
them on 14 other than describing what was done, unless I had a
clear 15 consensus from them that this was something they
wanted to 16 say.

17 MR. KINSMAN: You were just asking for a
consensus 18 among those plaintiffs attorneys.

19 MR. MARSH: Yes.

20 MR. KINSMAN: So you weren't looking for
consensus 21 between the insurers attorneys and the plaintiffs
attorneys, 22 you are just looking for, okay, I met with the
plaintiffs 23 attorney group, could they come up with something that
they 24 believed, among themselves, would be a good thing, and
you are 25 telling me there wasn't really any consensus.

26 MR. MARSH: Right. I will probably be sorry
I said 27

78

1 this, but I'll throw it out with the idea I'm not sure
where it

2 goes, but I'll see what you think of it. The fact
remains that
3 the department does have contact with every person who
gets
4 injured in the system. We send an injury report --
when we get
5 an injury report, we send out a booklet telling them
what their
6 rights are and that sort of thing. Maybe, maybe this
addresses
7 what you are talking about, to say that when we send
that
8 booklet out, because I've seen other states do this,
if we send
9 what I would call a short outcome survey to each one
of them
10 and say, if you are interested in telling us what your
11 experience was with the workers' compensation system,
send them
12 in to us, and then we could somehow process that
information
13 for you as a council and say, out of the 24,000
replies we got
14 back from these people, here are some common themes.
Maybe
15 that is a way of putting on the table what it is that
you
16 talked about, I don't know.
17 MR. KINSMAN: Maybe what you do is rather
than send an
18 exit survey to all 24,000, maybe you randomly choose
five
19 percent of that and send out with that random number
and see

20 what you get for a response.

21 CHAIRMAN DAUGAARD: That would be a lot more
22 manageable.

with -- 23 MR. KINSMAN: I can't imagine trying to deal
be an 24 even if only 10 percent of them send it in, it would
□ 25 enormous amount of information.

79

excitement 1 CHAIRMAN DAUGAARD: There's a lot of
in the

2 back of the room, a lot of people want to help.

is the 3 MS. ROBERTS: The one that's really agitated
Tears of 4 one that's going to be looking at all the surveys.
5 joy.

(Laughter) 6 MR. AYLRWARD: I think she needs a union.

burdensome 7 CHAIRMAN DAUGAARD: To protect her from a
8 work environment, huh?

the same 9 MR. MARSH: For what it's worth, we could do
who they 10 thing with employers and insurance companies. we know
unemployment 11 are because our employers get a mailing from
every
hundredth 12 year. we could just include a short survey in every

13 one saying, how is it, how is it out there. I don't
know. I
14 almost -- I hesitated to bring that up because it
would be a
15 lot of work and -- yeah, she's shaking her head at me.
But it
16 is maybe one way that we can address this, the concern
that you
17 have, trying to get a handle on what's out there.
18 CHAIRMAN DAUGAARD: I wonder if you are going
to get a
19 response rate, a response rate from the satisfied
people that's
20 equivalent to the response rate you will get from the
21 dissatisfied people. It might be that the response
will be not
22 representative. You almost have to have a polling
firm that
23 persists until they have got a certain fraction of the
whole
24 that responds one way or the other, and to send out a
written
25 survey without that kind of guaranteed response rate,
I worry
□

80

1 about what you are going to get.
2 MR. LIEN: It's not my intent to make it
burdensome or
3 even go through this process. It's just a recheck in
back for
4 me, a recheck in back saying, are we getting the
information

5 correctly in terms of what the highest issues are out
there.

6 CHAIRMAN DAUGAARD: I would say, too, again
thinking
7 about what is the purpose of this committee, why have
a
8 committee like this in the workers' compensation area
versus
9 any other area that could be raised in the legislative
body? I
10 would say this committee is created because of the
complexity
11 of this area and the complexity of the proposals that
could be
12 offered up by those that are regularly and intimately
involved
13 with the process. They will offer up notice
provisions and all
14 kinds of things that to the lay person legislator are
just
15 beyond the ken. So I wonder if this committee almost
exists to
16 primarily deal with those complex proposals that are
brought
17 forward by the industry as opposed to by I could see a
worker
18 bringing forth something that it's a lot simpler to
address
19 straight out at the legislative level. Whereas I
could see the
20 insurance industry or the employers having the money
and the
21 wherewithal to bring forth things that are a lot more
22 complicated that a body like this would be helpful to
the

or 23 legislature to deal with. I don't know if that's fair
24 unfair.

□ 25 MS. ROBERTS: I think it's fair.

81

the 1 CHAIRMAN DAUGAARD: well, I would just say if
public at all 2 department could renew its efforts to inform the
deal 3 levels that this committee exists, that we are here to
whether 4 with problems in the workers' compensation area,
companies, 5 through notices through employers and insurance
workers 6 that's obviously the easy course, but maybe to injured
exist and 7 or a sampling of those, just let them know that we
so far in 8 then we will deal with those issues that have arisen
with those 9 our future meetings and if more come up, we'll deal
10 as they come up. Is that fair?

11 MR. LIEN: That's fair.

well, I 12 CHAIRMAN DAUGAARD: Sound good to everyone?
count on 13 need to get on the road here quickly, but I'll just
were brought 14 the staff now to group these proposals that either

if we
next
ease the
coming
bills to
through all
you are
it in
meeting.
it off in
do you
□

15 forth today or that were on the agenda, and I wonder
16 should try and take a certain fraction of them at the
17 meeting rather than all of them. I think it would
18 burden on those who are interested. It's sort of like
19 to the legislative meeting if the chairman posts ten
20 be heard. You don't know if they are going to get
21 10 so you almost have to go to the meeting even though
22 number 10 on the list. I wonder if we could just cut
23 half and just deal with half of them at our next
24 would that be agreeable to everyone if we try to bite
25 a couple chunks as opposed to all of them at once? Or

82

capability?
just leave
of these
people

1 think maybe I'm underestimating our efficiency and
2 MR. BARBER: I think you are being a realist.
3 CHAIRMAN DAUGAARD: How about that, if we
4 it up to James and Madam Secretary to maybe take half
5 issues and post all of them on the Internet and make
6 aware we are going to be considering all of these over

the

just

leave it

object to

we set the

the

site?

web

group

the

public

wants to

the other

it will be

do that

7 course of the year, but maybe at our next meeting we
8 consider half of them. Does that sound good? I will
9 to you to choose which half we take first. Anybody
10 that? Sound all right? Okay, anything else? Shall
11 next meeting date?

12 MR. AYLWARD: Are there any other copies of
13 proposed legislation? I had a couple people ask me.

14 CHAIRMAN DAUGAARD: That James put together?

15 MR. AYLWARD: Yes. Could we have extra ones?

16 CHAIRMAN DAUGAARD: Will this be on the web

17 MS. ROBERTS: Yes, we will print it up on the

18 site. And then, if I could procedurally, just for the

19 and for anybody in attendance, procedurally we will do

20 public hearing next meeting, we will start with the

21 hearing, go through the issues and have everybody that

22 comment, and then if we need the second meeting to do

23 five or additional issues, and then the next meeting

24 committee discussion and action, right? We would not

25 all at one meeting. I wanted to know for the agenda.

□

83

1 CHAIRMAN DAUGAARD: Say that again, Pam.

2 MS. ROBERTS: Procedurally for the next
meeting, it's

3 a public hearing to start out the meeting on five
issues. Then

4 would we close it and have committee discussion and
action on

5 those five issues?

6 CHAIRMAN DAUGAARD: I guess I was thinking
more of

7 handling it somewhat like a legislative committee
where we have

8 the department come as, let's say, a proponent of
section one

9 or whatever it is and then we take testimony from
opponents on

10 section one and then we ask questions of the
proponents and

11 opponents and then we close off public testimony and
then we

12 discuss and take action or no. And we can always
defer action

13 to a further meeting if we want to. But if we feel we
are

14 fully informed -- I do think it's important not to
take action

15 today because we want to get that public notice out so
others

16 who have interest in the particular language, they
have got a

17 chance to react and come forward and support or oppose
18 anything. Does that sound okay?

19 MS. ROBERTS: Sure.

20 CHAIRMAN DAUGAARD: Is that agreeable to
everyone,
21 that's a sort of like in the legislative committee? I think
22 familiar pretty methodical process that a lot of people are
23 with.

24 MS. ROBERTS: Sounds good. Then just so
everybody
25 understands, once the council takes action on any of
these
□

84

1 pretty much issues that are brought forth by the public, that's
2 the end of it. You will not be getting a letter from
3 the council, you will not be getting a letter from the
department
4 saying anything. This is a public hearing, everybody
can
5 testify participate and listen, but anybody that writes or
6 the should not expect to be getting anything written from
7 bills. It council or from the department in reaction to these
8 to have will all be in the final report. I don't want anybody
9 any misconceptions about that.

here to 10 CHAIRMAN DAUGAARD: That's right. We are
to the 11 react and to make recommendations to the Governor and
else 12 legislature, I guess, about any direction. Anything
Today is 13 before we set our next meeting date? Let's do that.
14 what, May 30th?

15 MS. ROBERTS: We need at least -- once we get
notice. 16 organized we need -- we need to give everybody 30 days

17 CHAIRMAN DAUGAARD: Let's look at something
near the 18 end of July or middle of July. I am gone the fourth
week in 19 July, or excuse me, the fourth full week I'm gone.
How about 20 the week of the 16th, how does that look for people?
I could 21 do it the 16th, 17th.

22 MS. ROBERTS: That's a bad week for me. We
are doing 23 our summer study that week, too.

24 CHAIRMAN DAUGAARD: How about the week of --
I could 25 do it the 31st, I could do it the 1st.

□

85

1 MS. ROBERTS: 31st looks good.

2 CHAIRMAN DAUGAARD: 31st is a Tuesday. How
does that

3 look for people?

4 MR. LIEN: Fine with me.

5 CHAIRMAN DAUGAARD: 31st of July.

6 MR. HAASE: I would be unable to attend.

7 MS. ROBERTS: That whole week?

8 MR. HAASE: Yeah, I have meetings out of
state.

9 MS. ROBERTS: You were gone that whole week
before,

10 right?

11 CHAIRMAN DAUGAARD: I could do it Friday, the
10th.

12 MS. ROBERTS: Of August?

13 CHAIRMAN DAUGAARD: How would that suit
everyone?

14 That's Friday, the 10th.

15 MR. AYLWARD: I'll be gone that week.

16 MS. ROBERTS: How about the 13th, that
Monday?

17 MR. AYLWARD: Of what?

18 MS. ROBERTS: August 13th, that Monday.

19 CHAIRMAN DAUGAARD: I'm gone that week.
Maybe we

20 better stick with the 1st or the 31st, rather, we have
got

21 everybody but one as far as we know.

22 MS. HINDERAKER: Mr. Chairman, if we have to
give 30

23 days notice and we are going to divide this into
potentially

24 two meetings, should we be setting both of them today?

both,
□

25 CHAIRMAN DAUGAARD: Good thinking. Let's set

86

next

1 our two meeting dates. Let's say July 31st for the

maybe

2 meeting date, and Jeff, I'm sorry, but then something

3 later August or early September.

week of

4 MS. ROBERTS: So you were gone the second

5 August, how about that week of the 19th of August?

22nd but

6 CHAIRMAN DAUGAARD: I could do it not the

7 most other days that week.

Tuesday, right?

8 MS. ROBERTS: We did the other one on

9 That's a bad Tuesday.

10 CHAIRMAN DAUGAARD: Bad Tuesday for you?

good, the

11 MS. ROBERTS: Monday or Wednesday would be

not work

12 20th or the 22nd. Or the 23rd. Any of those dates

13 for anybody?

14 MR. BARBER: What date?

the 21st

15 MS. ROBERTS: We are looking at the week of

16 of August, so Monday would be --

other one.

17 MR. BARBER: That would be too close to the

18 MS. ROBERTS: It would be --

19 CHAIRMAN DAUGAARD: Yeah, maybe we should go
into
20 early September just because if we defer something
from the
21 first meeting, then you really don't -- people
wouldn't have
22 time to do anything.

23 MS. ROBERTS: The last week of August?

24 CHAIRMAN DAUGAARD: That's better for me
anyway.

25 MS. ROBERTS: That whole week is good for me.

You
□

87

1 call it. Is this Tuesday?

2 CHAIRMAN DAUGAARD: How about September 4th,
5th, 6th,
3 any of those?

4 MS. ROBERTS: I'm getting worried we are
getting too

5 close to our cutoff date of October 1st is the day the
report
6 is due. So if we do July 31st and August 31st, how is
that?

7 CHAIRMAN DAUGAARD: August 31st won't work
for me. Go

8 earlier, August 27 would work, Monday, the 27th. How
does that
9 suit, August 27th?

10 MR. LIEN: Fine.

11 CHAIRMAN DAUGAARD: Jeff, can you make that

one?

12 MR. HAASE: That's fine.

13 MS. ROBERTS: Perfect.

14 CHAIRMAN DAUGAARD: July 31 and August 27.

15 MS. ROBERTS: Thank you.

16 CHAIRMAN DAUGAARD: How about time?

17 MS. ROBERTS: What time do you folks like?

18 CHAIRMAN DAUGAARD: Is 1:00 in the afternoon
all right

19 or do we want to meet in the morning, late in the
morning, or

20 what's your preference? Jeff, you probably got a long
haul.

21 MR. HAASE: Doesn't matter. I'm fine in the
mornings,

22 yeah.

23 CHAIRMAN DAUGAARD: It really doesn't matter
to me.

24 MR. BARBER: 10 o'clock in the morning.

25 MR. STAINBROOK: The next several meetings
might take
□

88

1 a little longer to go through.

2 CHAIRMAN DAUGAARD: Shall we say 10:00, is
that what

3 you were saying, Randy?

4 MR. STAINBROOK: Yeah.

5 MS. ROBERTS: Then we can do a lunch break if
we need

6 to.

7 MR. HAASE: Would the afternoon session be to
act on

8 the discussion that we have?

9 CHAIRMAN DAUGAARD: The way we do it, let's
say it's

10 issue one, whatever that issue is, someone has brought
forth an

11 idea and most of the time it's the department that's
bringing

12 forth an idea. They come up and say, here is the
proposal and

13 then they go through it in a little more detail than
was done

14 today and everybody else knows what the proposal is
because

15 it's posted. And then others who are in support of it
can say,

16 me, too, great idea, I'm in support of it. Then those
who are

17 opposed to it say, I don't like it, here is why I
don't like

18 it. Then we ask them questions if we have got
questions, then

19 we close off testimony and we act on that issue right
then and

20 there, not hold it till later in the day, we act on it
-- we

21 take testimony on both sides, discuss and act before
we move on

22 to the next issue, so we keep it in all our minds and
then

23 empty it out and fill it with the next issue. Does
that sound

objection,

24 good? So 10 a.m. on both those days. Hearing no

I'll
□

25 that's what we will do. If there's nothing further,

89

"aye."

1 declare the meeting adjourned. All in favor say

2 (whereupon, the motion passed unanimously.)

3:42

3 (whereupon, the proceedings were concluded at

4 p.m.)

5

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□

90

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C E R T I F I C A T E

2

3

STATE OF SOUTH DAKOTA)

4

COUNTY OF HUGHES)

SS.

5

I, Carla A. Bachand, RMR, CRR, Freelance

Court

6

Reporter for the State of South Dakota, residing in

Pierre,

7

South Dakota, do hereby certify:

8

That I was duly authorized to and did report

the

9

testimony and evidence in the above-entitled cause;

10

I further certify that the foregoing pages

of this

11

transcript represents a true and accurate

transcription of my

12

stenotype notes.

13

14

IN WITNESS WHEREOF, I have hereunto set my

hand on

15

this the 4th day of June 2007.

16

30May07.txt

17

18

19

20

Carla A. Bachand, RMR, CRR
Freelance Court Reporter
Notary Public, State of South

Dakota

21

Residing in Pierre, South Dakota.

22

23

My commission expires: June 10,

2012.

24

25

□