WORKERS' COMPENSATION
ADVISORY COUNCIL MEETING

KNEIP BUILDING
700 GOVERNORS DRIVE
PIERRE, SOUTH DAKOTA

TUESDAY, JULY 31, 2007

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(Whereupon, roll call was taken and the following members were present: Chairman Dennis Daugaard, Secretary Pam

Roberts, Secretary Paul Kinsman, Connie Halverson, Randy Stainbrook, Paul Aylward, Carol Hinderaker, Glenn Barber, Jeff Haase and Chris Lien.)

CHAIRMAN DAUGAARD: We have good attendance. The next thing on the agenda is our meeting minutes. Are there any changes or additions that anyone noticed should be made? Seeing none, would someone move to approve the minutes.

MR. LIEN: So move.

CHAIRMAN DAUGAARD: Is there a second?

MR. BARBER: Second.

CHAIRMAN DAUGAARD: Second by Glenn Barber. Any discussion? Those in favor say "aye."

(Whereupon, the motion passed unanimously.)

CHAIRMAN DAUGAARD: Motion carried. I would like to propose that we rearrange the agenda a little bit. When the agenda was created, I think Pam did a good job of identifying those things that didn't maybe get as thorough a discussion last time and put them at the head to make sure that they would get discussion this time, and then those that were maybe discussed a little bit more thoroughly at the end of the agenda.

In looking through those items, I believe there are

some that are relatively noncontroversial and I'm going to take some risk in identifying them and if we find that my identification of them as noncontroversial is in error, then we will drop them from immediate discussion, but I'd like to take some of those first so we can move those out of the way, sort of like many meetings have a consent agenda, they address the noncontroversial things, get them out of the way and then move on to the more substantive or controversial things. So is that

agreeable to the council members?

Help me now, and I would like the audience to participate here, help me identify those that are noncontroversial. I'm going to say, I'm going to propose that issues 11 and 12 I don't believe will be controversial. Does anyone disagree with that? Does anyone here intend to oppose the proposals that are made under issues 11 and 12? I don't see anyone.

MR. SHAW: Mr. Chairman, I do have some comments and suggested changes on those.

CHAIRMAN DAUGAARD: Some improvements that can be made.

MR. SHAW: Depending on your point of view.

CHAIRMAN DAUGAARD: I know that issue number 11 is verbatim what is part of the proposal under issue 12 and I don't know if anyone caught that, but at least that's what I see. Well, let's consider those potentially noncontroversial,

shall we? Issue three I think is also relatively noncontroversial. Does anyone intend to oppose the proposal that's offered under issue three? Fern, you have some opposition to that? All right, how about issue six, anyone intend to offer opposition to the proposal under issue six? Rex, you do?

MR. HAGG: Not opposition, but just maybe some additional added language that I don't think will be real controversial but to make sure everybody has got a copy.

CHAIRMAN DAUGAARD: I guess my hope with identifying them as purely noncontroversial maybe is not warranted, but are there any other issues, James or Pam, any of the other issues that you see as likely to be relatively noncontroversial? You

are probably going to have a better understanding than I would.

MS. ROBERTS: I don't know that any of them will be easy, Mr. Chairman.

CHAIRMAN DAUGAARD: Well, let's take the risk that 11, 12, three and six are less controversial, shall we say, than maybe the others. We will start out with the easy slope rather than the high hill, how about that? So without objection, I'm going to take up 11, 12, three and six in that order first. Any objection to that? All right, let's go to issue 11 and under issue 11 in the materials mailed out, there is a proposal and as I understand it, this is your proposal, Fern, am I correct?

MS. JOHNSON: Correct.

CHAIRMAN DAUGAARD: Do you want to come forward and offer some comments in support of this proposal? I'm going to conduct this in the form of a committee meeting, similar to a committee meeting where we will ask for those in support of a proposal, we will take all those, and then those in opposition to that proposal, we will take all that and then we'll close off the testimony and we'll discuss it among ourselves and take action before we move on to the next issue. Is that agreeable to the council? And we will ask each person offering testimony questions at the time they are at the table rather than holding it for the end. It's the Senate version versus the House version. All right, Fern.

MS. JOHNSON: Good morning, Mr. Chairman, members of the council.

CHAIRMAN DAUGAARD: Will you identify yourself.

MS. JOHNSON: I'm Fern Johnson, president of the South Dakota Injured Workers Coalition. I have a couple things, and

I visited with you briefly before you started the council meeting here, two brief issues. One is I'd like to make a recommendation specifically to Chairman Daugaard. According to 62-2-10, we would like to make a recommendation according to the statute, it allows three years of council members to be on the board. My understanding is the majority of the members here have been on here more than three years, so our

recommendation is that new appointees be considered, okay.

The second recommendation is visiting with the coalition members and members, you will acknowledge that a lot of workers cannot come down to Pierre. Workers are from throughout the whole state. We would recommend that it be divided up. Pierre, you have at least three meetings in a year, one be in west river in Rapid City, one in Pierre and one in Sioux Falls, okay?

CHAIRMAN DAUGAARD: So those are suggestions apart from this issue, but we will just take note of that and make it a part of the minutes and we can look at that later. On issue 11.

MS. JOHNSON: I don't know if we have our film ready yet, but like I visited with you beforehand and I'll reiterate myself, I'll be real brief. We have a proposal in here that covers everything and basically this issue number 11 as far as prompt payments of the medical. According to our proposal, it covers this in -- if you have the paper, our proposal in front of you, it kind of all ties in together for prompt payments and it has to do with claims processed, period. When you start with claims processing, you start from the report of injury and you go on. That entails most significantly medical payments being made promptly. That's the prime interest here really in

work comp, to get medical to the worker. So our bill basically starts the format in the claims process from the very beginning

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clear through the whole litigation.

Now, the proposal that we have here is guidelines according to ARISA and Mr. Marsh addressed this, that he was going to do some research on surrounding state laws and how they regulate claims processes and expediting medical payments. I went through Iowa, Nebraska and Minnesota. Most of these provisions that are in here are consistent and congruent with ARISA guidelines. They are consistent with Nebraska. The Department of Labor has probably researched that. That's basically the intent of these bills. It's a regulatory process.

CHAIRMAN DAUGAARD: So Fern, just to be sure I'm understanding you, you are referring now to the package of bills that you sent on the 23rd; am I understanding you correctly?

MS. JOHNSON: Yes.

CHAIRMAN DAUGAARD: I wonder if among those, there are lots of different things, but among them is -- so you changed essentially the proposal that we have shown under issue 11.

MS. JOHNSON: Yes, I have, and that's the one that I showed you earlier before we started here. That's dated July 23rd.

MS. ROBERTS: Mr. Chairman, if I could, when I was reviewing our issues today, I wondered if we didn't have a typo. That maybe wasn't the Fern Stanton Johnson proposal,

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that that was more -- do you know, James? That was right before I came down here, I was looking at it. That issue

number 11, did that come from somewhere else rather than. . .

MR. MARSH: We didn't propose this I don't think. It was discussed informally but never. . .

MS. ROBERTS: I guess it was an outstanding issue, it was an issue that she had, so we named it the Fern Stanton Johnson, but where did the bill come from?

MR. MARSH: The original draft of this came from me.

MS. ROBERTS: It's kind of a department bill.

CHAIRMAN DAUGAARD: I see it under number 12.

MS. ROBERTS: Number 11.

CHAIRMAN DAUGAARD: Verbatim it's under 12 as well. Fern, are you telling me that the Department of Labor has a bill consistent with what we have proposed way back in May?

MS. JOHNSON: I'm not sure now.

CHAIRMAN DAUGAARD: I treated issue 11 as being your proposal and then I noticed that the Department of Labor had verbatim that same language in its proposal for penalties for late reporting under what's labeled issue 12 in the agenda. It's word for word, their part three is the same as part 11. Now, I'm not sure now, it doesn't appear that that's your proposal because what you sent in on the 23rd last week is different.

MS. JOHNSON: It is our proposal and I really don't

care who makes the proposal, if the --

MS. ROBERTS: Are you talking about issue 11?

MS. JOHNSON: The medical, if you are talking specifically medical, I don't care. If the department comes in and says this is our proposal and it's consistent with ours, we'll back you.

MR. AYLWARD: Does Fern have a copy of what we are

looking at?

CHAIRMAN DAUGAARD: I don't know. Do you have something that has the agenda as issue one, two and three?

MS. JOHNSON: I don't have that, no.

CHAIRMAN DAUGAARD: Let me scan your package a second, Fern. Just stand by.

MS. ROBERTS: If I could clarify for members of the committee. Ms. Johnson has a packet that she sent, which is issue number two. When we discussed medical delays last meeting, that was issue number 11. It was listed as a new section. We also put it as a Fern Stanton Johnson just kind of to clarify that she also had that in her package. But she's now made some revisions and so in her issue number eight, which has various issues, she's going to have a bill which talks about delays in medical payments, which is different than issue number 11.

CHAIRMAN DAUGAARD: So what I would say is the council should scratch out this issue 11 page because it does not

reflect Ms. Johnson's proposal. Rather her proposal is found on page six of the package I think Monica sent out on July 26th, a package of materials, and it's near the back of that, I think it's two, three pages from the back, page six and seven.

MS. JOHNSON: If I may interject, Mr. Chairman, it is on page four, because like I just said, it integrates the claim process starting under section 62-7 and it moves on, and if you are going to put it all under 62-4, I guess where I had a problem with is 62-4 deals with medical payments, however, 62-7 deals with the claims process, and in common sense the claims process, medical gets paid by the start of the claims process.

CHAIRMAN DAUGAARD: So they are interrelated is what

you are saying.

MS. JOHNSON: Right. So I guess our proposals here are not in concrete. It's a work in progress and I have not seen issue 11 from the department until just now so I really don't have any comment against, unless I can digest it a little bit.

CHAIRMAN DAUGAARD: Well, we have got -- I thought we had some agreement on this issue, but I guess we don't. Again, in the interest of trying to get rid of some of the noncontroversial items first, let's suspend this delay of payments business and move down to issue three and six, all right? Fern, I'm going to have you stand down and I'll call you back up in a bit, if that would be all right. Thank you

for your patience.

Let's go to issue three, medical findings versus expert medical opinion. The department has a proposal and who wants to offer testimony in support of that?

MS. ROBERTS: Mr. Chairman, maybe we should have an introductory so that everybody understands the issue and if you would like James to do that, that would be great.

CHAIRMAN DAUGAARD: That's essentially part of any proponent's testimony, set the stage.

MR. MARSH: That's fine. We discussed this proposal with various members of the, I guess you would say the insurance defense bar trying to get a handle on what could be done in light of recent Supreme Court cases that have talked about medical evidence in terms that we have difficulty coming to terms with honestly. We are finding that medical opinions that would not carry a lot of weight in an ordinary litigation setting suddenly seem to find their way into an administrative

record and form the basis for decisions which we find kind of questionable, in all honesty.

The most dramatic example to me is in the Orth case where basically the Supreme Court rested its entire decision on a one-paragraph opinion from a doctor in response to a letter from a lawyer for the claimant and there was no other foundation for it than that. It was simply a piece of paper. We don't even know necessarily what question was being asked to

prompt this response. As opposed to a lengthy independent medical review that was done by the insurance company's physician, which was, as far as I can tell, ignored in the decision.

So the object behind changes such as these is to base as much as possible decisions on our part in the workers' compensation cases on credible medical information, both as to the injury and to the condition. We wrestled around with language quite a bit in terms of trying to make some work and this language represents a compromise. We simply want to extend the concept of credible medical information both to the injury, the evaluation of the injury that arises, and to any conditions or disabilities that result from it. That's where we are at.

CHAIRMAN DAUGAARD: Anyone else want to offer testimony in support of this proposal?

MS. ROBERTS: If not, Mr. Chairman, then James did get either an e-mail, phone call or some kind of information which I hope has been passed out from an attorney; is that correct? Is this not one of them, James?

MR. MARSH: I don't think so. Maybe.

CHAIRMAN DAUGAARD: Are you talking about Dennis

Finch's letter?

MS. ROBERTS: There was an attorney from Sioux Falls that could not make it.

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MR. KINSMAN: Jon LaFleur.

MS. ROBERTS: Is that in issue number three? I want to make sure that all the testimony that was submitted in writing is also considered here since I don't think the group has had a chance to really look at that.

MR. MARSH: I don't believe he addressed that particular issue in his comments.

MS. ROBERTS: Staff, anybody else do you think submitted written comments or talked to you or e-mailed you, James, on this issue?

MR. MARSH: No.

MS. HINDERAKER: I have a question or clarification. It appears that issue three, the suggestion is to add the words "or condition."

MR. MARSH: Yes.

MS. HINDERAKER: We weren't changing objective medical findings, just "or condition."

MR. MARSH: That was our original idea, but we backed away from that.

MS. HINDERAKER: We have called it medical findings versus medical expert opinion.

MR. MARSH: Yeah.

MS. HINDERAKER: I'm not quite certain. . .

MR. MARSH: That isn't necessarily true. That's how it came up, but this is what we used to try to address it, a

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little more tangential than the original proposal.

MS. HINDERAKER: We are adding the words "or condition."

MR. MARSH: Yes.

CHAIRMAN DAUGAARD: Any other questions of James on information we have?

MR. AYLWARD: How do you see this changing anything?

MR. MARSH: Okay, specifically if we are looking at a case like Orth where the doctor was asked to address what part work played in a person's disability, which is what he was asked, he essentially says, 50 percent of it's work, 50 percent of it's not work. Then what the statute will do with the change is to say we need more than just an off-the-cuff kind of opinion from a doctor, which is basically what he gave. Instead we need something with some kind of, as much as possible, measurable, objective foundation, tell us why.

MR. KINSMAN: You are saying that the evidence presented in the Orth case, then, was on a condition and that this change would have addressed that as opposed to the medical evidence on an injury?

MR. MARSH: Correct.

CHAIRMAN DAUGAARD: Other questions of James? Does anybody else want to offer testimony in support of this proposal? If anyone wishes to offer testimony in opposition or an amendment.

MR. HAGG: Do you take defense riders?

CHAIRMAN DAUGAARD: Yes, sir.

MR. HAGG: Mr. Chairman, members of the committee, my name is Rex Hagg. I'm an attorney in Rapid City and practice primarily in this area and primarily for the claimants. I

don't have really an objection to this change in and of itself. My concern is some of the comments that were made and having the claimant's attorneys give another side to that about whether or not this was a wild consideration by the Supreme Court or not.

Just a couple things. The rules of evidence have always been a little bit more liberally construed, the strict rules of court evidence, in administrative hearings. I think that everybody would probably agree on that. And I'm not exactly positive, but I thought I read in the Orth decision, and maybe some of the attorneys can correct me, that there weren't actually any live testimony or depositions taken. So if there's no live testimony or depositions taken, all the reports were coming in that way, which is allowed under our rules. You can submit medical reports without having to go and take a deposition. It saves on costs and other things, and apparently the attorneys in this case made the decision they were just going to submit the reports.

So I don't think this is a wild decision by taking the doctor's testimony out of context. That's done all the time.

You write a letter, Doctor, what is your opinion about this, or some people say, we are going to send them to our expert and have him examined and they are going to do a report. Well, if they do that report and it's slanted or tainted, then you are allowed at a hearing or deposition to cross-examine that doctor to say, now, Doctor, is that what you really mean or not, what about this consideration?

So all those things were not done and if the attorneys just submit the records to the department and those letters are in there or other things, those records that say that, here the

doctor says this is very difficult, so I would say 50 percent and 50 percent. So again, this is fine, I don't think this really changes all that much, but I think the context in which this happened is important because I don't think it was slanted, I don't think the Supreme Court fell off their rocker and these are -- this is our Supreme Court, these are very intelligent people and they make very reasoned opinions, and so I think the context -- I just wanted to lay that context out so that the other side of the coin is presented in that manner.

CHAIRMAN DAUGAARD: Thank you. Any questions of Mr. Hagg? Okay. Does anyone else wish to offer testimony in opposition or amendment of this proposal? Seeing none, all right, what's the attitude of the council? Is there a motion?

MR. AYLWARD: Taking into consideration Mr. Hagg's comments, does this in any way, will this cause more

depositions to be requested? Is it going to increase the costs to both the employer and the employee? Are we blowing something out of proportion that we really shouldn't be messing with and is it going to have consequences far greater than fixing something that's perceived as a problem that really isn't? I don't know the answer.

CHAIRMAN DAUGAARD: Does anyone have any thoughts?

MR. MARSH: In my own opinion, no, and I say that because in the Orth case itself, because it came in in a written form, one of the observations made was when it comes in front of the department and then we review it and it goes up on appeal, they are going to take a clearer or -- I'm sorry, a de novo review of it or start over from scratch, so the message being sent to the field is if you don't put a doctor on the stand or take at a minimum through a deposition process, you

are likely to have a ruling that might go in your favor but there is no guarantee it's going to hold up because the appeals court is going to come back and look at it over again, essentially retry it. So the damage is already done, at least in that regard. I can't help but think the field out there, they are going to be putting a lot more doctors on the stand anyway. So I don't see that this changes a thing as far as how much expense is going to be involved in the litigation process.

MR. AYLWARD: That's already happened?

MR. MARSH: Yeah, the genie is out of the bottle.

CHAIRMAN DAUGAARD: Is there a motion?

MS. HINDERAKER: I would move that we add the words "or condition" to 64-1-15 as a recommendation of the council.

CHAIRMAN DAUGAARD: Is there a second?

MR. BARBER: I would second that.

CHAIRMAN DAUGAARD: Discussion on that. Further discussion. Secretary, call the roll.

MS. TREBESCH: Paul.

MR. AYLWARD: No.

MS. TREBESCH: Randy.

MR. STAINBROOK: No.

MS. TREBESCH: Guy. Carol.

MS. HINDERAKER: Yes.

MS. TREBESCH: Connie.

MS. HALVERSON: Yes.

MS. TREBESCH: Jeff.

MR. HAASE: Yes.

MS. TREBESCH: Chris.

MR. LIEN: Yes.

MS. TREBESCH: Glenn.

MR. BARBER: Yes.
MS. TREBESCH: Dennis.
CHAIRMAN DAUGAARD: Yes.
MS. TREBESCH: Paul.
MR. KINSMAN: Okay.

MS. ROBERTS: On all of these motions, the two of us do not vote.

CHAIRMAN DAUGAARD: Well, in cases where we have less than a unanimous opinion, I'd like our report to the Governor to reflect that. Let's go to issue number six, medical release. To set the stage for the audience, if you don't have it, the proposal is to add a new section to chapter 62-4 and to require that employees give medical releases if employers ask for it. Who would want to offer testimony in support of this? This is a department proposal, so James, do you want to offer testimony in support of it?

MR. MARSH: I can give some background. The concern that was presented to us in a group that we discussed previously is that it's been very difficult, there is no physician/patient privilege as to workers' compensation records, but because of the federal HIPAA law, a number of providers hesitate, nonetheless, to release medical information to insurance companies related to work comp claims. Ninety-eight percent of their claims are probably not work comp but two percent are, so they naturally get a little skittish. This is an attempt to try to move that process along by encouraging the employee to sign a release which will allow at least workers' compensation related records to be disclosed without any issue.

CHAIRMAN DAUGAARD: Any question of James? Anybody

wish to offer further testimony in support of issue six? Anyone wish to offer testimony in opposition or an amendment? Rex Hagg.

MR. HAGG: Mr. Chairman, members of the committee, again, I do not have any objection to this. I think it's understood and it's done all the time. The only thing I would request the committee to consider would be just a one line sentence to the end of it saying that the employer shall provide a copy of all medical records and reports received to the employee or the employee's attorney.

A couple reasons for that. One, it saves costs. Every time you send a request to a provider, they charge you 30, 40, 50 bucks to get the records and if they are being gotten already, what's the hurt in it? And I think any person, whether it's employee or employer, anybody should be entitled to receive their own medical records, and so I think it will both save costs and it's just something that the employee should have, a copy of his own medical records.

CHAIRMAN DAUGAARD: Say your sentence again, please.

MR. HAGG: I've got it written out here for you, Mr. Chairman, if you receive it.

CHAIRMAN DAUGAARD: I'll read it. The language is "the employer shall provide a copy of all medical records and reports received to the employee or the employee's attorney." I would say a better English would be "the employer shall

provide to the employee or the employee's attorney a copy of all medical records and reports received." Is that agreeable?

MR. HAGG: Yeah.

CHAIRMAN DAUGAARD: Reword it that way. So the

reworded again is "the employer shall provide to the employee or the employee's attorney a copy of all medical records and reports received." Is that agreeable to the department?

MR. KLAAHSEN: How about upon request, because not in all cases will they --

MR. HAGG: I have no objection.

CHAIRMAN DAUGAARD: You want to come forward and offer that.

MR. KLAAHSEN: My name is Sue Simons with Dakota Truck Underwriters, who both Larry and I are here on behalf of. Our recommendation would be to take and add to Mr. Hagg's proposal "upon request" because there will be many claims that, one, may not be in litigation where the employee is not going to desire to get a copy of what might be very thick medical records at the cost of copying and sending and et cetera. So we would just suggest that that be added to the proposal.

CHAIRMAN DAUGAARD: I see Rex nodding.

MR. SHAW: Morning, I'm Mike Shaw, I'm an attorney from Pierre and I represent Property Casualty Insurers Association of America, a trade association of companies whose workers' compensation members make up the largest market share

of work comp coverage in the state.

In addition to Sue's comments, I would think it would be fair upon request if the employee bore the cost of copying those, because in many cases, in many work comp cases the medical records are very -- there's a lot of them. There's stacks and stacks, this is a document heavy thing, and that's fair. I think that in most cases that this is being done, that we share those records with the employee and they pay the costs, but that way there's no question. That would be my only

comment.

CHAIRMAN DAUGAARD: Thank you.

MS. MERRITT: Mr. Chairman, I'm Mary Merritt, I'm here with South Dakota Association of Managed Care Organizations, and I oppose this due to the fact that when employers, insurance companies designate a case to a managed care organization for workers' compensation, the majority of us are RNs and our license and many of us have certifications, additional certifications. Those preclude us from redisclosing medical records to another party, so in that particular case, we would not be allowed to redisclose to an attorney.

CHAIRMAN DAUGAARD: Would you be prevented from disclosing when your patient has given a release to you?

MS. MERRITT: A specific release to our employer, we could, but not if it were given to the employer. We would need a release covering us specifically and our name listed along

with our employer, so if it said the employer, we would need to get an additional request.

CHAIRMAN DAUGAARD: I don't see that that would be in conflict with what this statute would permit. I think this is just saying that if the employer asks an employee to give a medical release, then the employee must do that and then they would give this release to you and you would be relieved of your --

MS. MERRITT: My further question is what are employers doing with the medical records, because in general, an employer would -- when an employer has an insurance company, they ask them to administer their workers' comp claim. What are employers doing with those medical records? There's a concern there. Are they redisclosing? Are they familiar with

the regulations and the confidentiality of redisclosing? Are they redisclosing them to an agent? If they are, they should not be doing that.

MR. MARSH: Would you like me to address that, Mr. Chairman?

CHAIRMAN DAUGAARD: Sure.

MR. MARSH: A couple of things. For the benefit of the council, the reason the term "employer" is used in the statute in the request is because under work comp on the work comp title, employer, insurance company, self-insured, all those things are interchangeable, in essence. If I'm insured

by a workers' compensation insurer, it's the same thing as an employer, so when information is released to an insurance company, it's being released to the employer, hence the use of the term.

In terms of privacy act protections, to address the concern that's presented, if medical information is presented to an employer and the employer discloses it to someone who has no -- is outside the privacy circle, if you will, the employer is then liable, even if it's a workers' compensation record, that employer is going to get sued for breach of this person's privacy. It's a separate individual civil tort for that. It would not behoove an employer to be releasing information in that way.

CHAIRMAN DAUGAARD: Mike, did you have a specific language that you want to offer about cost reimbursement? Did you draft something?

MR. SHAW: I have not. I certainly could, I would be happy to. If there's no objection from Mr. Hagg or anyone else, I'd be happy to try to put a short sentence together and

provide it to you.

CHAIRMAN DAUGAARD: Would you do that?

MR. SHAW: I'll work on it right now.

CHAIRMAN DAUGAARD: Other testimony in opposition or amendment to the proposal under issue six? All right, what I've got so far is it seems to me there's consensus around this

language. "Upon request, the employer shall provide to the employee or the employee's attorney a copy of all medical records and reports received," subject to some further language about cost reimbursement.

MR. SHAW: Mr. Chairman, I think if you just added a sentence that simply stated "the employee shall pay reasonable copying costs," that would be acceptable. Unless anyone has an objection.

CHAIRMAN DAUGAARD: The employee shall pay reasonable copying costs. I think we have a consensus on what the proposal is. Is there a motion?

MR. LIEN: I make a motion that the Workers' Compensation Advisory Council include in its report to the Governor the new section under 62-4 with the amendments offered today.

CHAIRMAN DAUGAARD: Is there a second? Is there a second? I'll make the second. It's been moved and seconded that the language is "upon request, the employer shall provide to the employee or the employee's attorney a copy of all medical records and reports received. Employee shall pay reasonable copying costs." Discussion on the proposal.

MR. BARBER: I see no problem, we are just trying to implement the treatment of the problem, so let's keep it moving.

MR. AYLWARD: How is it handled now, James? Can I

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refuse to do that?

MR. MARSH: Yeah, there isn't any law that says that you have to sign a release for that information. Technically, it shouldn't stop anything. If it's information that's relevant to the comp claim, the provider has to release it anyway, but the problem is in many cases they don't, even if it's a clear direction, because they are concerned, I think, some of the information in the record might be relevant, some of it might not, so they say they are not going to release anything.

MR. AYLWARD: How has the term "relevant" been interpreted?

MR. MARSH: We don't have a lot of cases on that yet. Relevant has a legal meaning, but whether they would apply it here or not I don't know. We have received advisory opinions from the Center for Medicare Studies, because they have had to deal with this already, and essentially say it's kind of handled state to state in terms of what's relevant and what isn't. You have to look at -- I guess in our state you probably have to look at our injury definition and say what falls within that potentially and what doesn't and say records that are connected with that, that goes in, records that aren't, they don't. I'm sure it's a case by case sort of thing in practice.

CHAIRMAN DAUGAARD: Further discussion. Seeing none,

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Sarah, will you call the roll.

MS. TREBESCH: Paul.

MR. AYLWARD: Aye.

MS. TREBESCH: Randy.

MR. STAINBROOK: Yes.

MS. TREBESCH: Carol.

MS. HINDERAKER: Yes.

MS. TREBESCH: Connie.

MS. HALVERSON: Yes.

MS. TREBESCH: Jeff.

MR. HAASE: Yes.

MS. TREBESCH: Chris.

MR. LIEN: Yes.

MS. TREBESCH: Glenn.

MR. BARBER: Yes.

MS. TREBESCH: Dennis.

CHAIRMAN DAUGAARD: Yes. I don't know that we have got any other issues that will be easily compartmentible and noncontroversial, unless anyone sees one. Well, let's then go to the issue of delays and I think this is sort of a broad issue that relates to delays of processing the claim and delays in particular about paying medical expenses, and I don't know that we can separate them easily, so maybe to set the stage, I'm going to ask Fern again to come up. Are we able to play that 20-minute piece that Fern brought?

MS. HARDING: If you are allowing that, she will have to bring in her laptop because our computer will not read it. So you will have to bring in your laptop to do the small disk.

CHAIRMAN DAUGAARD: Do you have that in the building, Fern?

MS. JOHNSON: No, it's outside.

CHAIRMAN DAUGAARD: Why don't we -- I know Farmers

Insurance had a proposal that's identified under issue nine that's related to delays and do we have anyone here to offer that or do we have the letter alone?

MR. MARSH: Mr. Chairman, my understanding is that their representative wasn't able to attend the meeting today. So the letter would be what we are going on.

MR. AYLWARD: That's the letter from Farmers?

MS. ROBERTS: That is in your packet of information that you received.

CHAIRMAN DAUGAARD: How does this compare with the proposal that Fern Johnson has? James, can you compare that to her package that she mailed last week?

MR. MARSH: It addresses a very different issue. It talks about situations where an individual has received an impairment rating, may be eligible for permanent benefits and the insurance company is then directed by us to send them what we call form 111, which essentially says this is how much you get, this is how we calculated it and it doesn't do anything

more than that. It's not an agreement or anything along those lines.

When that's submitted to us, in some cases the claimant, for whatever reason, it's up to them, may not sign it. It comes to us then after a delay of usually a few weeks, the insurance company says to us, we were not able to obtain the claimant's signature on the form, we want to go ahead and pay benefits. Now, the practice has been with the department so far, there isn't any real law about this actually one way or the other, because the claimant has not signed it, we then send in -- we send a letter to the -- we go through, we make sure their calculations are correct based on a rating they show us

and the form they give us, make sure the calculations are correct, and if they are, we send a letter back saying, go ahead and pay, we don't have any issue with you paying in this amount. We can't approve what you have done because we don't have the claimant signing it acknowledging that this is correct, but at least you admit you owe this much so go ahead and pay it.

The concern from the insurance industry, as I understand it, is that they want -- this leaves things too ambivalent because the matter of whether they have paid benefits correctly has never been addressed. So what this proposal does, as I understand it, is simply to say an agreement comes to us without the claimant's signature, the

rating is correctly calculated, the benefits are correctly calculated, the department agrees that at least on its face everything was done correctly so we should be able to treat that as an agreement, to go ahead and approve it. That's the idea behind it. I'm not sure how real of a problem it is. I guess I would defer to Farmers on this since they brought it up. That's what they are asking.

CHAIRMAN DAUGAARD: Does anybody -- well, let me ask you, James, since you sort of set the stage. What is the difference under this proposed change from what is the current situation? In both situations it seems to me the claimant has not agreed to it, in both situations the insurer starts to make a payment without the claimant's agreement, and in both situations, both under current law and under the last sentence of this statute, the claimant can still complain that the nature and extent of benefits are improper. So I'm not sure I see what has changed with the new statute being proposed. Do

you see a change?

MR. MARSH: My own view is no, I don't see any significance of it.

CHAIRMAN DAUGAARD: Do you think it would speed claim payment?

MR. MARSH: Possibly.

CHAIRMAN DAUGAARD: It might give the insurer some sense of oh, yes, we have been approved in a way, even though

the claimant could still complain.

MR. MARSH: Yeah. That's a possibility.

CHAIRMAN DAUGAARD: Would it burden the department significantly or do you do this calculation anyway?

MR. MARSH: We run through the numbers anyhow, so it doesn't make a difference to us bureaucratically.

MR. BARBER: If the person would sign the check or take the money, would that be an indication of acceptance, even though -- would that be implied as acceptance?

MR. MARSH: I don't believe so, in my own view. I suppose you could have a situation where an insurance carrier would actually put language on the back of the check and say by signing this here, but I'm not sure that that means much without the department giving the blessing, if you will.

MR. BARBER: Sometimes those settlements are written like that with that clause, acceptance, so people are going to be very reluctant to cash the checks and it will still leave it all in limbo.

MR. MARSH: We get those calls anyway. I have had individuals who had tens of thousands of dollars worth of work comp benefits sitting on their desk and they won't cash the checks because they are concerned they are signing their lives

away. Our view has never been that, that that's the case. Might as well cash the check.

MR. KINSMAN: Under the change, the department would

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have approved that permanency rating plus they would be signing the checks so there is an additional step here from the standpoint that the department then would have approved that permanency rating, right?

MR. MARSH: We would have approved the rating, yes. I think the only maybe substantive difference in the situation like that is to look at potentially whether the insurance carrier's behavior is reasonable, which is maybe what they are worried about. It would be more likely their behavior would be reasonable under those circumstances than not, but I don't see any other real change.

CHAIRMAN DAUGAARD: Other questions. Does anyone wish to offer testimony in support of this proposal from Farmers? Does anyone wish to offer testimony in opposition or amendment?

MS. JOHNSON: I might have missed something here. Which one are you on?

CHAIRMAN DAUGAARD: We are on issue nine.

MR. AYLWARD: Does this happen a lot, James?

MR. MARSH: I don't actually know, to be honest. I have no idea.

MR. AYLWARD: They don't indicate in their letter whether it's an ongoing or one time.

CHAIRMAN DAUGAARD: Does anyone -- Fern, you are welcome to jump in at a point when you have a chance to look at this. Does anyone have a motion with respect to this? Fern,

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do you want to offer some testimony?

MS. JOHNSON: I do. Like I said, I haven't received -- I haven't looked at this yet, but just by looking at this and if something is submitted to the department and it's still in dispute, it's signed, it's a disputed issue that is done as far as the employer is concerned, when the disputed issue is not done, it's still in dispute, it hasn't been fully litigated yet. So I guess in just looking there, this contemplates that the employee doesn't have any right to further dispute anything.

CHAIRMAN DAUGAARD: In response, I'd say the last sentence says, "Nothing shall prevent a claimant from petitioning the department for a hearing on the nature and extent of benefits due, including the proper amount of compensation paid." So that last sentence says even if the department says, well, we think the rating is right, we think the calculation is right, go ahead and pay it, the claimant can still come back later and say, no, I disagree.

MS. JOHNSON: I'll have to interject because historically, and Mr. Hagg can verify this probably, is if there's an agreement made per se like the 110 agreement, 111 form, that's res judicata, it's done, it's a decision done. You go back in and petition later on, it's going to be waived because that approval is done. You cannot go back in and change that rating because it's already been approved. They

are going to argue on the defense as res judicata, you can't change it. Historically --

CHAIRMAN DAUGAARD: As I understand it, the statute being proposed is not addressing the question where everyone has signed off on this form 111. It's where the claimant has not signed and the insurer is wanting to know, gee, should we

pay, should we not pay. Farmers seems to think that if the department would say, yeah, you have rated it correctly, you have calculated it correctly, then that would somehow speed things or somehow protects them. I don't quite see how it does with this last sentence in there, how it gives them any greater protection. But I'm thinking if claimants are going to get paid faster, then it might be worth giving some, and apparently some other states are doing this.

MS. JOHNSON: I'd like to express that there is a statute, 62-3-18, and then there's also 62-7-5, which means if an agreement is contemplated or it's basically contract law, if that agreement is done and signed and approved by both parties, then it can go up to the Department of Labor and approve it. However, there's a problem with if there's a rating. You may have an employer that has a permanent partial or whatever impairment rating based on MMI or based upon loss of use or whatever, okay. Permanent total disability. If there is still a dispute and that approval or that agreement or that proposed agreement or whatever it is, this form which they are

contemplating here is sent up to the Department of Labor and it's approved, it's done, it's out the door, it's res judicata, it's done. There's still a dispute in the air, it's not done and litigated. When you go back in and try to petition to change that, established law already has set precedent, it's res judicata, it's done. So I would strongly oppose the language in this. If there's some other addition that can be made with some exceptions to that, it doesn't comport with already existing statute, 62-7-5.

CHAIRMAN DAUGAARD: Do you see a distinction between a form that's submitted without a claimant's signature and a form

that's submitted with a claimant's signature?

MS. JOHNSON: I do.

CHAIRMAN DAUGAARD: I think this statute addresses the situation where a form is submitted without a claimant's signature. Do you understand that?

MS. JOHNSON: Yes, I do.

CHAIRMAN DAUGAARD: You feel if the department approves the rating and the calculation with this statute in place, that it would then be binding and even with this last sentence in the statute, that a claimant could not come back and say, I disagree with the rating, I disagree with the calculation?

MS. JOHNSON: I do. I do, it contravenes existing statute.

MR. LIEN: I have a question, if I may, for Mr. Marsh. I'm referencing the Farmers letter dated July 22 or 27th, the third paragraph, first sentence. In South Dakota if the LM 111 is submitted without a claimant's signature, the department takes the position that we should pay what we believe is owed, but this should not be considered as approval of the submitted LM 111. Can you specifically point to what he's referencing to?

MR. MARSH: What he's talking about is one of the statutes that Fern mentioned actually, 62-7-5, where it talks about an agreement coming to us and us actually approving it and it becoming enforceable as if the department had issued an order saying pay this. He's saying essentially we don't get a 62-7-5 agreement whenever we send it this way. What he wants, at least he claims to want is something more like that kind of agreement. I just don't know the language in this provision

actually does that. But that's his concern, this is not an approved agreement within the meaning of that statute, when he sends it and we say go ahead and pay it.

MR. LIEN: Sorry for the over simplification, but would it be fair to state this new section basically says you have the ability to move it forward and argue it later as opposed to argue if now, delay it and then move it forward?

MR. MARSH: That's the idea.

MR. LIEN: Thank you.

CHAIRMAN DAUGAARD: Anyone else wish to offer anything in opposition or amendment of this issue nine proposal? What's the wish of the council?

MS. HINDERAKER: Mr. Chairman, appreciating that Farmers has sent a letter with their opinions and with some wording but also recognizing Mr. Marsh's opinion that maybe it wouldn't change much, it would be my recommendation that we table this issue or not act on this issue today and if someone from Farmers can come and speak in favor of it and maybe give us some kind of an explanation of their recommendation so that we can consider it with a little bit more knowledge, I guess I would recommend that we not take any action on this today.

CHAIRMAN DAUGAARD: What's the wishes? Glenn, I see you nodding.

MR. BARBER: Was that a motion?

CHAIRMAN DAUGAARD: Move to defer action until our next meeting?

MS. HINDERAKER: Yes.

MR. BARBER: I would second that.

CHAIRMAN DAUGAARD: Further discussion on the motion to defer? Randy?

MR. STAINBROOK: I don't have a discussion. Who presented the proposal, the Department of Labor or Farmers Insurance?

MR. MARSH: Farmers.

CHAIRMAN DAUGAARD: Farmers. Any further discussion on the motion to defer?

MS. HINDERAKER: And I would clarify that motion to say that we would defer it and not discuss it unless someone comes to explain or discuss it.

CHAIRMAN DAUGAARD: Defer indefinitely if Farmers doesn't appear to defend it. So maybe the motion would be to defer action until Farmers comes and convinces us to act upon it. Is that maybe your intent?

MR. BARBER: Restate the second.

CHAIRMAN DAUGAARD: Any further discussion on that? That would essentially be kind of like a final disposition, so I'll ask Sarah to call the roll.

MS. TREBESCH: Paul.

MR. AYLWARD: Yes.

MS. TREBESCH: Randy.

MR. STAINBROOK: Yes.

MS. TREBESCH: Carol.

MS. HINDERAKER: Yes.

MS. TREBESCH: Connie.

MS. HALVERSON: Yes.

MS. TREBESCH: Jeff.

MR. HAASE: Yes.

MS. TREBESCH: Chris.

MR. LIEN: Yes.

MS. TREBESCH: Glenn.
MR. BARBER: Yes.
MS. TREBESCH: Dennis.
CHAIRMAN DAUGAARD: Yes. James, will you correspond with Farmers and let them know that's what we have done?
MR. MARSH: Yes.
CHAIRMAN DAUGAARD: How is our technology?
MS. ROBERTS: To explain to the committee, we didn't know that there was going to be a CD today and our technology here is not compatible with the CD she brought so they are trying to -- she brought in her laptop and is trying to get it to work here. I frankly don't think it will because the state system has a lot of firewalls so that you can't just use random hardware, so I really -- I don't know that they can figure it out. I don't know what the wishes of the chair or the committee are.
CHAIRMAN DAUGAARD: Do we have a microphone? Can't we just play the laptop stand alone and put the mike up to it? Oh, it's video, I didn't know that.
MS. JOHNSON: You can see it on a screen here. It's just not pulling up.
CHAIRMAN DAUGAARD: It might be the best we can do.
MS. ROBERTS: We can turn it so at least some of us could see it.
CHAIRMAN DAUGAARD: I don't know that this is

addressing any particular proposal, is it, Fern? It's more testimony regarding delay; would that be a fair statement?
MS. JOHNSON: That and medical, medical delays.
(Brief pause.)

MS. SIMONS: Just for the record, on behalf of -- Sue Simons on behalf of Dakota Truck Underwriters would object to this type of presentation absent it specific to an issue. According to the agenda, there is supposed to be time at the end of the hearing for just public comment on any issues of importance and so for purposes of not realizing we could come and just kind of expound on any issues that we choose, we would like to at least add for the record an objection to this.

CHAIRMAN DAUGAARD: Okay, that's fine. I'm going to allow it because I believe it relates to the concerns that have been raised with respect to delay in administration of claims and delay of medical payments.

(CD submitted by South Dakota Injured Workers Coalition played for the council.)

CHAIRMAN DAUGAARD: I'm going to call a halt to this. It's hard to understand how this relates to the issues of delay and it's hard to hear. If he wants to come to another meeting and testify or if you can provide a medium that would give some testimony in support or opposition of one of your specific proposals and how his testimony would encourage adoption or not adopting one of these proposals, then I think that would be

germane, but --

MS. JOHNSON: They can't come down here, this is the reason why for the video. I can get this so that if it doesn't get done here, we can do it when we go to Pierre.

CHAIRMAN DAUGAARD: You produce it in a medium that can be played here and I'll watch it ahead of time and then I'll be able to decide whether it's germane to the issues we are considering. Would that be fair?

MS. JOHNSON: I don't understand why it doesn't work,

but I guess you gotta do what you gotta do.

CHAIRMAN DAUGAARD: Let's take up now the package of bills that Fern brought and that everyone should have received from Monica's mailing of July 26th, and they are -- as I had requested at the last meeting, I asked Fern to produce her proposals in a form that represented amendments to our existing statute or additions to our existing statute and she's done that. So I think it's generally in an effort to address delay.

Let me ask the members in the audience, were any of you able to see or were any of you aware of the proposal that Ms. Johnson put together prior to now? I know the members of the council of course would have received it on July 26th but I'm wondering if any members in the audience did.

MS. SIMONS: Is that different than issue eight in the packet?

CHAIRMAN DAUGAARD: Yes, it is, it's substantially

different.

MS. SIMONS: Then no.

MR. SHAW: No.

MR. LYONS: No.

MS. ROBERTS: Do you want us to go make copies and distribute them to the audience?

CHAIRMAN DAUGAARD: I hate to be deciding this on the fly without a chance for everyone to look at it and see it.

MS. ROBERTS: Mr. Chairman, maybe we could have her present them so everybody could hear and then wait till next time.

CHAIRMAN DAUGAARD: That's a good idea. Let's do that. Does every member of the council have this document that was attached to Monica's July 26th memorandum?

MR. LIEN: Yes.

CHAIRMAN DAUGAARD: Glenn does not. I wonder if we want to get copies to the audience so they can follow along. Monica, could you make extra copies?

MS. HARDING: I'll go make some copies.

CHAIRMAN DAUGAARD: Fern, do you want to come forward and review the package that you have presented in early July, on July 23rd? Take us through those. Let me just set the stage here. I see you have got them grouped into Roman numeral one, two, three, four, and can we take them one at a time or are they so interrelated that you really need to look at the

whole thing all at once? Would it work, let's say for example, if the council all agreed that the proposals under Roman numeral two should be proposed to the legislature but not one, three and four, would that be irrational? Do you understand my question?

MS. JOHNSON: Well, like I said earlier, starting with one, it starts with who this applies to, then it goes into the starting of the claims process.

CHAIRMAN DAUGAARD: That's Roman numeral two?

MS. JOHNSON: Correct, which is the insurer and the employer's responsibility.

CHAIRMAN DAUGAARD: Then Roman numeral three is? That's just a recitation of prohibited practices and penalties.

MS. JOHNSON: That would be where it starts in section one, section 62-7, statute 62-7, that's probably number three, Roman numeral three.

CHAIRMAN DAUGAARD: Then Roman numeral four specifically relates to medical benefits.

MS. JOHNSON: Correct.

CHAIRMAN DAUGAARD: I guess I'll ask my question again, could we adopt Roman numeral four and none of the rest? Would that make sense? Would that be possible and have the statute read or does one part require the other? If you are not able to answer that off the top of your head.

MS. JOHNSON: They require each other because the last

section, section four, talks about the medical and how that is included within the contents of this bill. You can't really have that unless the other three sections are complied with. It's consistent.

CHAIRMAN DAUGAARD: Why don't you go ahead and present each of the four sections or each of the four groupings and then we'll ask questions as you go.

MS. JOHNSON: Section one or volume one, whatever you want to call that, section one, it applies to 62-6 overall. Basically the first is the application, who it applies to. Section two, it contemplates what the purpose of it is. It's pretty common sense. We have included a definition, which is the adverse determination, which is on page two. Then it moves into integration into 62-6-3, which contemplates that adverse determination, whatever that determination is, it goes into 62-6-3, which is the requirement of the report and I know you have asked me this before, what that report is. The report is -- starts from the initial injury report that the employer fills out, if they have that, under 62-6-1. If they don't use that and they use the employee's first report of injury, which is basically under 62-6-2, and that gets filed with the Department of Labor.

CHAIRMAN DAUGAARD: I just notice under Roman numeral two, each of those sections says it amends 62-6-3, so do you

intend all these paragraphs to be inserted under that part of

62-6-3?

MS. JOHNSON: I do, unless it says amended. Now, the first one says section one, where it adds a new section, right under Roman numeral two, the new section would be purpose.

CHAIRMAN DAUGAARD: All these would fall under that specific statute, 62-6-3?

MS. JOHNSON: Correct.

MR. LIEN: Mr. Chairman, I had a quick question in light of the fact that the audience does not have this information that she's getting into the specifics. If it's okay with you, I had a couple general questions to ask her while Monica is making copies, we may be able to address some of those, if I may. In your cover letter to this, just a few clarifications from your perspective. You said that you submitted the following in A, B and C form is what I was looking at on your first page.

MS. JOHNSON: That refers to the other proposals, not my proposal.

MR. LIEN: So those are all to what is not in terms of the 62-6 and the one, two, three and four that we are going to be addressing right now, those were to everything else that we were going to address in addition to these?

MS. JOHNSON: Yeah, A, B and C has nothing to do with other than what is preceding up above where it said 62-1, which are those other proposals right here.

MR. LIEN: I'll reserve those questions for when they come up. I wanted to clarify that the cover letter was to this, but I wanted to clarify it was actually to the remainder

of the issues that we are going to discuss, so thank you, Mr. Chairman.

CHAIRMAN DAUGAARD: You can continue.

MS. JOHNSON: Okay, now, under section four, which is on page three -- let's move up above that. The new section is what we were talking about initially, which the Department of Labor essentially are doing the penalty, increasing the penalty. Am I wrong on that, where it address the $500 penalty? It's an increase.

MS. ROBERTS: I think you should present your proposal and then there's a different one on the table, too.

MS. JOHNSON: Okay. So then let's get into section four on page three where it goes into 62-6-3. This is an amendment and what it adds on the end here is there's an extension. Not all times does an employee or their attorney or representative know there's an extension being requested or that it's ever even granted. This is plain and simple they need to know it's being requested, because we are talking about delays. When an injured worker is injured, he's waiting to see what's going on with his claim. If there's an extension being requested, that pushes it out 50 days. This acknowledges and it gives him that notice or her that notice.

Section five, this gets into the adverse determination shall be sufficiently specific to convey clearly. This basically mirror ARISA guidelines under what an insurance company is to provide when they are denying a claim. A lot of injured workers that file confidential information to us, this is just a few of them, one of the biggest problems is they don't get specific denial, it's vague, there's nothing really that they can go by. On the other hand, there are some that

are specific. What this would cover is a consistent denial that's specific and it follows regular health care insurance guidelines. We don't have it in work comp, we need it in work comp.

There's nowhere for an employee to go to say, well, why are you denying my claim? You specify this in generic forms and then it gets into litigation and drug out for years. This is what we are trying to avoid, expedite that claim, get that done first before it gets to the Department of Labor and a petition is done. That's pretty much all taken care of before it even gets there. The courts are bogged down, the Department of Labor is bogged down with petitions and they drag on. In the meanwhile, delays. So that to me would clarify, get that out in the open and go on from there.

CHAIRMAN DAUGAARD: Fern, why don't you stand by while Monica is handing out those sheets. (Brief pause.) We are now -- Fern just finished describing what is intended by page

three, section five, which is near the bottom of page three, right?

MS. JOHNSON: Correct.

CHAIRMAN DAUGAARD: Please continue.

MS. JOHNSON: We are going to volume three, page three into four. Section one and two and three basically is the same integration of that claims process, that investigation that the insurance company or the employer, if they are self-insured, are going through. Like I said, these are nothing inconsistent than what other states are going through. This is very vague compared to Nebraska, Minnesota and Iowa of what they require of claims in a work comp arena. This follows with what I was just saying, the specifics, the investigation, their claims

practice, are they following the claims practice under ARISA. It needs to be integrated within the work comp system.

An injured worker that gets hurt, their claim should not be any less deficient than a person as an employee if you were to break your leg skiing. You want your claim processed in that month. You don't want to wait 60 days, three months, six years, you want it done. There's no reason why an employee should have to be diminished any less criteria than an average person is under regular health insurance plan.

So you get down into three. This is where the problem arises with delays, the prohibited conduct. You don't have -- this is consistent with ARISA, 30 days, we discussed this back

in May. Mr. Marsh talked about 30, I've got an extension of the 60, which basically covers that extension time period. That's 50, gives him another ten days. All of these are prohibited conduct that are all consistent with ARISA and you can take a look at it under ARISA guidelines under the basic general investigation of a claim and claim processing. It's all consistent here, it's consistent with Nebraska, it's consistent with Iowa and Minnesota.

Then you get into number ten on page five. $100,000 is steep. However, an injured worker, which was the second one that I had on the film here, was injured working for a construction company, had worked for them for years. I'll testify on his basis in a basic form because we can't show the film. He's in a wheelchair now, he can no longer make the $1500 a week he made before. He gets 300, and I question that because based upon his earnings, why he is not getting the maximum amount. That's something he can deal with the Department of Labor on on his own.

However, $100,000 is steep, it appears to be steep to some people, but when you lose your livelihood, you lose your family, you lose any means of medical support coming in to take care of you, he's in a motel, living in a motel, he has nobody that comes and takes him other than a Rapid Ride when he gives 24-hour notice. He's stuck there. $100,000, it would put him in a decent environment. No, work comp is not a welfare system

and it doesn't replace you back to your living standard before, but it certainly should not put you in a substandard environment either.

Then we get into section four on page six. This is a new section, the penalties. This is basically from Nebraska law. If you don't have some type of restrictions and some guidelines and regulatory control over recalcitrant employers and insurance companies -- I will have to say not all of them do this. There are a lot of them that do. Those are the ones that are ruining it for the rest of the insurance companies that are complying with statutory guidelines and doing what they are supposed to do. So with this 30 percent, if they are doing what they are supposed to be doing, they shouldn't have to worry about a 30 percent penalty.

Each of you will probably agree that the courts are bogged down with litigation. It is not beneficial to a plaintiff's attorney to have a case drag on for years. However, it is for the other side. It's the bleedout, you bleed them out, see if they will settle for ten cents on the dollar. That needs to stop. How can you stop it? Put a penalty, put a penalty on it. If they are doing what they are supposed to do, you don't need to worry about it. Like a speed limit down on the road, if you don't go by the speed limit, if

you don't have it posted, it's going to get abused. People are going to get killed, that's a given. So we need some

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guidelines in work comp, it's being abused.

Section four, bottom of page six, a new section, and this basically is the commencement of payment. A few of the workers complain they don't get their benefits, even though it is work-related. They are not getting paid. So when does that commencement of payment arrive? There's a question of when is it ascertainable? Well, when they don't deny it or when it's awarded, they should be given those benefits immediately, and not to deviate here, but you get into this 62-1-1, which I don't want to confuse you any further, but the Wise vs. Brooks case. A lot of times medical are not getting paid. The worker is either forced to pay for it on their own or their secondary insurance company pays for it or they don't get any medical. If there's no guidelines of when they have to commence that payment or if they drag it on, what is going to stop them from dragging it on? So this basically outlines common sense what is required.

Section two, this is guidelines according to ARISA, just like any other health care plan, 60 days. However, there is a problem and I understand that it is probably a problem with some medical providers on insurance companies that request medical information, medical records from providers and the providers aren't providing it on a timely manner. That happens, I won't say that it doesn't, it does. And there are statutes on guidelines of when they don't comply with that.

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However, the worker shouldn't have to suffer for that so this

basically is a guideline for everybody to follow.

Page eight, section three, there's a typo error in there. It says, "If the billing or portion thereof is contested, denied, or considered incomplete, the physician shall be notified in writing," there should be a period there. "Within 30 days after receipt of the billing by the employer."

CHAIRMAN DAUGAARD: Where does the period go?

MS. JOHNSON: After "in writing."

CHAIRMAN DAUGAARD: After the word "writing"? Then a new sentence begins, "that the billing," that's a new sentence? That wouldn't make sense.

MS. JOHNSON: That is not a period there. Take out "that the billing is contested," that's redundant, then you start in with "within 30 days," that's consistent with health care guidelines on processing of claims. If it's not done --

CHAIRMAN DAUGAARD: I'm still not clear. There's a period after the word "writing."

MS. JOHNSON: Cancel that. Retract that. Take that totally out.

CHAIRMAN DAUGAARD: Leave the comma after the word "writing"?

MS. JOHNSON: Correct.

CHAIRMAN DAUGAARD: Omit what wording?

MS. JOHNSON: Everything in between and start out with

"within 30 days." Take out "that the billing is contested, denied or considered," that's just redundant from what's above.

CHAIRMAN DAUGAARD: Leave the word "complete" or take the word "complete" out? Say the words that should be omitted.

MS. JOHNSON: "That the billing is contested, denied or considered complete."

CHAIRMAN DAUGAARD: Thank you.
MS. JOHNSON: The rest of it is pretty self-explanatory. Government entities are not covered under the health care service and I think that's pretty consistent with the Department of Labor medical fee schedules and some of the statutes anyway.
CHAIRMAN DAUGAARD: Questions. I have a question. I'll start with this Roman numeral four, I'm not quite following it. In section one you start out by saying as soon as possible, no later than 30 days, employer/insurer shall pay, then there's provisions later for requesting additional information. Then section two says payment shall be made within 60 days of each receipt. I'm not quite following why there's both. What am I missing?
MS. JOHNSON: That's if proceeding up above they deny it, they temporarily deny it because of whatever reason they have.
CHAIRMAN DAUGAARD: Where does it say that?
MS. JOHNSON: Up above, "the employer or insurer shall

pay the charge or any portion of the charge not denied," okay?
CHAIRMAN DAUGAARD: Under section two on page seven, are you with me?
MS. JOHNSON: Yes.
CHAIRMAN DAUGAARD: It says payment for medical treatment provided or authorized by the treating physician shall be made by the employer within 60 days after receipt of each separate billing. So in that section you are saying the insurer or the employer has 60 days to pay a billing, right?
MS. JOHNSON: Or contest it.
CHAIRMAN DAUGAARD: Above it says, this is in the same

section, 62-4, you are proposing to add a new section that says no later than 30 days the employer or insurer shall pay the charge. So I don't understand which one is applicable. If I'm an insurer and you submit a bill, do I have 30 days or 60 days?

MS. JOHNSON: Okay, starting up at the top, as soon as reasonably possible and no later than 30 days after receiving the first medical bill charge, they shall pay the charge or a portion of, unless they deny it. If they deny part of it, say they deny it all, they have 30 days, no later than 30 days to provide notification to the employee and the provider its reason for the denial, and that's spelled out under 62-6-3 under the preceding volumes.

CHAIRMAN DAUGAARD: Let's say I don't deny it, I'm not going to deny. I get a bill under section one, I have 30 days

to pay it, right? I'm not denying it. I have 30 days, but can I say under 60 -- or under section two it says I have 60 days. So I'm a good cash manager, good cash manager, I'm going to wait till 50 days after the receipt of the bill to pay it because I want to earn money on my money. So am I missing something? Isn't there a conflict between those two sections?

MS. JOHNSON: There probably is, I'll have to agree with that. Like I said, this is a rough draft. I guess when I drafted this, I contemplated the insurer requesting further medical. This can be made consistent and probably take out a lot of this language and put it up into the commencement of payment and I would draft that verbatim basically according to the ARISA guidelines to be consistent.

CHAIRMAN DAUGAARD: Any other questions by any of the committee members? Does any member of the audience wish to offer testimony in support of these proposals, further

proponents of these proposals? Now, in light of the fact that many of those who would be impacted by these have just seen them, I'm going to offer opportunity to testify now and also this afternoon, so you have got time to look at it now, but does anyone wish to offer testimony right now?

MR. SHAW: Are you taking opponents?

CHAIRMAN DAUGAARD: Opponents, yeah, let's go to opponents. I don't see any further proponents.

MR. SHAW: Mr. Chairman, Mike Shaw, representing the

Property Casualty Insurers Association of America. As I listened to Ms. Johnson go through this, I flipped back through the issues that have been set forth in the Web site of this council and it appeared to me that many of these were identical to those issues. There's a few new ones, there's a couple of changes, but most of them are identical. It also appeared to me that these are identical to what Ms. Johnson presented to this council last year and a lot of them are identical to the bill that was introduced before the South Dakota Legislature, the bills that were introduced in the Senate last year as well. So to say this is a rough draft or a work in progress, I don't know that that's actually fair.

Generally, the insurance industry opposes measures of such nature because we believe that they are very punitive against the employer and the insurer and that because of such of a punitive nature, that they don't actually benefit the employee either. Instead of making the system easier and more workable, it adds adversarial posturing, it adds conflict to the system, which we certainly don't need. There's enough of that already.

Then generally I question the necessity for a proposal

with such breadth and such change from the system. To me it suggests to you that the system is in fact broken, which we do not believe it is. You have heard from NCCI, you are charged with presenting a report to the Governor, to the legislature

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each year of the state of workers' compensation here in South Dakota, and I haven't seen one that says our system is broken. In fact, we have had a relatively strong workers' compensation market in South Dakota over the last few years with very limited increases in premiums.

Now, that's one side of it, certainly, but it's certainly a side that we have to pay attention to. We need a healthy market, we need companies in here and we need our employers to be able to make their workers' compensation premiums or else there's not going to be any money left to pay the workers.

These are all things I'm sure each and every one of you know but I feel compelled on behalf of my clients to put this on the record today. These kinds of measures have a chilling effect on work comp and the market and I would urge you to reject them in whole. I can probably go on for an hour with specific comments as to this legislation and despite my nature, I'm going to restrain myself and not do that today. I would be very happy to visit with any of you at any point in time to voice those concerns, but with that, we oppose this type of legislation. I would be happy to answer any questions if any of you have one about any specific section and I'll tell you what my specific objection is. Thank you, Mr. Chairman.

CHAIRMAN DAUGAARD: Any questions of Mr. Shaw, of Mike? Does anyone else wish to offer testimony at this time in

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opposition? Just a moment, Ms. Johnson. I'll give you a rebuttal opportunity.

MS. SIMONS: Sue Simons again on behalf of Dakota Truck Underwriters and I would simply echo that Dakota Truck Underwriters would support the statements that were made by Mr. Shaw, and like him, we could talk about each one ad nauseam, but just as a general objection, with the understanding that if it does proceed further, we could make specific objections this afternoon after having more opportunity to review it.

CHAIRMAN DAUGAARD: Thank you. Anyone else? All right, Ms. Johnson, you want to offer some rebuttal?

MS. JOHNSON: I have a short rebuttal. As far as an economic impact, the majority of the insurance industry does impact the state quite a lot. So do the workers. No workers, they are not going to come. These same insurance companies have policies in Nebraska, Iowa, Minnesota and other states. These same statutes that I'm proposing here are there, they are more drastic. Did they leave that state? No. Why should we in South Dakota take a less diminished value in workers' compensation deviating from the intent of what it was served for?

There's a compromise there, each of you all know that. The employee gives up something, the employer gives up something. The benefits are being diminished more and more every year. Why the six to seven cases that are being brought

to issue now to taking more benefits away, to contradict the intent of what that workers' compensation, that statute was there, all of them from 1939, 1997, all of them, take a look at all of them. These statutes have been on the books for years. Why now change them? If in fact the insurance industry are

doing what they are supposed to do, why should they have a problem with those statutes staying on the book and those seven Supreme Court cases being settled law now? That's all I have to say. Thank you.

CHAIRMAN DAUGAARD: Any questions of Fern?

MR. LIEN: Mr. Chair, I have one for you, Ms. Johnson. You reference on a couple occasions that a lot of these are in direct conflict with the intent of the Workers' Compensation Act. Just for the benefit of the council, what is your impression of what the intent of the Workers' Compensation Act is?

MS. JOHNSON: The intent of the Workers' Compensation Act really wasn't for the benefit of the employee. Each of you probably know, and I don't need to reiterate that, is that they took away the negligence. A worker, when they get hurt, they are displaced, their livelihood, their family life is seriously affected, so way back -- I'm not giving you a history lesson -- in the 1900s when the Work Comp Act came into existence, nationwide they did a compromise so the intent was, worker, you give up this, employer, you give up this, in the meantime you

are not being sued for negligence.

Work comp is a very low level of replacement for that livelihood. Under negligence law, you are looking at the same under accidental insurance or accidental, what is those amounts? You should know what those are. Look at the negligence cases. You can't do that under work comp. So when you talk about conflicting with the intent of the work comp, when you start deviating and diminishing the benefits that are already there, they have already been diminished over the years, you might as well repeal work comp, because the intent

is no longer there. It's contradictory.

MR. LIEN: Thanks.

CHAIRMAN DAUGAARD: Any further opponents?

MR. OWENS: Mr. Chairman, members of the group, David Owens, South Dakota Chamber. I'm going to do two sentences and they are going to be ruled out of order because it answers your question rather than the topic. Before we walk out of here with that as the history of work comp, I would also point out that a good number of injuries, particularly auto accidents, wouldn't get paid under a tort system because of a contributory negligence standard, so one of the questions that the employers gave up is we don't ask if you caused your own accident, we want to get you fixed. Whether those benefit levels are enough is a separate debate, but it was a fair tradeoff at the time.

CHAIRMAN DAUGAARD: Any questions of Mr. Owens? Thank

you. Well, I'm going to suspend, without objection, I'm going to suspend further action. We are about ten to noon and that will also give everyone the opportunity to further read the proposals that are offered here and then we will recommence this afternoon. I'll open it up for testimony, any further testimony that anybody wants to offer, and then without objection, I'll see if the committee wants to act on those proposals. Is that agreeable? All right, then we'll adjourn for lunch and the agenda is an hour, so let's try and get back here a little before one.

(Whereupon, the meeting was in recess at 11:50 a.m., and subsequently reconvened at 1:00 p.m., and the following proceedings were had and entered of record:)

CHAIRMAN DAUGAARD: Let's call the meeting to order. I'd like to return now, I think what we'll do is we are going

to deal with the delay issues. We'll first continue discussion and action on the proposal that Fern Johnson had provided to us and then we'll discuss the others, 10, 11 and 12, which are also similar, and in some ways also identified under Fern Johnson's proposals. Then after that then we will go back, do seven, one, two, four and five. Is that agreeable to everyone?

Okay, does anyone in the audience or -- yes, does anyone in the audience wish to offer testimony in support or opposition to the proposals from Fern Johnson? Anything further? All right, action by the committee. Is there a

motion?

MR. AYLWARD: I'll move that we recommend to the Governor that we would support this legislation before the next legislative session.

CHAIRMAN DAUGAARD: All four proposals?

MR. AYLWARD: Yes.

CHAIRMAN DAUGAARD: Is there a second?

MR. STAINBROOK: Second.

CHAIRMAN DAUGAARD: Discussion on that motion.

MR. AYLWARD: Mr. Chairman, I wish we would have had a chance to watch the video that Ms. Johnson had. Possibly there could be some way that maybe if she could leave it and we could duplicate it some way and send it to the members or put it in the record, I don't know if that's possible.

CHAIRMAN DAUGAARD: I would think that would be possible.

MR. AYLWARD: Most everyone has a computer now where they can watch it. I know it's very difficult for injured workers to get here, many of them don't have the means or the time. The ones that are back working just can't take off and

come. We hold these sessions during working hours and it's extremely difficult for them to even get the time off. If they could, most people have a time to afford to get here.

Chairman Daugaard pointed out that there may have been some problems with some of the wording on this, the 60 days, 30

days, and I think those things could be corrected and worked out, but I believe that Ms. Johnson has brought some legislation that maybe would help deal with some of the problems of delayed claims. Insurance companies, now there really is no penalty for delay and delay and I think maybe this would help.

CHAIRMAN DAUGAARD: Thank you, Paul. Further comments.

MS. HALVERSON: I have a question. Do we know the extent of the problem?

CHAIRMAN DAUGAARD: Does any member want to respond to that?

MR. BARBER: You mean the extent of situations you mean that are existing?

MS. HALVERSON: How many delay cases are there?

MR. BARBER: Maybe Ms. Johnson could answer that.

CHAIRMAN DAUGAARD: Do you want to take a stab at that?

MS. JOHNSON: I would rather use a different term. I had a stack here of just members that filled out forms that gave us input of what the majority of the complaints are and the majority of them are delays. I feel that that can be consistent with what the Department of Labor and the Division of Insurance probably keeps a record of because the Senate, back in the nineties, and I guess if you forgive the term, one

of the senators called it a blood bath on work comp during one of the committees. It was recommended that the Department of Labor or the Division of Insurance, and I can't say which department it was, to keep track of what is going on, complaints or what have you. So I would presume that those are recorded somewhere, you know, because the workers that contact us, they are filling out forms saying they are contacting these agencies. They fill out these confidential forms, they exist.

And just the two members that have testified, being willing to come, like Paul said, they can't come. I guess the records would speak for themselves. The testimony of workers just out on the west region, those two that have come forward, there's many others that will probably come forward if it gets to the legislature, they will probably do testimony. However, they are there, and I don't think we have to scramble. To answer your question, ma'am, in all due respect, the records with the Department of Labor and the Division of Insurance should reflect that. They are required to show that statistic back in the nineties.

MR. BARBER: Ms. Johnson, do we have any record of the medical professionals complaining about late payment, that there's people not getting paid? They pay the medical people, are we hearing that, too?

MS. JOHNSON: We are. When I visit with the workers, they talk about the medical providers, and I have visited with

about half a dozen of just medical providers in Rapid City. Work comp is a constant problem for the medical provider, the person that does the accounting. Whether it's part their fault

whether it's part on the insurance, I would say it's probably a little bit of both. They don't get the medical records to the insurance company and vice versa, but the majority of them are the delays from the insurance company getting payment to the medical provider. Now, I could do a statistical, just in the west region, of providers and have them fill out what they experience on work comp. I think you would be very overwhelmed. It's a problem with medical providers.

MR. BARBER: We haven't seen them here as far as complaining here from this point of view. But I thank you for your input.

CHAIRMAN DAUGAARD: Does the department -- do we have records that identify the nature of complaints when we receive them, are they categorized in some fashion? Is there some sort of tallying?

MR. MARSH: No. To give perspective on that, when the automation system was first created back in the early nineties, the object was to, in all honesty, create a competing data system for NCCI. The concern was NCCI was the sole place where you could get any kind of data about how many injuries there are and how much they cost, all that sort of thing. It was thought that if they created this system, we would have an

alternative way of looking at those things, which we do to a point. At least our data is more current than theirs. We do have some ability to see things that they don't see. But as far as being a repository for how many claims have been denied or how many times people have issues with the system, it just wasn't designed for that. We maintain records along those lines, but we don't statistically collate them.

MS. ROBERTS: We have a workers' compensation

investigator who handles phone calls, so she could give us an idea of what kinds of complaints she hears, and frankly, we are not hearing an overwhelming -- they are more case by case individual, not like the whole system is broken and these claims are not getting paid.

MS. JOHNSON: I could add if you want to look at some statistics and how you could correlate, maybe a minute or miniscule problem is the reports of injuries. From the year before to 2006, the reports of injuries, the fines almost doubled, so from 15,000 at $100 a pop, if it's the maximum fine at $100 a pop, they could be 40, I don't know what they do, but I estimate that the statute says $100, from the year prior to, that's 1500 workers. It almost doubled the year after that, that's 25,000, over 25,000, that's 2500.

CHAIRMAN DAUGAARD: Explain what you are saying. That if there's a fine levied or delay. . .

MS. JOHNSON: Of a report of injury. So if you look

beyond the report of injury, that's what starts the claim process. If that report of injury is not timely processed or if it even isn't processed, more likely than not that injured worker is not getting medical.

CHAIRMAN DAUGAARD: Your point is that you are calculating the dollar amount of fines levied has doubled; is that what you are saying?

MS. JOHNSON: Almost doubled, yes, the statistics would show that it's up.

MS. ROBERTS: She's taking that from our budget. We have performance indicators and it shows the number of claims that have been filed and the number of penalties, so if, for instance, a company is a day late, is late on getting their

first reports in, then we would fine them to come in. We have a mechanism in place if they aren't getting their reports in, we fine them.

MS. HALVERSON: That number is increasing?

MR. MARSH: Just from my own perspective, it's because our process of going through and evaluating them has changed. In 2006 we automated all first reports, they had to be sent in electronically instead of on paper, so we can go in and automatically detect which ones are over the limit. And in the past it was just if somebody called and complained, we looked at the file and said this looks like this is late so we fine it. We are getting more efficient, that's all.

MS. JOHNSON: You could also take the logical consensus that Department of Labor is not going to know about a report of injury until the worker calls them.

MR. MARSH: That's how things originally worked, that's true. At this point, however, because they are all required to process everything through us, we can do that a little more independently than we could in the past.

MS. HINDERAKER: Mr. Chairman, just a couple of comments in response to Ms. Johnson's work. I appreciate the fact that you have done a tremendous amount of work and take this very, very much to heart and you have made a number of comments and worked very hard I think to try to format this in a way that it fits the current statute.

I have some concerns with this in that it's quite sweeping. There are a number of issues in this packet and I want us to be careful. I can only speak from my own experience, but I want us to be careful when we say that medical payment is delayed automatically means that a claimant

didn't get medical treatment. My experience is just because the bill didn't get paid within 30 days, it doesn't mean that the claimant didn't see the doctor, wasn't treated, his broken leg wasn't cast or whatever the example is.

Likewise, if there's a request for a delay for investigation on the part of the insurer, it doesn't mean that the claim never gets handled, it simply may mean that the time

period is longer than 20 days or whatever. I certainly would acknowledge that there are instances in our state, I don't know about 2007, but certainly in the past where workers didn't get the treatment that they felt that they should get or in a timely manner. But my concern with this particular packet is that it's quite sweeping and I have a difficult time supporting something that deals with four issues all in one packet.

That being said, you can probably anticipate how I feel about this particular motion in front of us. I want you to know that I appreciate the work that you do and I appreciate the fact that you represent workers who in your opinion or in their experiences find it difficult to get workers' compensation coverage, but I have a hard time with an eight, nine-page packet being one motion and I want to go on record as saying thank you for your work and I'm not disregarding it, but I have a real hard time putting all these things into one motion.

MS. JOHNSON: If I may respond to enlighten her just slightly.

CHAIRMAN DAUGAARD: Go ahead.

MS. JOHNSON: You discuss about the medical, you find it hard pressed to believe that they are not getting medical. From my view of the work comp, when a workers' comp injured

worker goes into the doctor, my understanding is they have to have preauthorization or that doctor is not going to see them.

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Now, somebody can correct me if I'm wrong, but 99 percent of the time what I hear from the providers is they get a preauthorization from that work comp provider. If they don't have it, then that worker is told, you are responsible for this bill on your own unless you have secondary insurance. If you have secondary insurance, you are required, we are required to get a denial from the work comp carrier in writing, 62-1-1(3) requires that. That kicks in that secondary insurance carrier.

However, if there is no secondary insurance carrier, the worker has to provide the medical on their own. One, they are already out of a job. Two, they are physically unable to work. Three, they are mentally and physically hurting. They are not going to go to a doctor because they don't have the money to pay for it. So to enlighten you on they are not getting medical, they are not getting medical under several of those circumstances. So it all interplays. So I hope you don't have a narrow view of looking at it as just -- and I appreciate your comment, I appreciate your intuitive, but that's not happening. This may be a sweeping move, but it's a good move. It regulates, it keeps things flowing so we don't run into a problem that the rest of the states are running into. They are already looking at repealing work comp, we don't need to do that here, or do we?

CHAIRMAN DAUGAARD: Further discussion on the motion?

MS. ROBERTS: Is this committee discussion now, Mr.

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Chairman?

CHAIRMAN DAUGAARD: We will permit questions if

committee members have them. Any further discussion on the motion? I'll offer some discussion. Again, I think the comments that Carol made I would agree. In my first comments about this before we began, I asked if this could be separated and these can be separated into different proposals. They don't all need to be packaged as one. So I don't think that was accurate.

I also think that there are significant errors in the drafting. I think it's noteworthy that we had pretty significant discussion over adding a couple sentences earlier today and to recommend that the Governor support a set of bills that has page after page of change, which a cursory review reveals to have conflict within them, I think is not responsible of us.

Again, I don't question the motivation for bringing this. I do think it's somewhat sweeping. I do think the list of penalties are more severe than any testimony has shown is necessary, in my opinion. That's not to say that I am ignorant, that I may not be ignorant of what may be necessary, I may be, but I'm certainly not informed enough at this stage to support this. So I will oppose the motion. Further discussion. I'll call the vote. Sarah.

MS. TREBESCH: Paul.

MR. AYLWARD: I'm sorry, we are voting on?

CHAIRMAN DAUGAARD: We are voting on your motion to support the package.

MR. AYLWARD: Yes.

MS. TREBESCH: Randy.

MR. STAINBROOK: Yes.

MS. TREBESCH: Carol.

MS. HINDERAKER: No.
MS. TREBESCH: Connie.
MS. HALVERSON: No.
MS. TREBESCH: Jeff.
MR. HAASE: No.
MS. TREBESCH: Chris.
MR. LIEN: No.
MS. TREBESCH: Glenn.
MR. BARBER: No.
MS. TREBESCH: Dennis.
CHAIRMAN DAUGAARD: No. All right, the next issue on the agenda we are going to take up is issue ten. It addresses the penalty for failure to provide medical reports and I don't believe that's also covered under the Department of Labor, or is it?
MR. MARSH: Mr. Chair, I received a phone call from Mr. Mores with Farmers Insurance, I guess I thought it would have been communicated, but apparently not. He's withdrawing

that proposal. We can take it off the table, so that's an issue they consider not worth considering.
CHAIRMAN DAUGAARD: All right.
MR. AYLWARD: This is number ten?
CHAIRMAN DAUGAARD: Number ten. I do think there is some -- that would stand alone. Let's take up now issue 12. Just again I think that issue number 11 in your package was inadvertently labeled as Fern Johnson's proposal. That was not correct. In fact, if you look at issue 12, part three, which is the second to the last page near the bottom, issue 12, part three, if you can find that, everybody got that, and you compare that language to issue 11, you will see it's identical.

So issue 11 is part of issue 12. Everybody follow that? So this is a proposal from the department, so James, you want to offer the background and proponent testimony?

MR. MARSH: Yes. When the package of proposals came up before the legislature last January, there was an issue that came up, and it's been discussed a little bit today, in terms of late reporting and how they felt as if there were potential issues in terms of delaying medical treatment and not filling out reports on time, first report, the incident report, that sort of thing.

And this is our effort to try to address some of those issues. It's a pretty straightforward thing. Part one simply increases the fine for failing to fill out a report on the part

of an employer, on the actual injury reporting, from $100 to $500. Part two relates to the behavior of insurance companies who do not fill out or do not then forward the injury report they receive to us, do not follow up on an investigation of the claim in a timely way. The fine would increase from $100 to $500.

Part three is an effort for us to try to address the medical issue in particular and in the first part of that section again we are referring to the employer, that's a generic thing as far as the law is concerned, so it can be an employer or insurance company, self-insured, and it calls upon them to take a medical bill and act upon it when it's been properly submitted. If they are satisfied that what they need to know about the bill has been given to them in terms of reports and records, that they should either pay it, deny it or ask for more information. Again, it's an attempt to address some of the issues that were presented in the last legislative

session and some of the things that have been presented here.

CHAIRMAN DAUGAARD: Does any member want to sever that into three sections or are you satisfied to deal with it all together? Any member want to sever it or are we okay dealing with it? Anybody have any questions of James about those explanations? I notice on the first page of the issue 12, the simple change about two-thirds of the way from the bottom, the word "one" is crossed out and the word "five" is inserted, so

it changes from 100 to 500, everybody see that? Then in part two on the second page, about in the middle of the page, again the word "one" is crossed out and the word "five" is inserted, raising $100 to $500. That's against the insurer who fails to promptly forward the claim, right?

MR. MARSH: Yep.

CHAIRMAN DAUGAARD: Part three is all new language, the whole part three is brand new wording. I see the language -- the sentence at the end of part three gives the department authority to promulgate rules, so questions about what's prompt or what's a reasonable request for additional information, you could define that further by regulation. Any questions of James about those three proposals under issue 12? Any member want to offer testimony or ask a question?

MR. DEGREEF: I have a question. Phil DeGreef. In the center of that page where you mention employer, are you looking at employer and insurer as the same one person where the fine will go against the insurer or are you planning to fine the employer as well?

MR. MARSH: If the employer is self-insured, it would be a fine for them. Where it's their insured, it would go against the insurance company, if you are talking about part

two.

MR. DEGREEF: To further that question, then, if the employer fails to file the claim with the insurer, is there any

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penalty against him?

MR. MARSH: That's the section one, part one, where it talks about increasing the fine from $100 as it is now to $500.

MR. DEGREEF: The employer, not the insured, the employer could be fined under this provision as well; is that correct?

MR. MARSH: If they are self-insured.

MR. DEGREEF: What if they are not self-insured?

MR. MARSH: No.

MR. DEGREEF: In other words, if they fail to file the claim with the insurer, they are scot free, but the insurer is going to be subject to a $500 penalty?

MR. MARSH: If the -- the employer has a separate duty from what the insurance carrier has. The employer reports their first report to the insurance company, the insurance company reports it to us. And the insurer has a duty to investigate it. So they are two discrete acts, have no relationship to each other, other than it's the same injury report of course. So in the case of the employer, they can be fined if they don't get that report in to the insurance carrier in a timely way.

CHAIRMAN DAUGAARD: That's in part one.

MR. MARSH: Right. If they happen to be self-insured and they turn around and don't get the report in to us, we would fine them as a separate act for that. If we are talking

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about an insurance company, they have no duty to do anything until they get that injury report on their desk. So at that point if they delay unduly, then the second section, part two would kick in and they would be fined for not getting the report in to us.

CHAIRMAN DAUGAARD: The first sentence says within ten days after receipt, right? That's the key.

MR. DEGREEF: I understand that part of it. My question was whether or not an employer who is insured, if he is going to be subject to the fine under this provision. In other words, he's off scot free?

MR. KINSMAN: No, you are confusing the question.

MR. MARSH: If you are saying they have no responsibility for the insurance company not getting the report to us, I guess technically that's true.

MR. DEGREEF: That's my point.

MS. ROBERTS: If I could clarify, it's the existing statute, the only thing that's changed in both of those sections is the amount, so nothing really changes except for the amount.

MR. HAGG: Mr. Chairman, just a question on part three, then. Is there any penalty provision for that that's read in anywhere else in the statute, or the question is so what if they don't do it? That's just a question.

MR. MARSH: There isn't any, as you noted, there isn't

any penalty specified. I guess we could take direction from the council in terms of whether something should be added or whether in the rules process itself a specific penalty provision would be included.

MR. KLAAHSEN: Just one point that I'd like to, Mr.

Chairman, get a clarification on also. I think we were fined a few times because we filed the reports electronically but the department couldn't -- there was something wrong or whatever, they were rejected, and for whatever reason, we didn't get the notification back and they weren't fixed and therefore they were late and we got fined. Well, we attempted to do it in a timely manner and for whatever reason, it didn't work. And if you had a failure of some kind of technology, it could end up to be, if you do a fair amount of business, a lot of dollars worth of fines at $500 a pop.

MS. ROBERTS: To answer, if that was the case, we do not have to implement a fine and we would not if that could be proven.

CHAIRMAN DAUGAARD: It seems to me that's something that's going to happen very infrequently and once it's corrected, it's corrected. But I hear what you are saying. It's a bad feeling when you try to in good faith file.

MR. BARBER: If you file it with response required, then you would know if they received it.

MR. KLAAHSEN: I'm not the technology person so I

don't know exactly how this all works, all I know is maybe we can get a refund, then, huh?

CHAIRMAN DAUGAARD: Let's get back to the question Rex raised, which was under part three, there is no penalty and the question is, should we add a penalty?

MS. SIMONS: Sue Simons again and I'll ask James because I didn't bring the statute book. Isn't there already in existence a penalty that says if you delay payment of any benefit, that they can impose a ten percent penalty? It would seem to me if you have the statute that now says you have 30

days or whatever it is to pay a medical bill and you don't fall within one of the exceptions, that that penalty provision that already exists should cover and respond to Hagg's concern about not having a penalty if you don't apply.

MR. MARSH: Two points on that. First of all, the penalty provision you are talking about is 62-4-10(1) and it only refers to disability benefits, not medicals, which has always been kind of a problem. Second, the court cases that interpret 62-4-10(1) say we can only impose that penalty if there's an actual wrongdoing or reckless conduct on the part of the carrier, which basically is much different than what we do in awarding attorneys fees or something extreme like that. So it's a little like hitting a thumbtack with a sledgehammer, so this is somewhat different, it doesn't require that level.

MS. SIMONS: It allows an employer not to pay a

medical bill if they dispute that it is related?

MR. MARSH: Absolutely.

MS. SIMONS: The cases have said if there's a legitimate dispute, then the penalty doesn't apply.

MR. MARSH: Right.

MS. SIMONS: If I could make another comment while I'm up here, I think that when we use -- use of the term "a properly submitted bill," if you look forward, probably could lead to questions as to what that entails and I think it might be a better time to address that in the text of the statute to say a properly submitted bill, because as the process works, I might get a bill long before I get a medical record and it says I saw the doctor for X and you don't know when you get that bill if X was a fall down the stairs that might have occurred after an injury, therefore, calling the compensability of the

bill into question, and I would think that a properly submitted bill would be receipt of the invoice and the corresponding medical record, that's the time that you would have a properly submitted bill to trigger your 30 days, and I would suggest that in order to avoid maybe litigation over what that really means, it would be an opportune time to define that simply as that, that it's receipt of the itemized statement and the corresponding medical record describing the services provided constitutes a properly submitted bill.

MR. MARSH: Do you want me to address that?

CHAIRMAN DAUGAARD: I think that makes sense.

MR. MARSH: To let you know the reason why I chose to do it through the rule process instead of through law is because in the work comp system, we have frequent contacts with providers who are going to be on the front end of this through the fee schedule and through the managed care system we have. And we found that it's easier to make what I would call procedural fixes to things through the rule process instead of through law because we only do that once a year. People in the legislature are not necessarily up to speed on what a HIPAA 1500 should be. It's just more efficient and more responsive to the people who are the end users of this thing if we do it through the rules process, but that was the reason I chose to do it this way.

MS. SIMONS: Then I would suggest it be a rule.

MR. MARSH: That's the point.

CHAIRMAN DAUGAARD: Thank you for that dialogue.

MR. KINSMAN: In the spirit of the rules review committee, when I look at this bill and your comment that you would maybe look at if that's necessary or take direction from

the commission as to whether there should be a fine under part three, when I look at your language that you will promulgate rules under 1-26 to implement this section, you may have some problems with implementing any kind of a penalty by rule if you don't provide for that authority in the bill.

CHAIRMAN DAUGAARD: I wonder if we could simply put --

MS. ROBERTS: If we are going to do a penalty, we should do it by statute.

CHAIRMAN DAUGAARD: I wonder if we couldn't simply put in something very comparable to that which is in part two right above it, just say an employer --

MS. ROBERTS: That wording.

CHAIRMAN DAUGAARD: Yeah, maybe use that literal sentence, with the five instead of the one.

MR. SHAW: Mr. Chairman, Mike Shaw, Property Casualty Insurers. At the beginning of this meeting when we were hoping issue 12 was not controversial, I indicated I had a few comments.

CHAIRMAN DAUGAARD: Thank you for reminding me.

MR. SHAW: Thank you for visiting. I appreciate that. First off, I want to address the penalty part before I forget. I'm concerned about that because there's a lot of laws that are on the books in title 62 that require employers and employees to do certain things that don't have penalties. Now, should we go back and put a penalty on every single one of them? I don't think so.

A lot of this -- I recognize that sometimes there's people that don't do things properly, okay, many times it's because of mistake or maybe just careless neglect. Where it comes to be a problem is it's repeated time after time after

time. Don't put penalties on things simply because people make mistakes, all right. That would be my advice to you on this. I would think long and hard about that before you do it. I would think more in terms of if you need to have penalties, make sure that there is some sort of course of action on behalf of a company that refuses to do this for really bad reasons. In that instance they should be punished and they should be punished severely, but penalizing those that make a mistake one time because they hired somebody new that didn't know the process I think is inappropriate.

Now, those comments also go I think to increasing the penalties from $100 to $500 in the first two sections of this bill. My companies are concerned about that because they think they do things right most of the time, all right, and they don't think that if they make a mistake, that they should be overly penalized as a result of that. So they oppose the increase from $100 to $500.

And again, as I think about this and think about, well, if there's a course of action that you can show that this one company does this time and time again, right now in the law there is already a very severe penalty that you can apply and it's in part two of issue 12 and it says the director of the Division of Insurance or the Secretary of Labor, if they are self-insured, can take their license to do business in South Dakota. Now, that's a very severe penalty and I question, in

fact I'm sure that it's never been attempted to be done before, but if you brought an action against a company to revoke their certificate of authority to transact the business of insurance in South Dakota, you are going to get their attention real

quick.

Now, if that doesn't work for whatever reason, then I would suggest to you that maybe you should fix that so it does work, or even implement a scaled fine, the first time it happens, it's 100 bucks, but if it happens repeatedly, it goes up, rather than just across the board throw everyone in the same boat. Those are my comments regarding that.

As far as part three, the medical bill payments, my companies don't oppose that, they think that's reasonable, when a bill is submitted, it ought to be paid. They are a little worried about 30 days, they just think 45 would be better, and I've heard ARISA is 30 days. Well, in my experience, all ARISA has done overall for this country is cost us a lot of money. Following everything because it's ARISA to me is not a valid argument. I would be happy to try to answer any questions.

CHAIRMAN DAUGAARD: Any questions?

MS. HINDERAKER: Does the department have a comment about some kind of a progressive fine as opposed to five times the current one?

MR. MARSH: We haven't looked at it. That doesn't mean we can't.

MS. HINDERAKER: But we can track that information efficiently and find out if an employer and insurer is a repeat offender?

MR. MARSH: Certainly.

CHAIRMAN DAUGAARD: How long ago was the $100 fine amount established?

MR. MARSH: Boy, long enough ago that I don't remember. It's been a long time.

MR. SHAW: Mr. Chairman, one more thing, I would point

out that it's also a class two misdemeanor under law right now to do this and, James, has the department ever turned this over to the states attorney's office to prosecute somebody that's a repeat offender?

MR. MARSH: No.

MR. SHAW: And maybe it's unworkable, but maybe we ought to use the tools we have already before we implement new penalties. Not that my clients want to be arrested for this, but if they are repeat offenders.

MR. AYLWARD: Mr. Chairman, is this the proper time, can I ask a question, too?

CHAIRMAN DAUGAARD: We are not too rigid here.

MR. AYLWARD: In the materials that Monica sent us, there was an e-mail from Cheryl Chamberlain and it had a bill attached and I don't think she's here, but does this deal with this subject and is this something -- it was in the packet of

materials I got from Monica. She sends an actual bill that she has and it looks to me like it's three months old rather than 30 days.

CHAIRMAN DAUGAARD: It probably does bear upon this issue.

MR. AYLWARD: I don't know either whether the fines are correct or what, but I think I'd like to apply Mr. Shaw's thinking to everything and when I'm speeding, it was just a mistake and I don't get fined because I just made a mistake, and maybe if I sped the second time, there would be a little fine, and the third time the fine might be a little more.

CHAIRMAN DAUGAARD: I like that.

MR. SHAW: I like that, too. Once again, we are together on something.

MR. AYLWARD: That's kind of scary, isn't it, Mike?
MR. SHAW: It is, what's happening?
MR. LIEN: Just as maybe a point of clarification, because I read that letter as well, Paul. I had some confusion to it and maybe it can get cleared up, but she says in her letter that all of the laws and regulations were followed. So to me what I was curious about is I understood her argument to be is if everybody does everything proper, there is still four months before I got paid for this, not that they delayed the process of getting all the claims filed. So I had the same question in my mind as you did with yours as to specifically

what she was addressing.
MR. AYLWARD: I wasn't sure about that either, Chris, whether she's implying that this happens all the time or if that's typical.
CHAIRMAN DAUGAARD: James, can I ask the question, is there any standard under statute today that defines at least with some beginning point what's reasonable in terms of speed in which a bill, a medical bill is paid?
MR. MARSH: No. Not in statute.
CHAIRMAN DAUGAARD: So this would set up the 30 days is the rule and that they would be subject to a fine unless the company or employer had good cause for noncompliance, which every instance where there's a fine, there is that in part one, yeah, there's wiggle room, "unless the employer had good cause for failing to file the written report within the seven-day period." That's part one. Part two, "unless the company or employer had good cause for noncompliance," that's part two, and if we imported that same language into part three, there would be this wiggle room so that there wouldn't necessarily be

an automatic fine. But it seems to me if Ms. Chamberlain's point is there is no standard really, what's reasonable is whatever to whatever a person might say is reasonable. I as an employer might feel like 60 days is pretty quick, I as a medical provider might think, well, 30 days should be the standard. Different people are different.

MR. AYLWARD: Someone made the comment today that if I'm a good money manager, I'll take whatever the maximum is.

CHAIRMAN DAUGAARD: Yeah.

MR. AYLWARD: Again, I don't know whether 30 days is too much. All of us get at least 30 days on our credit cards or whatever bills we have is usually a 30-day, so I don't know if that's too short, but if the bills aren't disputed, they should be paid and I don't think we want to put unreasonable burdens on people, but I don't see that as unreasonable and you should have some type of a penalty or people are just going to say, I'm not going to pay it until they make me pay.

CHAIRMAN DAUGAARD: Any further comments from the audience, any further testimony pro or con?

MS. SIMONS: Could I ask James for a clarification? Again Sue Simons. Let's just say, I'm assuming this will fall under C, but I want to make sure it's understood, that we get a bill and we get the medical records and we want to have an independent medical person review that bill to determine excessiveness, medical necessity or is it compensable. So long as we make that request within 30 days of receipt of that information, that will be compliance with the statute, because we may not hear from that independent medical doctor for 60 to 90 days. So to comply with this statute, what the employer would have to show is I received whatever you define eventually

as a fully submitted invoice on July 31st, on August 5th I

requested an independent medical review, then I will have complied with this statute?

MR. MARSH: In my view, yes.

CHAIRMAN DAUGAARD: Any further testimony or questions? Let's close now for committee action, unless the committee has a question that arises as we discuss it. Is there any motion or proposals from any committee member?

MR. AYLWARD: Mr. Chairman, I would make a motion that we put in part three that we put the same language for the penalty of the $500 penalty, that same language, the sentence that says the company or employer who fails.

CHAIRMAN DAUGAARD: The last sentence of part two?

MR. AYLWARD: Yes.

CHAIRMAN DAUGAARD: I guess that's not a motion. Yeah, let's make that a motion. Is there a second?

MS. HALVERSON: Second.

CHAIRMAN DAUGAARD: Any discussion on that amendment?

MR. BARBER: Did you say it? She did.

CHAIRMAN DAUGAARD: Connie seconded. Sarah, did you get that? Any discussion on that amendment, anybody disagree with importing the penalty language?

MR. LIEN: Mr. Chairman, I don't disagree with Paul, but I was going to make a suggestion that we give the Department of Labor some direction to redraft this language, because I think we have a consensus across the breadth of

competing views here that some form of tiered structure of penalty for first, second, third time offenders is agreeable to

all, but we do not have it in this legislation in its present form. I'm not disagreeing with the $500, but if it's going to be a tiered process recommended in the first two sections, it just as well be in the third section that Paul is referring to as well.

CHAIRMAN DAUGAARD: I think the way to address that is treat that as a substitute motion, that instead of inserting this language, that some tiered language be inserted.

MR. LIEN: I offer that as a substitute motion.

CHAIRMAN DAUGAARD: Is there a second?

MR. BARBER: I second then.

CHAIRMAN DAUGAARD: Discussion on that. Paul, do you want to offer thoughts on that?

MR. BARBER: It's sort of like the warning ticket I would say.

MR. AYLWARD: I guess are you suggesting, Chris, that that be put in all three sections?

MR. LIEN: Yes.

MS. ROBERTS: From an administrator's perspective, I'm concerned about administering a tiered system. Is it like the first time a company makes a mistake, they get a tiered of 100 and then the second time 500 or is it per employee? If it's a big company, they will have probably one immediately and then

go into the tiered. I guess when the bill was drafted, it took that 100, which had not been changed for a while, moved it to 500 and left it at 500 for every pop, and I guess I personally think that that, not having a tiered system, would be a lot easier administratively.

MR. LIEN: In response to that, Madam Secretary, my proposed substitute motion is to give the Department of Labor

direction to draft that to where it could be manageable and if it's not, to address that at that time. So I wasn't saying we needed to implement that, I'm just giving direction to the Department of Labor to see if they can draft language that would be reasonable in its form.

MS. ROBERTS: Thank you. That's doable.

MR. AYLWARD: Well, I think Paul pointed out a good point to me. If we import the same language that's in the others, I think that addresses some of the concerns. It says "unless the company or employer had good cause for noncompliance," so if it's a mistake and they have good cause, they are not going to get the $500 fine. I don't know that we need a tiered -- if it's just a mistake, it's a mistake.

CHAIRMAN DAUGAARD: Further discussion on that.

MS. HINDERAKER: I have a question. Anybody who can answer, I honestly don't know the answer to this. If the insurer does not meet these requirements and gets a $100 fine or a $500 fine, I assume that's passed along to the client.

MR. SHAW: I guess you have to ask Mike in terms of NCCI rating. Ultimately perhaps they would pass them down to rate it up, if that makes sense. Excuse me, in the back of the room there was a comment made that I thought perhaps you might want to hear. That is maybe this could be easily addressed by saying a fine of up to $500. That would allow the department discretion in the amount of the fine. Now, oftentimes when I say that to my clients, they are concerned, but you guys are very reasonable, level headed and fair regulators, but who knows what happens when the next Governor comes and there's other people there. But that is one other suggestion that perhaps the department could consider if they are going to look

at this further.

CHAIRMAN DAUGAARD: Any comment or discussion on that thought? Anyone?

MR. LIEN: Mr. Chairman, not to muddle the waters, or muddy the waters. My intent was I think we had a consensus on the tier, I'm not looking for consensus, just direction for the Department of Labor to see what would be reasonable. I can remove my substitute motion to give them the direction to draft something that they think would be reasonable, whether it be up to $500 or some tiered process or some reasonable process that they think in their discretion, so it's not limited just to a tiered fine structure.

CHAIRMAN DAUGAARD: Well, why don't we take that as

the motion, the motion being that the department come up with a proposal for the fine language, whether it be tiered or up to or as is and come back with their thinking on it.

MR. BARBER: That's the new substitute motion.

CHAIRMAN DAUGAARD: Yeah.

MR. BARBER: I would second that.

CHAIRMAN DAUGAARD: Any further discussion on that? I think we still need to come to the part three issue again because that's new language, but let's vote on whether or not that's agreeable to everyone, the question being on the fine language, rather than simply increasing it to $500, rather giving it back to the department to come back to the next meeting with some rationale for something short of the simple change of one to five.

MS. HALVERSON: Or it could be the five, they could decide that it's just the five.

CHAIRMAN DAUGAARD: It could be to come back and say,

you know, we like it as we gave it to you. Or they could come back and say, well, we have got this tiered system, or they could come back and say we want to make it up to or they come up with some other permutation. Let's vote on that. Sarah.

MS. TREBESCH: Paul.

MR. AYLWARD: No.

MS. TREBESCH: Randy.

MR. STAINBROOK: No.

MS. TREBESCH: Carol.

MS. HINDERAKER: Yes.

MS. TREBESCH: Connie.

MS. HALVERSON: No.

MS. TREBESCH: Jeff.

MR. HAASE: Yes.

MS. TREBESCH: Chris.

MR. LIEN: Yes.

MS. TREBESCH: Glenn.

MR. BARBER: Yes.

MS. TREBESCH: Dennis.

CHAIRMAN DAUGAARD: No. All right, so we are back to the proposal that Paul had suggested and that was to import the language.

MR. AYLWARD: I guess I would include in that all of the language that also says "unless the company or employer had good cause for noncompliance."

CHAIRMAN DAUGAARD: That entire sentence of part two would be added to the bottom of part three.

MR. AYLWARD: Correct.

CHAIRMAN DAUGAARD: Was there a second? There was, Randy, you seconded that? Connie seconded that. Discussion on

that motion.

MS. HINDERAKER: Will you repeat it?

CHAIRMAN DAUGAARD: The motion is to take the last

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sentence of part two and replicate it at the end of part three. So it would be the same language, including the "five" versus the "one." That last sentence, it's in the middle of the page there of part two. Do you see that, Connie? Take that language and duplicate it as creating a penalty under part three just as there is under part two, exactly as it's worded there. Discussion on that motion.

MR. STAINBROOK: Mr. Chair, I think I agree with Pam. I sit on several different committees where we have fines when rules aren't followed and payments aren't made and we have tried putting in tiered systems where somebody has to be subjective and look at things and decide, well, what does this person get, does this person gets 200, how bad is it, how bad did they make a mistake or mess up. And I think it's just easier if you say, look, here is what the fine is going to be, now, if it's a mistake, we'll alleviate the $500 fine, you show us good proof, it's gone.

I think it will be much easier to regulate and nobody has to be subjective as to how much that fine is going to be. If you simply say, here is the fine, if you can't prove that it's unwarranted, you are going to pay it and move on. So I would support just the language here is the fine, let's go.

CHAIRMAN DAUGAARD: Further discussion. Seeing none, let's vote. Sarah.

MS. TREBESCH: Paul.

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MR. AYLWARD: Yes.

MS. TREBESCH: Randy.
MR. STAINBROOK: Yes.
MS. TREBESCH: Carol.
MS. HINDERAKER: Yes. I agree there should be a fine.
MS. TREBESCH: Connie.
MS. HALVERSON: Yes.
MS. TREBESCH: Jeff.
MR. HAASE: Yes.
MS. TREBESCH: Chris.
MR. LIEN: Yes.
MS. TREBESCH: Glenn.
MR. BARBER: Yes.
MS. TREBESCH: Dennis.
CHAIRMAN DAUGAARD: Yes. Now, all we have done now is amend part three. Now the question is do we want to recommend this entire issue 12 proposal? Is there a motion?
MR. BARBER: So moved.
CHAIRMAN DAUGAARD: Glenn moves forward.
MR. STAINBROOK: Second.
CHAIRMAN DAUGAARD: Second by Randy. Further discussion.
MS. TREBESCH: Paul.
MR. AYLWARD: Yes.
MS. TREBESCH: Randy.

MR. STAINBROOK: Yes.
MS. TREBESCH: Carol.
MS. HINKERAKER: As is, huh?
CHAIRMAN DAUGAARD: As is.
MS. HINKERAKER: No.
MS. TREBESCH: Connie.

MS. HALVERSON: Yes.
MS. TREBESCH: Jeff.
MR. HAASE: Yes.
MS. TREBESCH: Chris.
MR. LIEN: No.
MS. TREBESCH: Glenn.
MR. BARBER: Yes.
MS. TREBESCH: Dennis.
CHAIRMAN DAUGAARD: Yes. All right. Now let's go back up to issue seven. James, will you refresh our memory about the Scheid case, what happened in that case and what the proposal is for?
MR. MARSH: Just to go back to that, Mr. Scheid was a mechanic for Capital Motors here in town, had an accident in which a tire blew up and his hands were injured to the point where he could no longer perform his work as a mechanic. For a period of time there was a question about whether he would be offered any kind of alternative position with Capital Motors at all. For about a year or so was unemployed. At some point

they offered him a position as a service writer for the company, where he could essentially look at the cars and say, this is what's wrong with it, we need to fix it, without having to do any kind of manual labor he had done in the past.
The problem was that the pay for that particular job, even though it was full-time, 40 hours a week, I believe at $9 an hour, was slightly less than what he was already receiving in weekly disability benefits from his insurance company. The issue was presented whether or not he was totally disabled and entitled to lifetime benefit with inflation adjustments based on the fact there was a difference between his preinjury, his

comp rate and the earnings he received in his proposed job.

The Supreme Court looked at the plain language of the law at 62-4-52(2) and said that for it to be suitable work, this person had to receive a wage which was -- which at least equaled what his comp rate was. That law had been on the books for many years, but the result of it I don't think was necessarily quite so apparent to people, because they looked at it, looked at somebody who is regular labor market job working 40 hours a week earning a suitable living but because it was a difference between that and his comp rate, he was now going to receive his comp rate and what he would receive 40 hours a week in his job, which between the two, his earnings would be substantially more than he ever earned as a mechanic.

This proposal, to try to correct that, is not an

effort to declare that a person like Mr. Scheid is not totally disabled, that's not the goal. Because he's still going to receive weekly benefits for the rest of his life and that benefit rate is going to be reflective of the fact he receives inflation adjustments every year. What it attempts to do is to say if this person is out there working a full-time job, that the earnings or a suitable job, that the earnings from that should be used to offset against his benefit rate so that he doesn't receive what appears to be a very clear double dip.

The formula that's proposed was one that was introduced in the legislature a couple years ago, went through the council, went through the legislature, the legislature said, we don't want to look at this because it didn't go through the council. We went through the council and the council at that point really didn't feel like they had enough information, as I recall, to be able to make a concrete

recommendation on it. But again the insurance industry has brought the issue back and our position was that it should be revisited.

The formula is the same as it was in the previous legislative proposal, which would be to take two-thirds of their earnings from the post injury job and to offset them on a weekly basis against whatever comp rate this person receives. So to give simple numbers, in Mr. Scheid's case I believe his comp rate was somewhere around $370 a week. If he's out there

earning 40, working 40 hours a week at $9 an hour for an earnings rate of $360 a week, you would take two-thirds of that 360, come up with $240 and you would offset that $240 from his comp rate, so he would reduce his comp rate from $370 he starts with down to $130, but his $130 in benefits plus his $240 or rather his $360 on the job is actually more than what he was receiving in comp benefits, but it is an offset to some degree of what he would have received in a true benefits plus earnings type situation.

CHAIRMAN DAUGAARD: All right, I think that brings us up to speed. I will take that as your testimony as a proponent of this language.

MR. MARSH: We are pitching this and the American Insurance Association, as I understand it, has also weighed in on it through letters, but that is our position.

CHAIRMAN DAUGAARD: Does any committee member have any questions of Mr. Marsh before we take any further proponents? Any questions of James?

MS. HINDERAKER: Is there any significance to your statement full-time employment?

MR. MARSH: No. Under the language as drafted, it

talks about obtaining other employment at a lower wage, so it -- or what the employee is capable of earning, so it could be part-time work, not just anything.

CHAIRMAN DAUGAARD: Any further questions of James?

Okay, further proponents of this issue seven language? Any further proponents?

MS. SIMONS: Me again, Sue Simons. I think there's always been some concern about the term totally disabled and you used the reference to 53 under there, James, and since the real issue on the wage comes under 52(2), because there may be other -- people can be totally disabled for more than -- they can be physically totally disabled and I think 53 talks about the variety of ways a person can be totally disabled. This statute is only meant to apply if the disability is based upon 52(2), inability to earn a substantial wage as that statute is defined, and I think that would avoid problems in the future as to whether this applied to somebody who might be physically disabled under 53, that by referencing in the first sentence under 62-4-52(2), it would really clarify this only goes to those situations where the person's total disability is based upon his inability to earn his workers' compensation wage. It would not apply in other situations where the person would be totally disabled, because normally in those situations they can't work anyway, but I just think for clarification purposes that's really what is intended by that, and Dakota Truck Underwriters was on the other side of the Scheid case and is obviously supportive of a bill that does not allow an employee to, I will use James's words, double dip and in the event earn more.

It's always important to remind the council that workers' compensation wages that you receive are nontaxable and I think that's why you use the two-thirds as the amount you are going to deduct, because when you add the 130 back in the wages, that's nontaxable wages, so in essence you are going to end up receiving probably still, in this scenario and in its application, more than you would just receiving your workers' compensation benefits.

In light of the fact that 62-4-52(2) was enacted back in 1994 and 1995, I think sometimes it's important to remember that the maximum amount a worker could have earned at that time under compensation was $338 a week. Probably not as difficult if you had somebody that was at the maximum compensation rate to get them back to that wage. Now the maximum compensation rate as of July 1 of this year is $571 a week and again if you have an individual that's at that maximum rate, to find them employment, even though they are fully capable of gainful employment to the tune of $571, in my opinion, by not addressing this Scheid issue, you are in essence encouraging South Dakota employers to pay lower wages per hour because if they end up with an employee that they are paying good wages to that ends up getting hurt but can still work but not get back up to the wage that we were paying, they have in effect been penalized for paying good wages. This allows them the right to allow that employee to be gainfully employed and not suffer the

total consequence of having to continue to pay full compensation benefits when that person is capable of gainful employment. I would be happy to answer any questions if anyone has any.

CHAIRMAN DAUGAARD: Are you suggesting, did I gather what you are saying at the very beginning it's the reference in the first line should be 62-4-52?

MS. SIMONS: Paren two. I think it's paren two where they define suitable employment resulting in insubstantial income.

MS. ROBERTS: Explain one more time for all of us.

MS. SIMONS: I don't have 52. Under 62-4-53, start there, which is the statute that's originally referenced. A person can be totally disabled if their physical condition, in combination with their age, training and experience and the type of work available in the community caused them to be unable to earn that. So you might have somebody that you never get to whether or not they can earn their compensation rate because their physical disabilities already precludes them from working anywhere at any job. So they could be disabled under 53 physically, and if you use this in the statute, I think it's clearer if you go back and say that it's only those situations that involve the inability to earn the definition of 62-4-52(2), and it might be redundant, but I think it's a clarification that would assist in future reference.

MR. MARSH: As I understand your position, what you are saying is that you feel that 62-4-53 people would include ones that we used to call statutory perm totals, two arms, two legs, that sort of thing. I don't know that I agree with that actually.

MS. SIMONS: I just want to be sure that the council understood that this only applies in those situations, that it is not going to apply in a situation other than when the person can't earn their comp rate. If you think that's clear, that's

fine, but I don't want people to think that it's going to apply any time outside of that scenario. Because that's the scenario that needs to be addressed in light of the Scheid decision.

MR. MARSH: The only reason I might disagree with you is because when you look at the scheduled system under 62-4-6(23), it does talk about people who lose two arms, two legs, that sort of thing and they are considered totally disabled automatically. It seems like when we discuss 62-4-53 when it was first being drafted, they were talking about odd lots, what we are talking about here. I think it's safe to say those two classes would still be distinguished even if we used this.

MS. SIMONS: As long as that's clear and I didn't want people to think it would apply to other cases of total disability.

CHAIRMAN DAUGAARD: Any further questions? Yes, Paul.

MR. AYLWARD: You made the comment about the maximum benefit paid and how in '94 it was less than it is now and it would be harder now for us to get people up to the maximum wage; did I understand you correctly?

MS. SIMONS: No. No.

MR. AYLWARD: This would encourage employers to pay less.

MS. SIMONS: This rate -- to apply 62-4-52(2) -- I'm bad with math -- you have an individual that's injured and is getting compensated at the maximum compensation rate. Because of his hourly rate and his weekly wage, to meet it, to say they are not totally disabled, you have to have $11, $12, you would have to find a job paying $11 to $12 an hour in order to find they are not -- is my math close, James -- totally disabled,

whereas $330 a week divided by 40 hours was significantly less, even in 1994. Minimum wage just went up for the first time in how many years.

MR. AYLWARD: So you are saying that would encourage employers to pay less?

MS. SIMONS: It may encourage them to pay a less hourly rate so the person's compensation rate is ultimately less so that if they get hurt and they can work, they can do that. We have this issue -- we had this issue back in '95 on the whole retraining concept, is you had employers in South Dakota that wanted to pay a good wage and every time their

employees were getting hurt, they weren't able to come back and earn their hourly rate and so the statute was amended to say if you can't earn the rate you were paying them but they can earn the rate for that position through the Department of Labor state average, they are not entitled to retraining. That again encouraged them to pay the greater rate, but it didn't subject them always to a retraining claim every time somebody got hurt. That's a fair summary of what happened in the retraining issue, and I see the same thing happening here, if you want to say South Dakota pays good wages to their employees and you want employers to do that, but they know in the long run if somebody does get hurt and they can make $9.50 an hour but they can't make $11.50 an hour, they are going to get both, they are going to pay them the $9.50 an hour potentially.

MR. BARBER: I don't think that's a consideration.

MR. AYLWARD: That's a long stretch.

CHAIRMAN DAUGAARD: Any further questions?

MR. AYLWARD: To finish my point, the maximum benefit is based on the average wage of the state, which comparative

was the same in '94 as it is today. I don't buy that argument at all.

MS. SIMONS: I would point out again that minimum wage hasn't gone up in any of that period of time. So you are still going to have individuals that back when you only had to pay them a little over the minimum wage, you were going to be able

to find them a job at the maximum rate. You are not going to be able to do that now.

CHAIRMAN DAUGAARD: Any further questions? Any further proponents? Proponents. Are you a proponent, Fern? I kind of doubt it.

MS. JOHNSON: Thank you.

CHAIRMAN DAUGAARD: Any further proponents? Opponents.

MS. JOHNSON: Let me just give you another twist for your brain here. I guess I have trouble with this statute, this proposal because it seemed to be redundant and take the place of 62-7-41. The Scheid case addressed 62-7-41 where the employer tried to apply this in lieu of the benefit rate, I'm not clear on this, but I leave this to higher up legal, but to me it seems this proposal, it just replaces 62-7-41 and it slips it into 62-4 under the permanent partial and permanent total. It's just a rewrite of the law from 62-7-41 to 62-4-53. It's redundant. We already have it. Does that make sense?

MR. MARSH: Do you wish me to comment?

CHAIRMAN DAUGAARD: Would you respond to that? Is there a difference between being totally and not being totally, is that the distinction?

MR. MARSH: If you look at the language in 62-7-41, the most important words in it are about two-thirds of the way

through the first sentence, it says, "employer may, in lieu of

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rehabilitation, require the employee to accept" et cetera, et cetera, et cetera. So that statute is a supplement to 62-4-5(1), which talks about rehabilitation benefits, not permanent total disability benefits. And they are two different standards for income, for usual and customary employment, all those things. It's not a permanent total disability statute at all. The employer is given an option under that law to either pay retraining benefits for a period of time, if somebody is eligible for them, or to pay the supplemental wage benefit under the formula that's set out in the statute. But it has no bearing on a permanent total disability case because if you look at 62-4-52(2) again, it says somewhere in here -- maybe it's in 53. Okay, an employee -- about the last sentence of the second paragraph of 53, it says, "an employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible." So a rehab claim and a permanent total claim are two completely different things.

CHAIRMAN DAUGAARD: Any further questions of James in response to Ms. Johnson's testimony? Any further opponents?

MR. DEGREEF: I have a question. Phil DeGreef again.

MS. ROBERTS: Come on up, Phil.

MR. DEGREEF: I had a question of clarification on this, too. As most of you probably know, I was one of the

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instigators when we brought this up a couple years ago and kind of got shot down on it. But the question I had, though, will this affect anything in 62-4-6(23) where they lose both hands,

both arms and so forth? I don't want to see that this would affect that. Would this affect that? I know in 62-52 and so forth on there, but on 62-4-6(23), the loss of both arms, both feet, both hands, eyes, so forth, that they are actually statutorily perm total. Will there be any effect on that statute?

MR. MARSH: No.

MR. DEGREEF: That was my question because I didn't want to see that one. That's all I had. Thank you.

MR. HAGG: Mr. Chairman, members of the committee, Rex Hagg again. This wasn't a good idea in '04 and I don't think it's a good idea now. If you feel like you are compelled, then I think there's a very easy fix to it. First of all, the Scheid case was kind of an anomaly that happened and doesn't come up very often because if you go back into the text of what we are dealing with here, these people have already been through the system, been through the litigation and proven themself to be totally disabled. So you are not -- what this new statute does is, especially if you want to narrow it down, when you add the words "is capable of," you talk about litigation. This case and this statute would just be litigated repeatedly because you go through your whole case to prove

totally disabled, a person goes out and if somebody wants to follow up and say, I think they can do this and they are capable of that, I've got another doctor's opinion now, even though they have been through the litigation that says they are capable of doing it, it's just going to start everything all over again.

And in the first instance, again if we go back, they have proven that they are totally disabled and if you look at

all the definitions that we get into in total disability, it doesn't say that they can't do anything, the definition is they can't do anything more than sporadic employment resulting in an insubstantial income, so it's not -- these people aren't -- maybe they can do something, maybe they are out at the rally and they can sit there for a couple years, or a couple hours during the year or something and monitor something and they do it and they get a little bit of income, but that's already in our statute, that you can't -- it doesn't say you can't do anything, it just says sporadic employment and not a continuous income. The person just can't work on a regular and sustained basis day to day. So this just opens up the can of worms for people that have already proven their case.

Now, if the Scheid case, if the people out there, there's a feeling that this is going on all the time and people are making a bunch of money off of it, I think if you want to do something, you just say, look, if you are employed, that's

verifiable, you can't argue with it, you are working, work some formula and make a subtraction or something. But if you get into may be able to do, is capable of doing, somebody gave him a job offer, this is going to open up the biggest can of worms and that's why this went down before, because it's just going to be a headache to try to apply.

Now, there might be a few people out there that come out better like Mr. Scheid did, but what about the people that are capped by the system? Somebody making forty, $50,000 a year and all of a sudden, boom, they are up to cap, that cap is about what now, 25, 30,000 maximum and the day that they took work comp they are not getting 66 and two-thirds, they are getting 50 percent or 40 percent of their old wage. And so do

you say, you people, you can't go out and do anything else, even sporadically or work at all to help yourself because if you do, you are going to get your money taken away.

And it really is, unfortunately, one case, and I think that's throughout a lot of the discussion today, trying to go back and fix the system for one case is a bad precedent to start getting into because these statutes have gone through the test of time and there's already litigation, but it gets narrower hopefully if there's interpretations. So I just ask you to consider that and remember that these people have already been through the system and proven their case and have problems.

So I would just ask you to really, really think about whether this is the proper thing to do. We went in the legislature, came back here, the committee reviewed it before. Just I think for all those reasons, it didn't go anywhere, but like I say, I always feel like I have to cover myself a little bit. If you think, boy, this has to be fixed, then if the person is working, put them in the formula, but make sure it's verifiable so nobody has to argue about whether they are making the money or they are not, it's quite simple.

CHAIRMAN DAUGAARD: Any questions of Rex?

MR. HAGG: Thank you, Mr. Chairman.

CHAIRMAN DAUGAARD: Any further opponents? I'll make note that there is opposition raised by the e-mail from Jon LaFleur. His last sentence on page one, he labels this the proposal to allow an insurer to reduce its weekly payment for a permanent total disability claim by the amount a claimant can earn, and the top of page two, those three points he argues in opposition. Then I would also note that the letter from Dennis

Finch also raises some opposition. Monica is going to hand out some of that material for the audience.

MS. SIMONS: Could I respond to Mr. Hagg with a possible suggestion? I don't in all honesty -- is this going to be on record I don't necessarily disagree with Mr. Hagg? He might have a heart attack if I say that. I don't think either the defense or the plaintiffs want to get into a constant

argument of what does "is capable of" means, and I think if I may offer an alternative suggestion to what you think about, that is to take the statute that Ms. Stanton referenced and that was really sort of the cause of the problem in Scheid, that being 62-4-41, and to add -- that talks about if the employee is not totally disabled but unable to return to their usual and customary line of employment, and if you added "or is totally disabled" as James mentioned under the odd lot doctrine, then they receive a supplemental wage, provided the employee is actually employed or offered employment, so you --

CHAIRMAN DAUGAARD: 62-7-41?

MS. SIMONS: Sorry?

CHAIRMAN DAUGAARD: Say it again, please.

MS. SIMONS: 62-7-41 is the provision that the court said did not apply in Scheid because he was totally disabled because he couldn't earn his compensation rate. So they said you can't apply this supplemental wage benefit even though he's actually employed because he's totally disabled. It starts out as not totally disabled. If you simply add that it also applies in situations where the person is totally disabled, again simply because they can't earn their comp rate, that they get this incentive or whether you use James's formula, again that applies only if the employee is actually offered

employment or is employed. So you end up addressing it in the same way you do with a rehabilitation claim.

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I just throw that out to address Mr. Hagg's concern that we are going to be fighting over my vocational consultant says you are capable of employment at $5 an hour, your vocational consultant says you are only capable of employment at $4 an hour. You get away from that argument because I don't think either side of this debate ever wants to be in that situation where we are just enhancing the pocketbooks of vocational consultants to come and testify one side or the other about somebody's capabilities. But if you limit it to a situation such as here where there is actual employment that has been offered or the person is actually employed, I think that addresses some of Mr. Hagg's concerns.

CHAIRMAN DAUGAARD: Thank you.

MS. ROBERTS: Mr. Chairman, for the committee and -- maybe I'll throw something out so the audience doesn't have to get upset about this bill. Remember when we started putting our issues together, it was a laundry list of things we heard out in the field. James put together legislation based on that laundry list. We brought them for consideration. The only proponent here today was the person that just testified who actually wanted to throw it out and start over. So I am just thinking that since the department wrote the bill, the only proponent has problems with it, maybe we should withdraw it and if the person that just testified wants to come forward with a new bill based on the other statute, work with James, we would

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be happy to do that in the interim, come with a new issue, that

would be fine. I think it would be probably not useful for all of us to sit and try and work through the legalese of trying to get a bill together right here, when the original bill I don't think has that much support to begin with. It was again just kind of a laundry list of things we put together and I don't want to put words in anybody's mouth, but that's what I'm getting as consensus from the audience at least and probably from the committee.

CHAIRMAN DAUGAARD: I'm not going to support the proposal as submitted for some of the reasons that were offered in testimony. If anything, it seems to me fitting it into 62-7-41 would be a place to put it, if anything is done at all, and I think one of the things that we learned the last time we looked at this is these odd lot permanent total disabilities are few and far between, are they not?

MR. MARSH: Yes, they are.

CHAIRMAN DAUGAARD: We are sort of fine tuning a very small part of the pie and if we do any fine tuning, that's probably where to do it is my opinion. What are some reactions of the committee?

MR. STAINBROOK: Mr. Chairman, my first reaction was listening to a lot of the testimony here today, both sides, we didn't want to look at sweeping changes because the system wasn't broke, and we didn't want to look at minor changes over

here because the system isn't broke. And as I looked through some of the changes offered today, this being one of them, the first thing that popped into my mind is listening to the testimony of both sides, the system isn't broke so why do we want to make this change, which affects very little people now, and as I look at the average wage, 14.25, to be affected by

this, the people that I look after and represent, the average wage is 17.50, so for me, this affects everybody that I represent. Potentially they could never make as much money as they do at their current profession, and to tell those people, hey, you can never do that to me is very wrong. So I support tabling this now. We have looked at it three or four times and I would support tabling this completely forever. I don't think the system is broke.

CHAIRMAN DAUGAARD: Any other comments? Anyone else have comments? Anyone else? Well, let's just withdraw that and unless someone else wants to bring it forward, I'm not going to.

MR. AYLWARD: Mr. Chairman, I would like it noted that we looked at this issue again and that we decided that it doesn't need our attention at this time.

CHAIRMAN DAUGAARD: Let's have the report reflect that, that we made that determination. Is that agreeable to the council? That was number seven. By my count, we have addressed eight, nine, 10, 11 and 12 and now we are to issue

number one and that is brought by the department, so James, do you want to set the stage and explain the proposal?

MR. MARSH: If you thought that one was complicated, this is again a matter that was brought up as a result of the Orth decision last fall. In that particular case, we had an individual who had a medical opinion in the form of a one-paragraph note from his treating doctor that said 50 percent of this guy's problem is work-related, 50 percent of it isn't. It went to us and subsequently to the Supreme Court to determine whether the work was a major contributing cause to the condition complained of. And to try to put some hands around

that again, there are basically three parts that have to be established for a comp claim to be considered compensable. It has to arise out of the employment, it has to be in the course of employment, and because of our law, has to be a major contributing cause to the condition complained of.

To give you an example, a person might have a desk job -- this is a real case so I can actually use it -- got up, felt a pop in his knee, went to see the doctor right away. The doctor scanned the knee, found out that the knee was full of arthritis, which nobody ever said was work-related in this particular case. So there wasn't any question that the person established that he had something that arose out of his employment because it resulted at least in part from the fact he would have made a claim because he got up and felt a pop,

which would be considered a work-related activity. It was in the course of his employment because his day starts at 8 o'clock, it ends at 5 o'clock and he gets injured somewhere in between. But because the arthritis had this much to do with his problem and was a major contributing problem and the work part was next to nothing, they did not consider the work to be a major contributing cause for his condition in that particular case. So that's why we thought things were settled.

But last fall when the Orth case came up, in I think what can be fairly argued as kind of secondary language or dicta, the Supreme Court said, well, when it comes to the person's injury, not necessarily the condition that results, but that first, whether it's a work-related injury or not, you say all the work has to do is to be a contributing factor to it in order for work to be responsible. So in our desk job person's case, if we have somebody who gets up and they feel a

pop and it has anything at all to do with his knee condition, with his knee injury, work is responsible for it because it had some contribution, however slight.

We have had major contributing cause on the books for 12 years and we understood that that major contributing cause test applied not just to the condition that results but the injury that leads to it. Apparently the Supreme Court did not agree. But in any case, we feel as if a clarification needs to be made to make sure that that same standard applies not just

to a person's condition but also to the injury which lead to it. And that's what this draft is designed to do.

I met with a group of attorneys in Sioux Falls who wrangled through this, we went through several drafts trying to figure out how to make this work as painlessly as possible and the result is what you have in front of you. In subsection A where it talks about -- to be clear, this injury definition of the code breaks it up into three different situations. Okay, in subsection A, it talks about somebody who has no pre-existing problems and then has a work injury. In those situations, we want to make it clear that both the injury and the condition have -- the work has to be a major contributing cause to them in order for work comp to be responsible.

In the second, sub B, that talks about situations where somebody has a pre-existing not work-related problem, they have arthritis in the knee, okay, whereas subsection A is there's nothing in the knee, okay, except for the work injury. Subsection B, if you have somebody with a preexisting problem in the knee followed by a work-related incident, the work-related incident has to be a major contributing cause to this person's injury, so it lists injury and condition in order

for it to be compensable.

In subsection three, all we are really trying to do by adding the language you see is to distinguish that situation from somebody who has a pre-existing work-related injury

followed by a subsequent work-related injury, because in those cases the law has always been that if the new injury contributes anything at all to the former work-related injury, work should still be responsible for it, work plus work makes work. So we are not changing that. We just want to make it clear we are distinguishing that situation from ones in which work has nothing to do with the claim or very little to do with the claim, and in that case those claims should not be compensable unless the injury is a major contributing cause to it.

I think those are the only changes we made. That's probably as clean as mud. That is the drafting we attempted to do to try to distinguish those situations. Our major concern, I guess, for what it's worth, is that when you leave the old contributing factor standard to injuries and you apply that to injuries, realistically, two-thirds of claims out there are what you call meds only where only medical benefits are paid. We are not talking about a long term time off of work or anything. And we have suddenly transferred liability to those two-thirds of cases to the work comp system that we didn't think we were doing before, so that's where the concern arises. We are talking about thousands of claims that are subject to this court's interpretation of the law. I know it's not what we have advised people publicly about how the rules apply, and as a result, they have followed our lead for the most part, but

that's all gotta change.

MR. AYLWARD: Question on the Orth case. Can you tell me just again what happened in that particular case?

MR. MARSH: Yeah, Orth had a degenerative disk condition in his back and for probably a year after he left the work at this particular place, a heavy labor job, and he was always telling people all along that I have this problem with my back and it's getting worse and worse and eventually I'm just not going to be able to do this any more, but he never connected it to his job. Well, after he left employment, about a year goes by and he is talking to his lawyer, he contacts his doctor in Sioux Falls and says, is this work a major contributing cause for his back problems, the doctor comes back and says, yeah, I think it is.

So then the guy turns around and files a comp claim and eventually it ends up in front of the courts. But it's basically a degenerative disk condition in his back, no herniated disks, no anything, it was just a gradual deterioration of his spine. And essentially one doctor said it's a fifty-fifty thing, 50 percent work, 50 percent not, and the independent medical looked at it and said, it's just the guy's back wearing out over time and so there wasn't any work connection or at least at best minimally.

CHAIRMAN DAUGAARD: Further questions of James. Further proponents of this proposal. Any proponents in the

audience. Mr. Shaw.

MR. SHAW: Mr. Chairman, Mike Shaw, Property Casualty Insurers. We agree with what James has indicated is the problem here. I for one personally have real concerns about when legislation comes to fix one court decision because

oftentimes it's not a good idea. However, there's exceptions to every rule and if a Supreme Court decision creates substantial problems or goes against what the legislature previously intended the law to be, it's certainly not unprecedented for legislation to come in and correct those decisions.

I think that's what we are dealing with here. I was around when the Blue Panel Committee was put together to address this situation, as was James, and I had the good fortune to serve on that as well and major contributing cause was a collected effort to come in to address a real problem that was occurring in work comp at that time. We were on the edge of a crisis in workers' compensation back then, and major contributing cause, that language and that decision was brought in to keep us away from the edge of that cliff.

Now, the Orth decision I think really was an unexpected left turn from major contributing cause and I think, for whatever reason, our court did it, sometimes they are result oriented, people can agree or disagree, but in my opinion, I think James would agree, this goes completely out of

line with what the legislature intended with major contributing cause. Now, maybe back then we should have put injury and condition in like we did here and then there couldn't have been the Orth decision. But I think this decision addresses it, I think it's a good and fair change because it certainly is not taking away a benefit that a worker had before, because the department had always interpreted the law consistent with the changes that they are suggesting, so really the Court decision adds to the benefits that were out there.

I do have one concern about the language in subsection

C, though. Maybe I haven't read it enough to understand it totally. What it says is -- you can see what it says, but it says the burden of proof is not something, okay. To me it's a lot easier to say an employee's burden of proof is this, okay. In other words, this says proof that employment is a contributing factor is insufficient to meet, so my question is what's the burden, what is sufficient to meet? Wouldn't it be easier to say the employee must prove that employment is a major contributing cause and not simply a contributing factor. James, I don't know, maybe that doesn't work right for you, I don't know. I'm just throwing that out. I realize when we throw things out, it kind of muddies the water, but I guess that's what we are here for, to sort through some of these issues. I do apologize, Pam, for doing that.

MS. ROBERTS: No, that's fine.

MR. SHAW: Those are my comments. We would support this legislation. Thank you.

CHAIRMAN DAUGAARD: Any questions of Mr. Shaw? James, do you want to react to the suggestion about the burden of proof or do you want to mull on that?

MR. MARSH: I would like to mull on that a bit. I know we discussed it in our group, I'm trying to see whether this double negative approach is workable. I guess we basically concluded that it was with our main object being to distinguish sub C from the other sections by using it.

MS. ROBERTS: Maybe we could have James explain who was on the work group, one of whom was Mr. Shaw's partners.

MR. SHAW: I talked with him about that, too, what were you thinking about.

MR. MARSH: The attorneys involved in that group were

Jeff Shultz, who is here, and Rob Anderson here in Pierre, Mike McKnight, who is with a firm that does a lot of work comp work in Sioux Falls, and I'm going to slight him by not remembering his name. Let me think a minute. Rick Orr with Davenport Evans, yeah. He will come and hurt me soon. That's one of Sue's cohorts. All people who have an immense amount of work comp experience, some more than me, and we wrangled with this over several meetings trying to figure out, because we had several drafts, some of which we threw away, and this was kind of the end result of that.

CHAIRMAN DAUGAARD: Further proponents.

MS. SIMONS: Sue Simons. Just briefly, Mr. Chairman. For those that weren't involved back in 1994 and 1995 when this process began to move away from the a contributing cause factor, I would just like to stress something Mr. Shaw mentioned and that is that this truly was a compromise that both sides agreed on when we went from a contributing factor to a major contributing cause. We fought for a long time over the word "a" versus "the" because that seemed to be the issue at the time, was it the major contributing cause or a major contributing cause. But the concept that I believe the lawyers and the legislature had in mind when they made those changes in 1994 is the exact interpretation that the department has been giving it, lawyers have been operating on since that change was enacted in 1994, '5, and truly this decision was something that was not anticipated and I don't believe intended by the legislature, and so to make the changes that are being suggested is really nothing other than returning to what I believe the parties agreed was an appropriate compromise and the appropriate standard for a compensable injury in the state

of South Dakota in 1994.

CHAIRMAN DAUGAARD: Further proponents. Opponents. Any opponents.

MR. HAGG: Mr. Chairman, members of the committee, Rex Hagg again. I'm not so sure about, frankly, about the "injury

and," if that clarifies or what it does, the impact. Sue and I will agree again, it took a lot of work addressing and breaking out, differentiating people that had, you know, pre-existing work injury, not a pre-existing work injury but an injury, and doing all that was painstaking and it got to this point. The thing that I don't like about this is that I think it's a little bit of an overreaction. Then the last section I think is very confusing, but let me tell you why I'm saying what I'm saying.

Reading this case, obviously the people that do defense work did not like the result of this and apparently the department didn't either. But as we talked about before, this is the same case we talked about in the beginning. A lot of things set this up. It was the fact that things were just submitted, there was no depositions or testimony, cross-examination in the litigation, as I understand it. I don't know if I have the right copy here, but I'm reading from the -- I don't have a numbered copy of the case here, but this is the case.

In the case, I think where the department was coming from, it talked about in the beginning the dicta about contributing factor, but then as you get into the meat of the case, the Supreme Court clearly says, in short, a case involving a pre-existing disease or condition, a workers' compensation claimant must satisfy two tests, and they put it

right in the opinion. Number one, causation of the injury, contributing factor test, what this is trying to say, and, it doesn't say "or," it says and causation of the disability, major contributing cause test. You gotta satisfy both. Then they found, based on their reading of these reports, they found that it met it.

I'm not sure that the statute is broken. You may not agree with this case, but I would say the thing to do would be to wait. They didn't change the test, they kept the test the same. If you go down to the bottom of this page and you say -- Mr. Shaw and I agree, if you take -- it's kind of like is it a duck or not a duck. Well, it's clearly not a goose, so saying something in the negative doesn't make any sense to me. Because then you are wondering, okay, what is the burden of proof. If you say it's insufficient, the contributing factor test alone, which the Supreme Court says, no, you can't do that alone, and so you put in the statute that that test alone is insufficient to meet the burden, that doesn't cure the case because the case says you need both.

Whether you are an attorney or not an attorney, that tense is pretty clear and easy to read. So it's kind of dinking around and trying to say something of what something is not when I don't think the case really has changed the law because it recognizes you gotta prove both. So if it looks like it's going to be problematic somewhere, as a claimant's

lawyer, if I'm looking at it, I still gotta prove both tests. This case doesn't get me off.

The biggest problem with the case that caused the

confusions was the doctor got -- says I really don't know, it's awful hard when you have got a lifetime of wear on your back but you are also doing a heavy lifting job constantly daily, how do I as a doctor sort that out. So he says, I'm calling it fifty-fifty, and if something is fifty-fifty, that's gotta be a major, because the other one is a major or there's nothing, but they are fifty-fifty, they are equal. So that's what the doctor -- that's what's quoted in the opinion that's got people riled up.

So I really think, again, this is one case that's not -- it's not worth worrying about, getting overly excited unless the law is really changing, but they didn't change the law in the case. They are just applying it and they said you have to have both parts of the test. Again, if you feel like there's a compelling reason to do this, I suppose adding the "injury and," I don't know what that really does, you can argue that that might change something or people infer it changes something when the case didn't change something. But the underlying added section on saying what it's not, I just don't think that's good legislation. It doesn't say what do you have to prove then and it only clearly says you don't have to prove one of the tests, and the Supreme Court didn't say that, it

said you have to prove both of them. I think it's much to do about nothing, frankly, and if it gets to the run away stage and goes somewhere, let's come in and address it. This is just the one case.

CHAIRMAN DAUGAARD: Questions of Rex. Further opponents.

MS. JOHNSON: I'm going to be brief. Fern Johnson. Let me refer you back to issue three where you just passed or

approved that one to add "or condition," specifically "or." You previously this morning passed issue three or approved it with the terminology put in there as "or," "or condition." To define in part 7A on this proposal, to be consistent with the spirit of the work comp injury or condition, number A, that should be "or," it should be consistent. If you put it as "and," take for instance the Sobko (phonetic) case, that man was hit with a wheel in the head, later on found to have brain damage and died. Now, that's a condition, it's a residual effect of the injury itself.

If you require the magnitude to prove that condition is a residual effect of that injury in the first place, you are raising two requirements upon the employee to show that the condition with that term and as well as that injury. It heightens the standard of proof for the worker. It goes against the spirit of the intent. You are reinventing the wheel, basically. Same thing with section B, the "injury and,"

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both are compensable. You are requiring too much of a heightened standard upon the worker, and like Mr. LaFleur addressed in his first paragraph, I believe it would create a quagmire. I believe it would. It's totally against the intent of what the worker has to prove.

Going down further in section C, and I agree with Mr. Shaw to a point, up until he further commented, what is the proof? If the contributing factor is not sufficient, what is proof? Historically, work comp has already required, like Mr. Hagg has already addressed, those criteria, two criteria are already there. Other than to change "injury and" to "or" on both sections A and B and that is to be consistent with following what the spirit of the statute already is and take

out that last section, that's all I have.

CHAIRMAN DAUGAARD: Any questions of Ms. Johnson? Further opponents. All right.

MR. SHAW: Could I make a comment?

CHAIRMAN DAUGAARD: Come on up.

MR. SHAW: Thank you, Mr. Chairman. First off, from what Ms. Johnson indicated, I think if you take the "and" out and put "or" in, that in fact just neuters, it renders this legislation totally useless because really the "injury and," that's the intent of this bill, if I read it correctly, and that's the problem with Orth. So I would urge you not to do that. If that's your intention, then just kill the bill,

because to me that's a shell game. Let's deal with stuff straight up. I didn't mean that Ms. Johnson was intending to try to mislead these people and I believe that you feel that that's appropriate, I just disagree with you.

The second thing is that my comments regarding the sentence in part C, I struggled reading it because of the double negative, so to speak, but I urge you don't throw the baby out with the bath water here, okay. I would rather see you pass this thing out, we can work on this down the road, than get hung up on language here today, because I think what you are doing is endorsing the concept that Orth made a mistake that deviated from what the legislature intended. Trust me, there's going to be a lot more debate on all these issues down the road. I guess that's all I'd like to say at this time. Thanks.

CHAIRMAN DAUGAARD: Any questions of Mr. Shaw? Thank you. Any further rebuttal? If not, questions of the committee or any action by the committee? Is there a motion?

MR. AYLWARD: Mr. Chairman, Mr. Hagg had something to say.

MR. HAGG: Can I say one quick thing?

CHAIRMAN DAUGAARD: Yes, go ahead.

MR. HAGG: I want to say that even when this legislation got passed originally, it was done with extreme caution because that is the history and the big tradeoff on

work comp and negligence, is causation, and the more that you require and put on the burden of causation onto the claimant, you have gotten away from the original intent of work comp and that was to say, okay, you don't have to prove negligence. If it happened at the job, it's going to be covered, but we are going to take away a lot of damages, and that tradeoff was there and this is a continual pecking away and tightening up of requiring the claimant, the employee to prove more and more causation and that wasn't the original intent. Thank you.

CHAIRMAN DAUGAARD: Now any committee action.

MS. HINDERAKER: I would move that the committee adopt the recommendation of the department in issue one as written.

CHAIRMAN DAUGAARD: Is there a second? I'll second it. Any discussion?

MR. AYLWARD: Well, Mr. Chairman, I have some real concerns with this legislation. Again, the Orth case, we don't have a long history with this and to say that this is going to change the way of doing business I think is premature and speculation. It may, but if what Mr. Hagg said is correct, and I believe it is, is that the Supreme Court didn't change anything, and I was reading the comments from Mr. Finch also and his reading of the case is about the same as what Mr. Hagg testified to, so if there is some change, I'm not sure that

there is a change in the law, but if there is, it looks to me like this is overcorrecting anything that may have changed and

again is adding a higher burden on the employee to prove their cases, and again, we are just pecking away at making the burden higher on the employee, and I think that's wrong. I really oppose this legislation.

CHAIRMAN DAUGAARD: Thank you. Further discussion.

MR. MARSH: If I may, Mr. Chair, there have been some issues raised about the legal issues surrounding this thing and certainly there seems to be a difference of opinion among the attorneys out there about what the impact of this case is. And yet it seems to me that as we discuss it, it becomes apparent that there's more -- there's more to this than we have talked about. For example, in the fact that it's acknowledged that there is a tradeoff in work comp and if we propose this bill, which we assert doesn't change anything, yet they say that -- they assert it doesn't change anything, yet we say we are returning it to where it was. It seems the two things are logically inconsistent. They are concerned about it because they think we are taking benefit away from employees, but with the same breath they are saying to us, you are not changing anything. It seems to me that those two things are logically inconsistent. We are or we aren't. In my view, we are returning things to where we felt they were before this case came out.

Now, I have heard Rex's comments and I understand that's certainly one way of looking at this Orth case but not

the only way. To me what he's trying to assert is that through the Orth case, what we have done is create an additional hurdle

for employees to cross in order to get benefits. But if we are looking strictly at injuries just when a person is injured and not having any disabling condition that follows, what we have really done is to lower the first hurdle that's in front of them instead of creating an additional one. And that's my concern. Are we in the public position of creating hurdles for employees? No. Are we carrying out what were the effects of this compromise in the legislature when they discussed this 12 years ago? Yeah, I think we are. Because I have to agree with Mike, when we were looking at that, we had double digit increases in our rates every year because we were losing control of this thing. And we didn't want to go back to that.

I've spent all the time since I've been director trying to head off problems like that, so I simply can't take the chance that an interpretation that has been proposed here from Mr. Finch and Mr. Hagg, whose opinions I respect, is going to be the way things ultimately turn out in the courts. I can't recommend that you roll the dice like that. So I would encourage you to support what we have done.

CHAIRMAN DAUGAARD: Further discussion.

MS. ROBERTS: Mr. Chairman, I don't mean to speak for Governor Rounds, but he did ask the Department of Labor to put together this work group and I just needed to let you know that

he was the Senate majority leader who was working on the compromise years ago and he had concerns, had heard concerns from lawyers about the Orth case specifically and he asked us to put together the work group to see if anything needed to be done. Now, to clarify, this bill has not gone to him yet, it will be in our report, but he did specifically ask us to make sure that that Orth decision did not change what the consensus

was back in '84.

CHAIRMAN DAUGAARD: The work group, the attorneys who participated in the work group, did they include attorneys who traditionally represent injured workers?

MR. MARSH: Not in discussing the causation standard, no.

CHAIRMAN DAUGAARD: Further discussion. Sarah, call the vote.

MS. TREBESCH: Paul.

MR. AYLWARD: No.

MS. TREBESCH: Randy.

MR. STAINBROOK: No.

MS. TREBESCH: Carol.

MS. HINDERAKER: Yes.

MS. TREBESCH: Connie.

MS. HALVERSON: Yes.

MS. TREBESCH: Jeff.

MR. HAASE: Yes.

MS. TREBESCH: Chris.

MR. LIEN: Yes.

MS. TREBESCH: Glenn.

MR. BARBER: Yes.

MS. TREBESCH: Dennis.

CHAIRMAN DAUGAARD: Yes. All right, let's skip issue two and go to issue five because that was also an issue raised by the Orth case. Since we have been discussing the Orth case, maybe that might ease the discussion a bit.

COURT REPORTER: Could I have five minutes?

CHAIRMAN DAUGAARD: Yes, a five-minute break.

(Whereupon, the meeting was in recess at 3:03 p.m.,

and subsequently reconvened at 3:13 p.m., and the following proceedings were had and entered of record:)

CHAIRMAN DAUGAARD: Issue five is what we are going to take up next. Again, that's a Department of Labor proposal, so James, I'll give it to you again.

MR. MARSH: This is again an outgrowth of the ruling on notice in the Orth case concerning actual knowledge. To give the background, the factual background as it relates to this issue, Orth again had a gentlemen with a degenerative disk condition in his back, he tells his employer that. He said, I've got this degenerative disk condition in my back and it's going to get to a point where I can't continue to work here any more. That's about all he said. Over time he continued to

work there, his coworkers would see him and he would be working away and would be in pain, without necessarily saying anything about a work connection to that. It was not actually reported as a work injury until a year after he left the employment when his doctor told him I think this is a work condition. So even he did not necessarily associate it with his work until long after he didn't work there any more.

In any case, one of the issues the insurance company raised in the Orth case was the fact that he didn't give them notice of his claim within three days after his injury occurred. Certainly not until after he left his employment. The Supreme Court found that the department did not address this particular issue in its case, but the Supreme Court felt it was clear enough that they could step forward and just do it. But in any case, they found that the employer had actual knowledge of this employee's work-related injury based on these sparse statements that this employee had made, because they

were alerted to the possibility that maybe there was a work connection here. And that was enough to them. The inquiry they asked specifically was toward the end of the decision. Well, this person, this employer knew the employee had a degenerative disk condition and they should have asked from what, and if they were obliged to ask from what, then that was sufficient enough to give them actual knowledge of the possible workers' compensation claim, thus obviating the need for this

employee to report it.

We agree that an employee does not have to walk up to an employer and say, you know, I think my back condition arose out of and in the course of my employment and it's a major contributing cause, my work was a major contributing cause to my back problems. But the employer should have enough information, without doing any further inquiry, to know, yes, this person got hurt, and yes, it could have happened at work. And that's what the draft is intended to do.

The language that's critical, in our view, is the underlying where it says employer had actual knowledge. We aren't changing that requirement. If they have actual knowledge of the injury, it's still enough, but by actual knowledge, we mean without the need of inquiry. The original draft in fact said without the need of additional inquiry, and the comment was correctly made additional inquiry is probably redundant, so the statement was left without that, knowledge of the injury and that the injury was work-related. So if the employee has given enough information or the employer sees enough to know this person has a work-related injury and has to ask no more questions, then that should be enough to satisfy the actual knowledge requirement, but they shouldn't have to do

any more than that in order to be able to figure it out.

The notice issue is particularly important because when this law was first amended back in the early 1990s, it

reduced the notice period from 30 days to three. One of the reasons why it was done that way is because we understand the longer a claim lingers from the time an employee gets injured to the point where actual benefits hit his hands, then the more expensive it becomes and the more protracted and difficult it becomes. So this was one of those changes that was made, reduce it to three days in order to reduce the median time that was involved from the time the person got injured and reported it to the point when benefits hit his hands. So to impose this loosey-goosey actual knowledge requirement that's now being imposed breaks all the rules. Mr. Orth didn't report it for a year, and I hate to say he got away with it, but it's more accurate to say that certainly that isn't any timely notice I can think of.

So that's the goal of the change, and again we went through the process of discussing it with the defense attorneys, we talked about it and they agreed this was the best draft we could produce.

CHAIRMAN DAUGAARD: Questions of James. Any questions? Any further proponents?

MR. SHAW: Mike Shaw again. Very briefly, I agree with James and I'm glad you brought up the bargain, as it were, in terms of reducing the notice time frames to three days, because in the discussion that we had then, both in the working group that suggested that legislation and in the legislature,

was how critical it is to have early notice so an employer realizes there's a work-related injury and get that employee treatment, because the sooner they get treatment, the sooner they can fix things and the less the chance there is that there's going to be a long-term problem. Because everybody agrees that the best thing for an employee on an injury is he gets back to work ultimately and the sooner the better, if he can do it safely. We think that this decision flies in the face of that and we support the department's suggestions. Thank you.

CHAIRMAN DAUGAARD: I have a question, Mike. I should have asked this of James, but adding the words "without the need of inquiry" seems to me to be a logical extension of actual knowledge and to reinforce that. Adding of the language "and that said injury was work-related," is that defined anywhere or does that add an additional burden of any kind beyond -- you have actual knowledge, the original statute just said knowledge. Now, what does that mean, knowledge that it occurred at work, knowledge that it occurred during the working hours? How much knowledge does one have to have under existing case law without this additional?

MR. SHAW: Work-related is more case law defined than anything, wouldn't you agree, James? It's quite broad, very, very broad. Walking to the parking lot. Even employees who, after they punched out on the clock and came back in the store

to shop where they worked, are deemed to be work-related injuries as well. So yeah, I think it is defined and I think it very much so benefits the employee, as it should, because when there's a close question under the laws of workers' compensation, you are supposed to resolve them in the favor of

the employee. With that said, I think that -- I don't think it takes away anything, I don't think it adds any other requirement, Mr. Chairman. Maybe James disagrees or someone else.

MR. MARSH: I would agree with that point of view. I don't think it adds a requirement to what's there, at least we didn't intend to.

CHAIRMAN DAUGAARD: If it doesn't add a requirement that wasn't there, then I'm wondering why is it here?

MR. AYLWARD: Why is it there?

MR. MARSH: The employer needs to know in terms of actual knowledge, not only if this person was injured but that the injury was work-related. That's the intention of it. I guess you could make the argument looking at actual knowledge versus injury was work-related that it might be intentionally duplicative, but I don't see that. I think there should be a specific requirement on the part of the employee to be able to say -- to be able to communicate the fact or have the employer communicate to them that there is a work-related component to this. It's not enough to know they were injured.

MR. SHAW: Workers' compensation is not to pay for injuries that happened when I'm home. It's a work -- excuse me.

CHAIRMAN DAUGAARD: I was going to say, so I could tell my boss I hurt my back but he doesn't have actual knowledge unless I say, I hurt my back at work.

MS. ROBERTS: That's what happened in Orth.

MR. SHAW: In Orth he says my back hurts. Well, I hurt my back working for Western Airlines years ago, too, and I complain at work today once in a while that my back hurts.

CHAIRMAN DAUGAARD: Any other questions of Mike? Mr. Shaw I should say.

MS. SIMONS: Sue Simons again. I have a concern under Orth that if it's not fixed in this fashion, you may have some situations where an employer is faced with a violation of federal law or making notice or making inquiry of an employee as to why they may be hurt or not hurt. The Americans with Disabilities Act, which applies to any employer over the size of 15, and the state Human Rights Act, which applies to any employer in the state of South Dakota, says you may not discriminate on the basis of a person's disability and that includes asking and making medical inquiries as to a person's medical condition.

And so the Orth decision, as I read it, the first thing that popped into my mind was if the Court said I have to

make an inquiry about a person's disability or about a person's condition, that if I do, I could violate state or federal law just by making that inquiry. Once the employee comes up and says, my back hurts and I think it's work-related, you can start and you can make that further inquiry, but if somebody is just walking and maybe says, my back hurts today and you say why, I'm here to tell you that that very likely could be a violation of the Americans with Disabilities Act.

So I think that for that reason, of placing employers in a position of do I get notice of an injury, otherwise I'm going to be -- he said his back hurt or he said his foot hurt or whatever, I'm now on notice under Orth because I didn't make a further reasonable inquiry, but if I make that reasonable inquiry, I may be before the South Dakota Human Rights Commission or the EEOC because I did. So medical inquiries are

very, very touchy when it comes to what you can or cannot ask of an employee. So I just think that Orth needs to be clarified that you don't have that duty unless and until the employee brings it to your attention that it's work-related. I think that could cause some serious issues for employers. Did you have a question?

MR. AYLWARD: Do you think it's a violation of federal law if an employee, I say my back hurts and you say as an employer, did you hurt it at work, that's a violation of federal law?

MS. SIMONS: It could be. I'm not saying it always is, but what it says is you must make further reasonable inquiry in order to make a determination of whether it is or is not work-related and the further inquiry -- and I do 99 percent employment law, the EEOC is very, very, very tight on what you can ask an employee about their medical conditions.

MR. AYLWARD: Well, if you do all that law, in your opinion, is it --

MS. SIMONS: Yes, it is, it could be.

MR. AYLWARD: -- is it a violation of federal law to say -- I say, I hurt my back and you as an employer say, did you do it at work?

MS. SIMONS: I'm saying it depends. If it's that direct, maybe, maybe not, I don't know. I'm just saying that the federal law says you may not make any medical inquiry of an employee, so I think I'm just throwing that out as one of the possible problems with Orth, that if it's not fixed, it could put an employer in that position and this simply goes back to case law. There is case law, and it's very old case law, it usually applies in a situation like this, where the person has

a pre-existing condition. One thing that James didn't say about Mr. Orth is that he had this when he came to work for this employer, he said my back has been hurting for years, comes to work for this employer, says my back is still hurting. There is case law in the state that says when you have that

pre-existing condition, there was already an additional burden on the employee to tell the employer that that condition that the employer already knew about was work-related. So again, I think that this change is consistent with the case law prior to Orth and so I think that's where that came from, the work-related portion of it.

CHAIRMAN DAUGAARD: Any further questions? Thank you, Sue. Further proponents. Opponents now.

MS. JOHNSON: Proponent. However, I want you to take into consideration one thing. This talks about notice, it doesn't talk about causation, so here we are getting into an employee gets hit in the head with some object at work, he tells his supervisor and says, that object hit me in the head. He's making it his own determination it's work-related, it happened here at work. I'm also going deaf. He's making a medical opinion. How far-reaching does notice have to give without need of inquiry? Without need of inquiry, I disagree with Ms. Simons, that gets into causation. All this deals with is notice. I hurt, that object hit me in the ear. Then it promotes the medical inquiry, okay, supervisor says, go see my doctor, go see your doctor. Then it starts the time frame. This is silly, it's basically silly. Your notice, how much more notice do you need? I hurt my ear, that object hit me. Do they want now I'm going deaf? How further does it need to go? This is ridiculous.

CHAIRMAN DAUGAARD: Any questions? Any opponents?

MR. HAGG: Mr. Chairman, members of the committee, I think, number one, there is problems in the area of notice, but I think as to where this is targeting is the wrong target. If you look and read that statute, in South Dakota we recognize cumulative trauma cases, especially carpal tunnel is the obvious. Are you going to be able to -- nobody can pick out a day when that injury first happened that somebody got carpal tunnel over a couple year period or whatever. And for some reason we have always kind of hid from that, and that's what this case is about. The guy had a back problem, as the doctor said, it's a tossup, it's 50 work and 50 pre-existing, and backs, cumulative back trauma and cumulative carpal tunnel things are very difficult cases. How do you pick out a notice date, let alone three days versus anything?

The three days was, frankly, that was a very -- that was a force fed hatchet job on going from 30 to three. I mean, it just happened and it happened that quickly that year in the legislature and it was a last minute amendment and it wasn't very well thought out. It really doesn't -- even putting that aside, because you can argue that all day about if employees, if they are feeling a little pain, whether they should report that. We have a lot of wonderful, wonderful employees in this state that don't like, especially working construction and everything else, don't like to run in and make a complaint

every time they got an ache or pain. They just don't feel right about it. You take people especially that work the hard labor jobs, they are always working with some kind of pain it seems like and they just don't run in.

So I think the best thing to do would be look at how do we do a reasonable notice statute for cumulative trauma cases instead of putting these additional burdens and elements in here. For instance, now that -- I think, Mr. Lieutenant Governor, you are hitting the nail on the head when you add that "and said injury was work-related." According to whom? The way I read this, the employer makes the decision whether they think it's work-related or not. They don't have to make any inquiry and they can say, oh, I don't think it is and that's now -- we have created a heck of a burden as opposed to saying, okay, the person has been complaining, I'm going to give it to the insurance company and they can do their investigation, the doctors will look into it, the doctors will say I think it's work-related or not, no, you have a disease, you don't have a work injury, which we have seen in the opinions they say. It's up to them to decide. But to place that burden and place that on now employers to be the gate keeper of what is and isn't related is a huge mistake, is a huge mistake.

Again, this case is here because it was cumulative, it was a very difficult case and now we are trying to go slap a

band aid on it and think this is going to help. This will do nothing to address cumulative trauma cases, nothing. So I would really encourage you to just stand back and look at this one a little bit and say, okay, are there some notice concerns? Because one thing about it, that is clear about this statute, it's black and white, if there's no notice, you are out. That's a heavy thing for an employee to endure, you are out. Now to say it's not only that you have to make sure that you report it but you also have to make sure and say and plead your

case that it's work-related and the employer can say, well, I just don't believe it. They are okay under the statute if you make this change. So please proceed with caution and if we want to dig in, let's dig in on cumulative trauma and see what's fair for everybody instead of this change. Thank you.

CHAIRMAN DAUGAARD: Any questions.

MR. HAASE: Mr. Hagg, I have a question. I was the past safety director at the employment I had and I asked that question one time to our carrier, because we had people that had carpal tunnel situations. And I said, when does the clock start, and the answer I was given was, once you seek medical help and you have drawn some type of opinion, the clock starts. The burden fell back onto the employee to come back and file the thing. And I don't think that's unreasonable.

MR. HAGG: I think that's very reasonable, frankly. I think that's very reasonable.

MR. HAASE: If you work for many years with a soreness, I would assume at some point in time during that many of years you would have received some type of medical treatment and gotten some type of expert opinion and so I would assume then the clock started.

MR. HAGG: If I'm doing the defense side of the case, I start asking, okay, when did it really first start hurting you. Well, it's been about a year when I started feeling it. Well, there's your three days, it's gone out the window. But what you said is very true and is very generous, and I think that there are people that interpret it that way and I think that's the right way, when you are getting treated for it. But it's left blank now and all you have to do is start asking questions of when you start feeling it, why didn't you go, how

bad should it have gotten before you went.

MR. HAASE: Could this say anything upon employee's knowledge? If you hurt for two --

MR. HAGG: Employee's first treatment?

MR. HAASE: -- if you hurt two years and you know you don't get any help, then nobody knows. But once you have gotten help, somehow somebody has made some type of decision where is it coming from.

MR. HAGG: I think those are good suggestions, that's what I'm saying. Let's address what's fair there. Let's face it, especially the older you get, you start -- I turned 50 this

year and it seems like every morning I got a little different hitch in my giddy up. Does it stop me? At what point -- I haven't had to go get treatment for my back, but I'm stiff in the morning. I think that's the exact discussion. If you are going to a doctor and he says you got a problem, you need to get in and report that. When you are at the end of the day and you are going like this but you are still doing your job, is that the time or what's the time? I think that's the exact discussion.

CHAIRMAN DAUGAARD: Thank you. Any further questions of Rex? Further opponents. Any rebuttal by proponents?

MS. SIMONS: If I could just address your question and Mr. Hagg's. The purpose of notice is not -- it's twofold. One, if you have a situation where an employee, even though they have never gone to the doctor, truly believes that whatever is bothering them is caused by work, they should have a duty at that point to come forward and tell you that, because part of the concept of notice is to allow the employer the opportunity to investigate, one, and maybe make some changes so

it doesn't become carpal tunnel so bad that you can never work again. Maybe there are some accommodations that can be made to your work place, and to wait until they go to a doctor four years later has deprived both parties of maybe making that injury less severe.

So saying they shouldn't have to do it, I think the

case law has said -- James, you can correct me -- is that instead of that the injury was work-related, that the employee has a reasonable belief that the injury was work-related. They don't have to know for sure it's work-related, the employer doesn't have to know for sure it's not work-related. The notice concept is if I'm there, I have this condition and in my mind the only thing I can think of that would have caused this is my work or I've gone to the doctor and they have told me, either one of those scenarios, that's what triggers what you need to give notice.

So the employer, when you are talking about actual knowledge, they have to know that something happened and know the employee believes that it's work-related to have actual knowledge. That's what the case law has said. It's not simply that we are going to make a determination right now this is or is not work-related. The notice is to give us the opportunity to make that investigation and make that determination.

CHAIRMAN DAUGAARD: Thank you. All right, what's the attitude of the committee? Is there a motion?

MR. AYLWARD: Mr. Chairman, this discussion brings up some interesting points that I hadn't really thought of and maybe this does need a major overhaul instead of just tinkering. Both attorneys here just brought up some good points, that maybe there is a better way to deal with

cumulative injuries. I worked for 15 years in a packing house

and every day I went there, like Rex says, I was probably sore and if I went down and reported that every day, we would have never got any hogs killed because we would have all been down reporting our injuries.

Maybe there is -- I haven't thought it through far enough to know what it should be, but maybe there should be a distinction between the guy like Orth and the guy that gets his finger cut off. I'm uncomfortable with these words because I'm not sure what they mean and what they would do to the burden. I don't have any suggestions on how to cure that, but I'm thinking maybe those points raised bring up a good point, that maybe there should be a different burden for cumulative.

MR. MARSH: It would probably be worth touching on some of those things briefly. First of all, Ms. Simons is right, when it comes to the notice test as our courts have interpreted it for cumulative trauma types of conditions, the clock doesn't start to run till a person has it serious enough to report it. They have to know it's work-related, they have to know that they were injured. They may not know that with cumulative trauma. You shake your fingers at the computer, you don't know if it's an injury or not. You have to know that it's serious enough to report because otherwise you are right, we have hundreds of thousands of work comp claims getting reported every month. So it's only when it becomes serious enough to report, the Supreme Court has said specifically in

the case of cumulative trauma cases, it has to be when the person loses time from work or is to seek medical attention or

should, that's the point when the clock starts to run.

The recent Supreme Court case, too, I think sheds light on some of this because -- I wish I could remember the name offhand, they blur together after while, but in this particular one, the employer was taking the unusual position that the employee had not satisfied the notice requirement because the employer thought this thing is work-related or not work-related at some particular point in time and three days went by so the notice period wasn't satisfied. Well, the Supreme Court didn't agree that that was a good way to start a clock. They essentially said it's when the employee as a reasonable person knows that, looking in their shoes, not an objective person even.

CHAIRMAN DAUGAARD: Believes, you mean?

MR. MARSH: Believes personally or should, should understand, given their level of experience, I got hurt, it happened at work, serious enough to report. I don't see anything in the draft we have come up with that changes that basic perception. It just says we are going to look in the employer's eyes now. That's not what it says. So the Court, being of liberal construction, following liberal construction by principle, they are not going to impose that requirement where it doesn't currently exist. And I guess I would tell you

straight up if this thing comes to one of our judges, I would anticipate they would look through the employee's eyes in deciding whether something is work-related, when it becomes serious enough to report, not through the employer's.

MR. AYLWARD: If I can follow up, in your opinion, then, if this language was in the statute when Mr. Orth, when his case was tried, he would have lost?

MR. MARSH: Yes. He would have lost because he had a degenerative disk condition in his back, he knew he had one, his employer was not notified of it for a year after he was seriously enough injured to treat it. Now that I think about it a little bit, maybe it might have changed because he didn't necessarily know it was work-related until his doctor said this is work-related and it wouldn't have been until then maybe that his three-day clock would have started to run. So in this particular set of facts, maybe Orth wins anyway, but to create the broad principle to say Orth always wins because the employer should have known about this claim, that's going too far.

MR. AYLWARD: That was going to be my point, is that Orth didn't know until he went to the doctor. And the doctor doesn't know for sure, he said fifty-fifty. So that was my point. I don't know, it seems like this might just cause more problems than it would cure.

CHAIRMAN DAUGAARD: Any further comments or is there a

motion? I wonder, James, again not to dwell unduly upon it, maybe I'm misunderstanding the discussion, but the insertion of the words "and that said injury was work-related" seems to me that looks at the employer's point of view, when you are saying that the Court looks at the employee's belief about what caused the injury. So I wondered how would you feel about inserting "and that the employee believes, and that the employee believes said injury was work-related," would that provide the same result that you are looking for in terms of not opening the doors to the clock never starting without actual inquiry?

It seems to me the real threat is that the Court might say employers have to inquire now after Orth and that seems to

me to fly in the face of the words "actual knowledge," so it strikes me that actual knowledge means you know, whether you have inquired or not, you know. And to impose a burden of inquiry is a little bit beyond that, so I think without the need of inquiry responds to Orth in a way that meets that problem.

Then if you need to further know not just that oh, I hurt my back, but indeed I believe I hurt my back at work, that it's work-related, if that's the actual knowledge an employer needs to know, it seems to me that's fair. Like the carpal tunnel guy, if I'm going to the doctor and I say, I hurt my arm, well, maybe I need to be saying to my employer, I hurt my arm at work, I hurt my arm because I have been doing these

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repetitive motion tasks. What do you think of adding that language or am I misunderstanding the problem?

MS. ROBERTS: Would you read what your amendment is?

CHAIRMAN DAUGAARD: Instead of adding "without the need of inquiry of the injury," well, that would still be there, but then the language "and that said injury was work-related," change that to say "and that the employee believes said injury was work-related." So I have to not only know that the injury occurred and that my employee believes it was work-related, I have to know that if I want to -- if the employee wants to say I didn't have to report within three days because you knew both that I was injured and that I believed it was work-related, I have essentially reported it orally to you.

MR. MARSH: Okay, I'm running the language by it. The reason I have a concern with it is because it does refer to the employer's actual knowledge as opposed to what -- the employee's belief ties into when the clock starts to run as far

as the three days goes, but it doesn't necessarily tie into what the employer's actual knowledge is. In other words, the employer doesn't have to say, I believe -- I know the employee believes his injury was work-related.

CHAIRMAN DAUGAARD: Why is it we are adding these seven words? Why are we adding those seven words if it's not an element that the employer must know? How do you know it's work-related unless you know what the employee thinks? Isn't

that what the Court looks to?

MR. MARSH: Yeah, they refer to it as far as the employee's requirement to report it, not necessarily whether it's a work injury in itself or not.

MR. BARBER: Won't the employee automatically say that? Wouldn't that be his logical statement to make, that it's work-related?

CHAIRMAN DAUGAARD: Unless he said something like, I hurt my back or my hands hurt, then does the employer have actual knowledge? You wouldn't have knowledge that it's work-related nor would you have the knowledge that the employee's opinion is that it's work-related. The way it's phrased here, it's almost like a question of fact has been determined or a question of law has been determined, it's work-related.

MR. MARSH: Which we don't want.

CHAIRMAN DAUGAARD: Which we don't want.

MR. BARBER: It took a doctor's statement to get that official in the case.

MS. ROBERTS: I see what you are doing.

MR. LIEN: I have a question either for James or maybe Rex or Sue. In the Orth case, I'm assuming they used the

reasonable person test. They did not? The reason I'm asking that question is the thought that came into my head, and I'll throw it out as a suggestion as well for the Lieutenant Governor, is that rather than that the employee would believe, I go back to my legal background saying a reasonable person in those set circumstances would have believed. So it applies to the employee and the employer, and the reasonable person sliding scale has to be in that set of circumstances. I don't know if that makes it more complicated or less complicated, but that was the reason for the question.

MR. MARSH: Because the original notice requirement as it's been expressed in the courts, in fact they say specifically you don't look at what a reasonable person would think, it's like a jury type of standard, but instead what would this person acting reasonably think. You stand in their shoes for a minute and you say, given their level of education, what did this person think at the time they reported it. To me that would be a standard that would get very nebulous, like begging for litigation.

CHAIRMAN DAUGAARD: Let me go back again. The current statute says that the employee is forgiven for not reporting within three days if the employer had actual knowledge. What does the case law say? What does that mean, actual knowledge? What is actual knowledge, knowledge of what?

MR. MARSH: That this person potentially has a work-related injury.

CHAIRMAN DAUGAARD: You mean the person has been injured and it might be work-related.

MR. MARSH: Right.

CHAIRMAN DAUGAARD: If that's already in the case law, can't we just leave that word out, "and that said injury was work-related," can't we leave that language out? The words "without the need of inquiry" it seems to me is sufficient to respond to the Orth changes and that further amendment is unnecessary. It seems to me to create a new standard.

MR. MARSH: I think I can buy that.

MS. ROBERTS: I have listened to what you are saying, but at the office they talked about his back all the time, but they just didn't relate it to the work. So I don't know that -- if you lawyers are fine with thinking that it's work-related, if that brings the work-related factor in, because he didn't even have to ask more on Orth, they knew that he had this back problem but never tied it to the work until a year later.

MR. MARSH: I can see that.

CHAIRMAN DAUGAARD: I'm wondering if actual knowledge has already been defined in the case law.

MR. AYLWARD: But as I understand it, Orth didn't connect it to work until the doctor said this was probably because of your work. So how could you put that burden on him?

CHAIRMAN DAUGAARD: To get this off the agenda and baack on time, I propose that we strike those words "and that said injury was work-related" as proposed and move this

proposal with those other inserted words, quote, "without the need of inquiry," so that would be the remaining amendment, the words "without the need of inquiry." And strike the others. Does everybody follow what I'm saying? Anybody second that?

MR. LIEN: Second.

CHAIRMAN DAUGAARD: Any discussion on that?

MR. AYLWARD: I think that helps. I still don't like the need of inquiry, but it's not near as bad if you take that out.

CHAIRMAN DAUGAARD: Any further discussion? I'll call that question, the proposal to strike those words. Sarah.

MS. TREBESCH: Paul.

MR. AYLWARD: Yes.

MS. TREBESCH: Randy.

MR. STAINBROOK: Yes.

MS. TREBESCH: Carol.

MS. HINDERAKER: Yes.

MS. TREBESCH: Connie.

MS. HALVERSON: Yes.

MS. TREBESCH: Jeff.

MR. HAASE: Yes.

MS. TREBESCH: Chris.

MR. LIEN: Yes.

MS. TREBESCH: Glenn.

MR. BARBER: Yes.

MS. TREBESCH: Dennis.

CHAIRMAN DAUGAARD: Yes. Then I would further move then this be proposed to the Governor.

MR. LIEN: Second.

CHAIRMAN DAUGAARD: Discussion on that. Let's vote. Sarah.

MS. TREBESCH: Paul.

MR. AYLWARD: No.

MS. TREBESCH: Randy.

MR. STAINBROOK: No.

MS. TREBESCH: Carol.

MS. HINDERAKER: Yes.
MS. TREBESCH: Connie.
MS. HALVERSON: Yes.
MS. TREBESCH: Jeff.
MR. HAASE: Yes.
MS. TREBESCH: Chris.
MR. LIEN: Yes.
MS. TREBESCH: Glenn.
MR. BARBER: Yes.
MS. TREBESCH: Dennis.
CHAIRMAN DAUGAARD: Yes. Okay, it is five minutes of four and I'd like to propose that we defer action on the remaining issues until our next meeting.
MR. AYLWARD: Second.

CHAIRMAN DAUGAARD: Moved and seconded. Discussion on that. As I see it, we have left issue number two and issue number four; is that right? Those are the ones we didn't get to today, two and four. All those in favor of deferring say "aye."
(Whereupon, the motion passed unanimously.)
CHAIRMAN DAUGAARD: Now, I'm going to treat Ms. Johnson's proposal about looking at the appointment of the membership and the hearing location as something that we can take up at the next meeting as agenda items, all right? Is that fair enough that we look at that? If James or Pam, if you would refresh our memory about the term of each of us, when we were appointed and when our term ends and so on, what the law says, that would be helpful, I think, in writing would be good. Then we will also look at and discuss whether we want to have future hearings at various locations as opposed to always in

Pierre. We will discuss that. I would like audience input on that as well. Any other items before we adjourn? I see item H is our next meeting is already scheduled, still good August 27 at 10 a.m. right here, right? Everybody is square on that?

MR. AYLWARD: Mr. Chairman, was there any way to duplicate Ms. Johnson's CD and get it to the members any way?

MS. ROBERTS: We are planning to do that.

CHAIRMAN DAUGAARD: Thank you. Thank you for reminding us about that, Paul. Thanks for confirming our plan

to do that. Anything else before we adjourn?

MR. HAGG: Mr. Chairman, at that next meeting are you still going to entertain other possible proposals, and if you do, do you want something submitted?

CHAIRMAN DAUGAARD: I think we will consider further proposals as time permits and if you want to submit things to be considered and to be disseminated before the meeting, then I'd say let's do that. Because if we have these two items, if we are able to dispose of those in short order, then we maybe have some time to consider other things. Whether we take final action, Rex, would probably depend upon whether we feel like there's been a fair opportunity for everyone in the industry, in the committee to consider it and deliberate fairly. Does that sound fair?

MR. HAGG: Yeah, and if I submitted something and knowing the other counsel that are here, I would just send it to them, too.

CHAIRMAN DAUGAARD: I think that would be advantageous toward progression.

MR. HAGG: A couple years ago we talked and we still have a big mess in these IME procedures and things on

independent medical exams and how those are worked out, and sooner or later we gotta address it. I'll talk with the other attorneys, but it's just still a fight and mess every time we do it. I would just like to --

MS. ROBERTS: It was on our agenda the first meeting and nobody wanted to address it.

MR. HAGG: It's a sticky wicked and it needs to get on the table.

CHAIRMAN DAUGAARD: I think it's good to keep discussing that because if you are concerned, it's a concern we should be informed about and remind ourselves about.

MR. LYONS: Shawn Lyons, South Dakota Retailers Association. Ms. Johnson's point of getting out around the state, it's probably not any easier for employers either, but I would tell you, I want to publicly thank James Marsh for going out. We sponsored work comp seminars last week in Sioux Falls and Rapid City and we had about 50 of our members in those few communities come out to those seminars and James did just an outstanding job of explaining a very complex issue to the employer side of at least small business, and I want to publicly thank James for that as well as Secretary Roberts time for him to do that.

CHAIRMAN DAUGAARD: He is a fount of knowledge, that's for sure. All right, without objection, I'll declare the meeting adjourned.

(Whereupon, the proceedings were concluded at 3:57 p.m.)

C E R T I F I C A T E

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

I, Carla A. Bachand, RMR, CRR, Freelance Court Reporter for the State of South Dakota, residing in Pierre, South Dakota, do hereby certify:

That I was duly authorized to and did report the testimony and evidence in the above-entitled cause;

I further certify that the foregoing pages of this transcript represents a true and accurate transcription of my stenotype notes.

Dated this 3rd day of August 2007.

Carla A. Bachand, RMR, CRR
Freelance Court Reporter