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WORKERS' COMPENSATION
ADVISORY COUNCIL MEETING

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KNEIP BUILDING
700 GOVERNORS DRIVE
PIERRE, SOUTH DAKOTA

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MONDAY, AUGUST 27, 2007

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Reported by Carla A. Bachand, RMR, CRR, Capital Reporting
Services, P.O. Box 903, Pierre, SD 57501 (605) 224-7611.

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MONDAY, AUGUST 27, 2007

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CHAIRMAN DAUGAARD: I'll call the meeting to order.

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Sarah, would you call the roll.

4 (Whereupon, roll call was taken and the following
5 members were present: Chairman Dennis Daugaard, Secretary Pam
6 Roberts, Secretary Paul Kinsman, Connie Halverson, Randy
7 Stainbrook, Paul Aylward, Carol Hinderaker and Chris Lien.)

8 CHAIRMAN DAUGAARD: I'll mention that Glenn had
9 intended to be here but had a health matter that I think was
10 hopefully not serious but wanted to recheck it today and so
11 we'll keep him in mind and hope for the best there. Before we
12 begin the meeting, I have copies of the issue listings that we
13 used as working documents last meeting, so if any member would
14 like, would anyone like one of those listings? Connie, I saw
15 you nod. Anybody else? Randy, do you need one?

16 MR. STAINBROOK: Yeah, I'll have one.

17 MR. AYLWARD: I've got one.

18 CHAIRMAN DAUGAARD: Anybody over here?

19 MR. LIEN: I've got mine, I'm good, thanks.

20 CHAIRMAN DAUGAARD: If anyone in the audience would
21 like some, they are right here, help yourself. The first item
22 on the agenda is the meeting minutes. Before that, is there
23 any questions or additions to the agenda as it was mailed out?
24 Everybody should have a copy of it. Any questions or
25 additions? We will proceed based on this agenda. The next

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1 item on the agenda is the meeting minutes. I noticed in
2 reading my minutes that on page two, the third paragraph down,
3 Carol is recorded as having moved to defer action on the issue
4 until the next meeting to see if a representative from Farmers
5 Insurance can be available to further explain their proposal.
6 On reading through the transcript, that's the way the original
7 motion came, but then we moved to revise the motion to defer it
8 indefinitely until a Farmers Insurance representative came

9 forward to urge it upon us. And we had a little discussion
10 about that, and the motion as it was ultimately adopted was not
11 to this meeting, because I looked for it on the agenda, it's
12 not on the agenda and that's correct, it shouldn't be on the
13 agenda because it was an indefinite deferral. So I think we
14 should amend the minutes. I move to amend the minutes to
15 strike the words "next meeting to see if," so then the minutes
16 would say "Carol Hinderaker moved to defer action on the issue
17 until a representative from Farmers Insurance" and so on. That
18 would be my motion from the chair. Is there a second?

19 MR. AYLWARD: Second.

20 CHAIRMAN DAUGAARD: Second by Paul. Any discussion or
21 question about that? Those in favor say "aye."

22 (Whereupon, the motion passed unanimously.)

23 CHAIRMAN DAUGAARD: Motion carried. Any other
24 corrections or additions to the minutes? That was the only one
25 I saw. I'll take a motion to approve the minutes.

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1 MR. AYLWARD: So moved.

2 CHAIRMAN DAUGAARD: Moved by Paul. Is there a second?

3 MR. LIEN: Second.

4 CHAIRMAN DAUGAARD: Second by Chris. Those in favor
5 say "aye."

6 (Whereupon, the motion passed unanimously.)

7 CHAIRMAN DAUGAARD: I think the agenda is pretty
8 straightforward. Again, we are going to deal with first the
9 terms of appointment and membership of our advisory committee,
10 which is statutorily identified, and then we will have some
11 discussion about whether we want to hold some of our advisory
12 council meetings elsewhere than Pierre. And I indicated in my
13 last or in the last meeting that we would take input from the

14 audience on that issue as well. I think that would be good.
15 Then we will deal with issues two and four and then open it up
16 for other comments or questions or issues that the public might
17 want to bring forward. Again, I mentioned at the last meeting
18 our intent would be not to take any kind of final action on
19 something that might be brought forward today, but essentially
20 set it out on the table for others to make comment at a future
21 meeting and carry it forward to that future meeting. Is that
22 agreeable to everyone? Anything else, opening comments or
23 opening concerns?

24 Then let's begin with a discussion on the terms of
25 appointment and membership of the Workers' Compensation

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1 Advisory Committee and, Pam, I see James has provided for us or
2 you have a one-page document which was distributed, should be
3 in everyone's hands. The first paragraph I'm guessing is drawn
4 directly from the statute.

5 MS. ROBERTS: It is, as actually the first three
6 paragraphs all are pretty much verbatim from the statute.

7 MR. AYLWARD: Which is it?

8 CHAIRMAN DAUGAARD: One-page sheet, looks like this.
9 It was distributed to you. We have eight members plus myself,
10 voting members, and then some nonvoting members, ex officio by
11 virtue of office, Paul Kinsman, Pam, and that's it, is it not?

12 MS. ROBERTS: That's it.

13 CHAIRMAN DAUGAARD: The two ex officio members. I see
14 that the two members whose terms expire next year are Guy
15 Bender, an employer representative, and then Paul, an employee
16 representative, both expiring June of '08, three in '09 and
17 three in '10.

18 MS. ROBERTS: Mr. Chairman, if I could, just to let

19 everybody know, that actually the three that are expiring in
20 2010 were recently reappointed, Carol, Glenn and Randy. Those
21 three were up the end of June and the Governor has recently
22 reappointed all three of them, just based on the workers'
23 compensation system is a very difficult system and the people
24 that are at the table right now are getting up to speed and are
25 up to speed on the issues and so he wanted to make sure there

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1 was some consistency and had no reason to replace any of the
2 three.

3 CHAIRMAN DAUGAARD: Sure, that makes sense, the
4 three-year terms, so the 2007, June 30th, Carol, Glenn and
5 Randy's terms were about to expire and you have accepted
6 reappointment and I appreciate that. I think what Pam just
7 said about experience and continuity is very helpful because it
8 is a complicated area.

9 I don't know if there's anything more that we want to
10 discuss about the membership. Any comments or questions? How
11 about location of our meetings? I would open it up to any
12 discussion about our meeting place and times. Just for an
13 opening to set the stage, our meetings have generally taken
14 place the first meeting sometime after the legislature
15 adjourns, I want to say March, April or May is about the first
16 date of our first meeting of each calendar year, and then we
17 have met more or less frequently in the years in which I've
18 been on the council, depending upon the number and complexity
19 of the issues. So if we have more complex issues, we tend to
20 meet more often, maybe an extra meeting or so. Otherwise try
21 to wrap up by late fall in time to get our annual report to the
22 Governor before he makes his decisions about which bills he
23 will support, whether they be agency bills or Governor's bills.

24 Is that a fair statement of schedule?

25 MS. ROBERTS: Very fair.

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1 CHAIRMAN DAUGAARD: What about the timing and location
2 of our meetings? Any questions or maybe I should say any
3 comments from the council members? What are your wishes?
4 Start first with the council. Paul.

5 MR. AYLWARD: I think it was suggested by was it Fern
6 Johnson that suggested that we move the meetings around maybe
7 to Rapid, Pierre and Sioux Falls, and I wouldn't have any
8 problem with that. It's maybe good to move it and see if we
9 would get any people from the public to come. I think it's
10 probably worth trying.

11 CHAIRMAN DAUGAARD: Other comments.

12 MR. LIEN: Mr. Chair, I know in a lot of the
13 committees within the state, they will usually try to pick
14 Pierre because it's viewed as the center, so from Sioux Falls
15 or Rapid, the two extremes, it would be easier to get to. I
16 know in the past we have done it through video teleconferencing
17 as well and I've used that in Rapid City and actually it seemed
18 to be a pretty good tool. So just as another suggestion, I'm
19 great with moving it wherever, but also as an added option, to
20 do the video teleconferencing as well is an idea.

21 CHAIRMAN DAUGAARD: That's a good comment. Any other
22 comments from the council? How about from the audience, anyone
23 from the industry? Yes, come on up.

24 MS. CHAMBERLAIN: My name is Cheryl Chamberlain, I'm
25 the vice-president of the South Dakota Injured Workers

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1 Coalition and I think that having the meetings in Rapid City as
2 well as Sioux Falls and Pierre would allow us to have members

3 that cannot come all the way to Pierre attend these meetings
4 and understand how the work comp system is actually occurring.
5 Now, the video teleconferencing would be nice if the meeting is
6 in Sioux Falls so the Rapid City members can view the meeting
7 and if the meeting is in Rapid City or Pierre, Sioux Falls and
8 Rapid City members can also view the meeting, and I would
9 greatly appreciate that.

10 CHAIRMAN DAUGAARD: Thank you. Any other comments
11 from members of the industry in the audience? I don't think we
12 are going to be setting any meetings for 2008. My hope, just
13 to give some perspective on '07, my hope is we will get through
14 the remaining issues that have been brought up this year at
15 this meeting and then hopefully the department will be able to
16 put together our draft report to the Governor and get it out to
17 all the membership and members of the committee and if there's
18 any discussion or comment or amendment, that we can maybe deal
19 with that by teleconference, and so I'm hoping that this could
20 be our last meeting of the year. What is our deadline to
21 submit the report?

22 MS. ROBERTS: The Governor has asked all the councils,
23 advisory councils get their stuff in by October 1st.

24 CHAIRMAN DAUGAARD: That's probably going to be about
25 all we can do. So shall we -- I'd like to suggest that our

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1 first meeting next year be, as it has been, in Pierre, and then
2 at that meeting we look at other meeting dates and places that
3 could be held elsewhere in South Dakota, have maybe one other
4 meeting in Rapid, one other meeting in Sioux Falls, and we will
5 try and schedule those meetings at one of the video conference
6 facilities and make that information known so that we can
7 either attend in person or by video conference. Does that

8 sound good to the council? Anybody object to that? All right,
9 that's our plan, then.

10 The next item on the agenda is issue two, which is the
11 payment pursuant to fee schedule, an issue arising in part out
12 of the Wise case. And in the packet that we used last time,
13 it's on the fourth page in and the Department of Labor has
14 drafted a proposed amendment to SDCL 62-1-1.3, and so James, do
15 you want to set the stage on this again and remind us what were
16 the circumstances of the Wise case and what this amendment
17 would, in your estimation, do.

18 MR. MARSH: In the Wise case, the claim was initially
19 denied by the insurance carrier for workers' compensation
20 benefits. The matter went through the hearing process, through
21 Supreme Court appeal and ultimately Mr. Wise was found to be
22 entitled to benefits. The issue arose on the part of the
23 insurance company that benefits for medicals should be limited
24 to those provided under our administrative rules for the fee
25 schedule, so the doctor charges \$60 for an office visit and our

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1 administrative rules call for a \$45 reimbursement. The
2 insurance company wanted to be able to pay the 45 instead of
3 the 60. Our rules do say in that regard that anything over and
4 above the fee schedule is eaten. The provider is not entitled
5 to additional reimbursement for the claimant for the
6 difference.

7 The proposal would be to allow the insurance company
8 to pay not the full amount of the billing, because kind of
9 backing up a little bit, I jumped ahead, the Supreme Court
10 found that the reimbursement should be for the entire amount of
11 the billing under the current wording of the statute instead of
12 what the department allows for in the fee reimbursement

13 schedule. So if the bill is \$60, they pay \$60. The proposal
14 would limit the reimbursement to the provider what the
15 insurance company has to pay strictly to what our fee schedule
16 calls for.

17 It has been a concern on the part of the insurance
18 industry, and I can see their point of view, that to do
19 otherwise puts the insurance company in an unenviable position
20 of having a reasonable basis for denying a claim, then turning
21 around having to pay more than what they would otherwise have
22 to pay simply for litigating it. And that's the reason for the
23 proposal.

24 To let you know, the insurance division also has some
25 proposed changes as far as potential subrogation interests and

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1 also as it relates to the effective network contracts they
2 would like to be considered by the council, and I don't know if
3 it would be better for them to address those issues or me,
4 that's a little bit outside my area, frankly. But just to
5 alert you to the fact that they have made those suggestions.

6 CHAIRMAN DAUGAARD: Any other -- let's then take
7 testimony from proponents of this proposed change. Are there
8 any members in the audience that wish to offer testimony in
9 support of this proposed amendment?

10 MR. MOSES: Thank you members of the committee.

11 CHAIRMAN DAUGAARD: You are Randy Moses.

12 MR. MOSES: Randy Moses, Division of Insurance. This
13 particular statute that we are looking at right now kind of
14 interplayed with health insurance for quite some time now. The
15 way things work under current law is when there is a dispute
16 between a health insurer and the work comp carrier as to who's
17 covering it, automatically the health insurance company has to

18 pay and then later if it's determined that it's work comp
19 compensable, then the recourse is for the health insurance
20 company to come back and try and recoup the amount that they
21 have paid from the work comp carrier.

22 What we have found, unfortunately, is that's a little
23 bit of a cumbersome process. I have been talking to Mr. Marsh
24 on this topic and it's my understanding from discussing it with
25 him that their hearing officers do not have the authority to

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1 require the repayment from the work comp carrier directly to
2 the health insurer, and it's created a difficult situation for
3 the health insurers to go through some extra costs and hassle
4 to get recouped for their money and really requires them to go
5 to court.

6 I am not here just to help out the health insurers,
7 although I don't have a problem with doing so. The reason I'm
8 here is that it's had a ripple effect over to the consumer
9 side. We have found that some health insurers and particularly
10 disability carriers are choosing not to write some policies in
11 South Dakota because of this extra hassle they are having to go
12 through, pay first, then try and collect later, and they may or
13 may not be able to get it, especially if the amounts of money
14 have gone directly to the client, reimbursement is not always
15 easy.

16 So with that in mind, I did work with Wellmark on an
17 amendment to this to enable the work comp or enable the
18 reimbursement directly from the work comp carrier to the health
19 insurer. Where there's been original denial, then subsequently
20 it's been found that work comp is applicable and it's
21 compensable under work comp, then and only then would the
22 reimbursement come back to the health insurance company who had

23 already paid the claim and only to the amount that they paid.
24 And that's really the crux of what we are trying to accomplish
25 here.

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1 CHAIRMAN DAUGAARD: If I understand correctly, this is
2 a substitute for the proposal that Mr. Marsh brought forward?

3 MR. MOSES: That's correct. I think the intent is to
4 accomplish what Mr. Marsh is trying to accomplish plus to
5 correct this problem in getting the health insurers reimbursed.

6 CHAIRMAN DAUGAARD: Thank you. If you could stand by
7 a minute. I want the members to be able to have a chance to
8 read it. Would you lead us through this?

9 MR. MOSES: Yes, be glad to.

10 CHAIRMAN DAUGAARD: Should the words "as follows" be
11 underlined?

12 MR. MOSES: I believe that's correct. I think that is
13 new language, I'm sorry. Basically it's going to accomplish
14 two things. Subsection one, where the benefits originally had
15 been denied by the employer, paid by the health plan, then
16 later determined to be compensable, then they may satisfy their
17 obligation by paying those expenses directly to the health
18 insurer, which I talked about. And then the subsection two is
19 the original thought that was proposed by Mr. Marsh and that is
20 the requirement that even though it had been originally denied,
21 it can still be paid under the medical fee schedule. So it's
22 really two components to it.

23 MR. KINSMAN: Randy, in your amendment, why are we
24 including disability benefits, can you explain that for me?
25 Because I'm trying to think of a situation where disability

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1 benefits would be included.

2 MR. MOSES: For instance, you have either an employer
3 or an individual disability policy and there has been a claim
4 under that disability policy, plus there's a question whether
5 or not that disability is work-related. Well, under the law,
6 the health insurer, the disability carrier must pay the claim.
7 If it's later determined to be work comp, then that's where
8 this problem comes in. So this enables that disability
9 carrier, if it's later found to be work comp compensable, to go
10 direct and get reimbursed for the amount they have paid.

11 MR. KINSMAN: If I have an independent disability
12 policy and I get injured at work, that's not necessarily --
13 there's an exception to that policy if it's work-related?

14 MR. MOSES: The way the statute currently is is if you
15 have any kind of health insurance and there's a dispute whether
16 it's work-related, the health insurance must pay first and then
17 later if it's determined to be work comp, then they have to go
18 back and try and seek reimbursement. This just tries to make
19 the reimbursement go a little smoother.

20 MR. KINSMAN: I'm trying to figure out if we are
21 including a disability policy or if we are talking about health
22 expenses here.

23 MR. MOSES: We are talking about both.

24 CHAIRMAN DAUGAARD: Randy, do all disability policies
25 exclude disabilities that are work-related?

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1 MR. MOSES: To the best of my knowledge, yes.

2 MR. KINSMAN: I didn't understand that.

3 CHAIRMAN DAUGAARD: I didn't either. Let me ask this
4 question, using an example. If I have got an injury or a
5 medical claim that my health provider charges \$60 for, let's

6 say, and my health insurance pays the provider that \$60, under
7 the fee schedule, if it's workers' comp related and it's
8 compensable up to, say, \$40, now, the way this reads, if I have
9 made my health claim and \$60 has been paid by my health
10 insurer, right, then where the medical expenses have been
11 denied by the employer and then paid by a health plan, so they
12 have paid these off and the expenses or benefits are later
13 termed to be compensable, the employer shall satisfy its
14 obligation of payment of the medical expenses by paying such
15 expenses directly to the health plan to the extent of the
16 health plan's payment. So doesn't that say that the workers'
17 comp carrier must pay \$60 to the health insurer?

18 MR. MOSES: I see what you are saying. Okay, that was
19 not the intent. Maybe we need to add "but not to exceed the
20 medical fee schedule," then they can just readjust the bill
21 with the provider later. I think that's a very good
22 suggestion, Lieutenant Governor. That would clarify it.

23 MS. ROBERTS: So then who's responsible for the \$20 in
24 this case?

25 MR. MOSES: The \$20 wouldn't be compensable to the

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1 provider, they would have to go back and adjust the bill. They
2 would have to write off that \$20 because by law the fee
3 schedule is --

4 CHAIRMAN DAUGAARD: The health provider probably will
5 already have paid it.

6 MR. MOSES: That's true, they can readjust their bill
7 with the provider later. They do that all the time. If we
8 said "not to exceed the medical fee schedule" on the end of sub
9 one, that would take care of that problem.

10 CHAIRMAN DAUGAARD: Where would you insert that

11 I language?

12 MR. MOSES: At the very end of sub one, I believe.

13 CHAIRMAN DAUGAARD: What would you say precisely?

14 MR. MOSES: Not to exceed the medical fee schedule.

15 "But not to" is maybe what we need to say.

16 CHAIRMAN DAUGAARD: But not to exceed amounts payable
17 under medical fee schedule?

18 MR. MOSES: That would work.

19 CHAIRMAN DAUGAARD: Not to exceed the amount
20 payable --

21 MS. HINDERAKER: Could you just use Mr. Marsh's
22 suggested wording, "pursuant to the fee schedule"?

23 CHAIRMAN DAUGAARD: You know, I don't like that
24 I language because to me -- first of all, Mr. Marsh's I language
25 where the words "pursuant to the fee schedule" are inserted,

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1 they modify the wrong part of the sentence because it makes it
2 sound like it's the interest rate pursuant to the fee schedule,
3 like there's an interest rate under the fee schedule. Those
4 words maybe should be inserted, "reimburse the parties not
5 liable for all payments made pursuant to the fee schedule," you
6 could do that.

7 MS. ROBERTS: If we go with this second draft, it's
8 completely different from the first draft, right?

9 MS. HINDERAKER: I just thought the wording might be
10 helpful, "not to exceed" and "pursuant to."

11 CHAIRMAN DAUGAARD: Yeah, I guess "not to exceed"
12 because that addresses the issue pretty clearly, that where the
13 health insurance allows a payment that's greater, that's
14 probably going to be -- that will occasionally arise I would
15 say, maybe frequently arise, I don't know. So I guess under

16 the language that we were talking about, the amendment as
17 offered by Randy Moses to be considered, we underlined the
18 words "as follows" at the end of the first full paragraph.
19 That's all existing language, that first paragraph is all
20 existing language with the statute. Then you would add "as
21 follows" to that and then the two paragraphs below.

22 The second paragraph on the page, that's labeled sub
23 one, at the very end of that paragraph, following the word
24 "payment," you would insert a comma, "but not to exceed the
25 amount payable under the medical fee schedule." Is that what

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1 everyone -- that's what I'm going to suggest. But not to
2 exceed the amount payable under the medical fee schedule. Then
3 I think subparagraph two is written the way it was intended.
4 Any questions of Mr. Moses about this proposed substitute?
5 I'll ask Mr. Marsh, do you see this as an improvement, because
6 it addresses the additional issue about health insurance and
7 disability insurance?

8 MR. MARSH: Yes, I do.

9 CHAIRMAN DAUGAARD: Otherwise it satisfies what you
10 were trying to do?

11 MR. MARSH: Yes.

12 MR. AYLWARD: Randy, what would happen -- to me this
13 wouldn't cover it, but what happens if the employee has no
14 health insurance?

15 MR. MOSES: Then this wouldn't apply at all.

16 MR. AYLWARD: What if the employee pays the bill?

17 MR. MOSES: This really doesn't have anything to do
18 with that I don't believe.

19 MR. AYLWARD: Well, that's my point.

20 CHAIRMAN DAUGAARD: Could we stand by a minute so I

21 can read this with that question in mind? Because I think
22 that's a very good question, Paul.

23 MS. ROBERTS: Could we put insurer or individual?

24 CHAIRMAN DAUGAARD: In my estimation, the first
25 subparagraph one is not a problem because there you are going

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1 to have it's paid by a health plan or insurer. So then you are
2 going to have a coordination of benefits issue that's addressed
3 by subparagraph one. Under subparagraph two, I could see some
4 workers' comp provider coming in and saying, gee, the medical
5 expenses were not paid by a health plan or insurer, which is
6 the language under subparagraph two, so I, employer, shall
7 satisfy my obligation by paying such expenses directly to the
8 medical providers, and I think we should change the word
9 "shall" to "may," so if the medical providers are unpaid, then
10 the health plan -- excuse me, the workers' comp provider can
11 pay them directly. If they are paid, then the workers' comp
12 provider can pay the employee, as they should in that case.
13 Does that make sense?

14 MR. STAINBROOK: From my perspective, I would be
15 opposed to it if an individual without health insurance is
16 limited to the fee schedule, especially when he is putting
17 money out to pay for the medical bills, he's probably putting
18 money out to hire an attorney for litigation because workers'
19 comp is not paying the claim and then he's going to end up
20 getting back less than what he put out on medical expenses?

21 MR. KINSMAN: In other words, he pays 60 but the
22 schedule says you get 40 and in one situation the insurance
23 company is eating the 20 and now you are saying the insured is
24 eating the 20.

25 MR. STAINBROOK: The injured worker, through no fault

1 of his own, is going to end up eating the money.

2 MS. ROBERTS: But the law says that the provider has
3 to accept the fee schedule, so in that situation it would be
4 just like the hospital or just like the insurance company, they
5 would get reimbursed and the hospital, the provider would have
6 to redo the bill, resubmit and then they would just get what
7 the fee schedule provides and the individual, if they have
8 overpaid, would be reimbursed that.

9 MR. STAINBROOK: Now the individual has to go fight
10 with the hospital to get reimbursements from that hospital.

11 MS. ROBERTS: No, because the law is specific, that
12 they only get the fee schedule.

13 MR. MOSES: We run across that issue all the time at
14 the Division of Insurance and we do get folks that say we need
15 help straightening it out and we certainly do provide
16 assistance to folks that run into these disputes and sometimes
17 it's just a matter of communication.

18 CHAIRMAN DAUGAARD: That's a current law right now?

19 MR. MOSES: We run across this with health insurance,
20 for instance, for balanced billing issues and they can't charge
21 above the contracted amount on health insurance where they have
22 a contracted provider. The same issue comes up all the time
23 and we can deal with it generally without too much problem.

24 MR. STAINBROOK: But it's getting to be more and more
25 every day where hospitals, clinics, doctors, et cetera, are

1 getting away from your Blue Cross/Blue Shield type fee
2 arrangements and stuff like that. You are seeing that more and
3 more all the time, where hospitals are not -- they don't have a
4 fee schedule with the insurance companies.

5 MR. MOSES: I would say that it's actually the other
6 direction. I would say that Wellmark has gotten a lot bigger
7 market share than they used to. Their market share has
8 increased significantly.

9 MS. ROBERTS: If I could clarify, though, this is not
10 an insurance plan. This is mandated benefits by statute, so it
11 would be different than a negotiated amount between an
12 insurance company and a hospital. This would be the mandated
13 benefits that would be paid by statute, correct?

14 MR. MARSH: That's right.

15 CHAIRMAN DAUGAARD: Maybe putting it in that context,
16 say under the fee schedule, under the workers' comp fee
17 schedule, again we use the \$40, \$60, it's payable at \$40, maybe
18 the hospital bill is \$60, maybe they have got a Blue Cross plan
19 that says if you are Blue Cross covered, you can get this for
20 50, but our normal charge is 60, so we are going to charge 60.
21 Bottom line is under the fee schedule, if the individual has
22 paid, whether it's 60 or 50, if it turns out to be workers'
23 comp related, the hospital is only entitled to 40, period, and
24 if the individual has paid 60 or if they have paid 50, if they
25 are the ones that have paid it, then they should be able to get

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1 back, under state law, that difference. Now, what you are
2 saying is the individual would have to fight with the hospital
3 over that and what I was hearing from you, Randy, is saying
4 that's current law. So this wouldn't change that. That's
5 current law.

6 MR. MOSES: That's right.

7 CHAIRMAN DAUGAARD: If we don't adopt this or we do
8 adopt this; am I misunderstanding?

9 MR. AYLWARD: I probably am. If we just adopt this

10 the way --

11 MS. ROBERTS: I actually think we need to amend what
12 you are talking about, but I don't think we have to be
13 concerned about the individual getting slammed around by the
14 hospital or anybody else because the fee schedule is mandated.
15 I do think we need to address your individual in the proposed
16 language, yeah.

17 CHAIRMAN DAUGAARD: I think under sub one,
18 subparagraph one, that is the first paragraph for this
19 amendment, that only applies where there's been a denial by the
20 employer or by the workers' comp carrier, but then there's been
21 a payment by the health plan or insurer, so that's not what you
22 are worried about, Paul, right? Sub one doesn't deal with that
23 and I don't think that would be a problem.

24 But you are saying what if the individual pays
25 directly because they don't have health coverage or for

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1 whatever reason they make the payment. Then sub two seems to
2 me that the employer could say, hey, if I pay directly to the
3 providers, I have satisfied my obligation and then the provider
4 has been paid twice and you want to be able to say, you can pay
5 the individual directly now because they are the ones that have
6 paid. So I think that's where I would either say --

7 MS. ROBERTS: What I'm looking at, I'm not a lawyer,
8 but number one and two where it says "paid by a health plan,
9 insurer or individual," and then down below in number two also
10 put "or not paid by health plan, insurer or individual."

11 CHAIRMAN DAUGAARD: I see what you are saying.

12 MS. ROBERTS: Up above it says parties, so it's
13 sweeping, but it's this new language. Maybe we need to say by
14 party.

15 CHAIRMAN DAUGAARD: So insert the word or individual
16 health plan, insure Oregon individual in sub one in a couple
17 different places. I have the benefit of looking on over your
18 shoulder. What you are suggesting, Pam, maybe you want to
19 recite that to everybody.

20 MS. ROBERTS: In subsection one, it would read "Where
21 medical expenses or disability benefits have been denied by the
22 employer, paid by a health plan, insurer," and then add "or
23 individual," and continuing on, "and the expenses or benefits
24 are later determined to be compensable, the employer shall
25 satisfy its obligation of payment of medical expenses or

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1 disability benefits by paying such expenses directly to the
2 health plan, insurer," and then add "or individual to the
3 extent of the health plan's or insurer's or individual's
4 payment." So we would add it three different areas, "or
5 individual, health plan's, insurer's or individual's payment,
6 not to exceed the amount payable under the medical fee
7 schedule, but not to exceed." And then down below in
8 subsection two --

9 CHAIRMAN DAUGAARD: Any questions about that? Did
10 everybody get that?

11 MR. SHAW: Excuse me, could I comment real quickly on
12 that part? I think that by the inclusion of an individual in
13 that first paragraph, you are really confusing things. Because
14 that part there only relates to where the medical expenses have
15 been paid by an insurance company, okay, if you read it. That
16 was the intent of that, I believe.

17 MR. MOSES: You know what, after I think about it,
18 Mike, realistically, even when the health care is paid, there's
19 usually some self pay, deductibles, coinsurance, so you may

20 need them both in there.

21 MR. SHAW: Right, but under law, if an injury is
22 deemed compensable, the employer and insurer have to pay the
23 claimant benefits, okay. There's already a statute under
24 medical fee payments, so maybe it doesn't hurt here, but it's
25 duplicious. I understand Paul's concerns, but I deal with

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1 cases all the time where the claimant has paid expenses out of
2 their pocket, the company already has to pay them back by law.
3 That's the basis of work comp. You gotta pay all medical fees
4 and you gotta pay all disability benefits, okay. You have to
5 do it, period.

6 So I think your concerns along this line are a little
7 bit unfounded in that there's already a requirement to do that.
8 Now, if you want to make it clearer, go ahead, but I just urge
9 caution by wordsmithing sitting around a table without thinking
10 it all through. The second part, Pam, I think your comment
11 about inclusion of "or individual" there certainly does not
12 hurt. The first one I'm a little concerned about.

13 MS. ROBERTS: In subsection two you are talking about?

14 MR. SHAW: In subsection two, I think that makes
15 perfect sense. It clarifies. If the individual has paid it,
16 the employer and insurer can certainly satisfy their obligation
17 by making that payment direct, or if the individual has not
18 paid it, okay, they can satisfy their obligation by making it
19 directly to the provider. James, what's the medical fee
20 section, 62-1? Whatever, but if you look at that, there's no
21 question that the employer and the insurer have an obligation
22 to pay these medical benefits if it's a compensable injury,
23 correct?

24 MR. MARSH: Yeah, no question about that.

25 MR. SHAW: No question, that's done. So without

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1 thinking this through exactly on this first paragraph, I really
2 urge caution there. The second one I think doesn't hurt
3 anything.

4 MS. ROBERTS: Maybe we need to go back to the drawing
5 board and wait till next round, the next year. I don't know
6 that we need to rush into this either. This was something the
7 department, the two departments have brought, and really ours I
8 thought was very easy and I think this really does make it a
9 more complicated issue that's going to bring probably more
10 testimony. It was not -- this piece of it was not on our
11 agenda today, for the public to know we might be talking about
12 subrogation issues. Anyway, just a thought for the council
13 members.

14 MR. STAINBROOK: I'm confused.

15 MR. AYLWARD: Mr. Chairman, I noticed we had some
16 written testimony was given to us this morning here from
17 Russell Janklow I think it is.

18 CHAIRMAN DAUGAARD: I just saw it and is this in
19 support of the proposed amendment or opposition?

20 MR. AYLWARD: Opposition.

21 CHAIRMAN DAUGAARD: I think what we should do is try
22 to get this to the point where the proponents want it to be and
23 then consider the opposition. Is that fair?

24 MR. AYLWARD: Yeah, I just wanted to ask a question
25 about what he said. It deals with this issue. I don't know

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1 that it deals specifically with this language. If you want to
2 go ahead.

3 CHAIRMAN DAUGAARD: I would say if the proponents
4 think that this -- it seems to me that Randy has raised a good
5 and valid concern about efficiency of our program that can be
6 addressed at the same time we address the issue raised by the
7 Wise case and so I think it's good for us to include both in a
8 consolidated proposal and then look and see whether the
9 opposition that Russ Janklow raises, and I haven't -- when I
10 came in this morning, this was laying on the table. He sent it
11 I can see August 23rd, so I don't know if any other member have
12 had a chance to read through it or not, but I have not.

13 MR. AYLWARD: I read it this morning, that's all.

14 MS. ROBERTS: We got it Friday and we thought print it
15 and bring it here.

16 CHAIRMAN DAUGAARD: There's nothing else you could do.

17 MS. ROBERTS: I think that is a very good way to do
18 it. Let's get something and see if there's other supporters.
19 Maybe it's the two departments and let's see who the opposition
20 is also.

21 CHAIRMAN DAUGAARD: I would say that this is an issue
22 brought by the department, so if the department would prefer to
23 defer this to a future meeting, we sure can. We can also do
24 some more wordsmithing and then see where it goes. All this is
25 going to do is get into the legislative arena and if it's got

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1 flaws in it, as Mr. Shaw suggests, or if it's redundant at
2 worst to the extent that the additional words just clarify and
3 create a little redundancy, that doesn't bother me so much as
4 if it would cause -- if there is a conflict. I don't see it
5 causing a conflict.

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

7 CHAIRMAN DAUGAARD: Again, I'm not as well-versed as

8 others.

9 MS. ROBERTS: I guess I would be interested to see if
10 there's any other support in the room to proceed today and if
11 not, I think it could wait until our next annual report and we
12 could do some work on it with interested parties like we've
13 done.

14 MR. LIEN: Mr. Chair, just before Mr. Moses leaves, I
15 have one quick question for him. You had made comment that
16 under the disability plan providers and potential health plan
17 providers, in its present form 62-1-1.3 is causing them to
18 modify some of those plans because of the uncertainty at the
19 tail end of whether they may get payments.

20 MR. MOSES: Actually, it's worse than that. Some of
21 them are saying I'm not going to sell this product in South
22 Dakota.

23 MR. LIEN: It's serious enough that they are not even
24 offering that as an option?

25 MR. MOSES: That's correct, that's why I brought this,

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1 rather than let the health insurance industry fight their own
2 battles, given there was an availability issue for South Dakota
3 citizens on certain types of insurance, I felt this was a
4 compelling issue that needed to be addressed.

5 CHAIRMAN DAUGAARD: Thank you.

6 MR. MOSES: Thank you.

7 CHAIRMAN DAUGAARD: I would say at this stage we have
8 the proposal that Randy Moses brought forth that the department
9 agrees meets or does what their proposal originally intended to
10 do plus addresses this coordination of policies issue, so we
11 have a proposal in front of us. Now, the way that it was
12 wordsmithed on the fly, granted, Pam had suggested inserting

13 the word "or individual" in three different places, the last
14 one being "or individual's," possessive. Then we had also
15 added the words at the very end of the first paragraph "but not
16 to exceed the amount payable under the medical fee schedule."
17 Under subparagraph two, I don't think you continued yet. Why
18 don't you do that, Pam so we know what you are talking about.

19 MS. ROBERTS: Again it was to add "or individuals" so
20 it would read, "If the medical expenses were not paid by a
21 health plan, insurer, or individual," that would be new
22 language, "the employer shall satisfy its obligation," blah,
23 blah, blah. Again, it is on the fly.

24 CHAIRMAN DAUGAARD: Any others who wish to offer
25 testimony in support of this amended proposal from Mr. Moses?

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1 Do members of the audience have copies at all? Does any member
2 not have a copy that would like one? Does any member of the
3 audience wish to speak in favor of this proposed change?

4 MS. SIMONS: Sue Simons on behalf of Dakota Truck
5 Underwriters. We would speak in favor of a proposal that
6 addresses this issue because it is an issue that causes a
7 significant amount of problems in situations, again, there are
8 many reasons to deny a workers' compensation claim and to be
9 penalized in doing so, which the law gives you the right to do,
10 and then end up paying in excess of that because you challenged
11 a claim is not I don't think with the spirit of the comp law
12 and would also actually require or allow providers to receive
13 benefits in excess of what they have agreed to accept by law.
14 So it is an issue that we are supportive in addressing.

15 One of the additions of the new language on disability
16 benefits I do think either needs to be talked out a little bit
17 in that when you talk about medical expenses, those have been

18 paid to a provider, who are very used to dealing with, like he
19 said, reimbursing and rebilling. Disability payments are paid
20 directly to the employee, so if the work comp carrier ends up
21 under this reimbursing a disability carrier, then their comp
22 benefit are going to have to be any difference between the two,
23 because the employee has already gotten the money.

24 For example, if Safeco, which is a big disability
25 carrier, short-term disability carrier, pays \$100 a week for

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1 benefits and it's later determined to be compensable, under
2 this the comp carrier now has to pay the \$100 back to Safeco
3 but the employee has the \$100, so they should only have to pay
4 \$150, if that's the comp rate to the employee, and I don't know
5 that this bill makes that very clear. Or in reporting to the
6 Department of Labor, if the insurer reports a payment of only
7 \$150 a week to the employee when their comp rate is \$250, how
8 is that going to be understood as to why there's no difference
9 in the comp rate? That's never been in the statute before and
10 I bring that up more as how is that going to work procedurally
11 and to make sure that it's understood that the comp -- the
12 claimant is only going to get the difference between the two.
13 Because it's either the fee schedule or the permanency schedule
14 or the temporary disability schedule, so you may have to work
15 with that with the addition of the disability benefits.

16 The only other issue we would raise is there are some
17 providers, DTU being one of them, that have other discount
18 arrangements with certain providers within the state that may
19 be less than the fee schedule, and again in those
20 circumstances, if they have made those arrangements, so when
21 you say not to exceed payments under the medical fee schedule
22 or any other discount arrangements I think would also be

23 applicable here so that if you do have someone that has even
24 gotten a greater benefit so that they can provide a lower rate
25 to their insureds, they should get the benefit of that as well.

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1 The other thing to remember is this is with interest,
2 so if you have an employee who paid the \$20 and it's been a
3 year since they have got reimbursed, they are going to get
4 whatever the interest is on that difference as well for the
5 money that they had lost. But it is with interest, whether
6 it's back to the provider or back to the employee. So we do
7 believe that this is an issue that does need to be addressed
8 and would prefer that it be addressed now instead of a year
9 from now. And the ability also to pay the medical providers
10 directly is something that we support.

11 CHAIRMAN DAUGAARD: Do you think that the language
12 harkening back to your first point about disability payments, I
13 think that we need to take care that when you state, now, I
14 want everybody to understand, that won't do it. We need it to
15 say it in the language. The wording as it is and as Pam has
16 added to it, will that cause problems, in your estimation, in
17 that disability instance you described?

18 MS. SIMONS: Well, number one will never apply to an
19 individual because they will never pay the disability benefits.
20 It's almost as if you are going to add disability. Not to make
21 things more complicated, you may want to deal with that in a
22 separate paragraph. Leave your medical expenses pursuant to
23 the fee schedule, because it does -- the first part of the
24 statute does talk about insurance benefits in general. So if
25 you wanted to have a B that applied only to disability to which

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1 you would then add the employer then is entitled to an offset

2 for any benefits repaid to the disability carrier, that way you
3 don't have the disability and the medical and the fee schedule
4 all in one particular paragraph would be a suggestion as to how
5 to address that issue. Because it's never been in there
6 before.

7 MS. ROBERTS: I guess I am getting back to Paul's
8 original question. Why did the Division of Insurance even put
9 in disability benefits? The whole statute and our fixes were
10 always for medical payments and wasn't that your original
11 question? Our department has never understood why the
12 disability benefits is deferred to the Division of Insurance.

13 MR. MOSES: We have had more availability issues with
14 respect to disability than with your major medical coverages,
15 so I'd say it's just as big of issue, if not more of an issue
16 for disability insurers than it is for major medical carriers.

17 MR. AYLWARD: Under present law, how does the issue --
18 how does your company deal with the issue of a disability
19 payment?

20 MR. KLAHSEN: You mean if there's a disability
21 carrier there?

22 MR. AYLWARD: Yes.

23 MR. KLAHSEN: We don't run across it that often, to
24 tell you the honest truth, that I see. When we do, we pay the
25 claimant. So if the claimant is due X amount of weeks of

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1 compensation at Y amount, we pay them, and I guess we have left
2 it up to the disability carrier and the employer to decide
3 whether there is some reimbursement due.

4 CHAIRMAN DAUGAARD: Would you identify yourself?

5 MR. KLAHSEN: Larry Klahsen with Dakota Truck
6 Underwriters.

7 MS. SIMONS: When I've been involved from the
8 litigation standpoint where there have been disability benefits
9 that have been paid, again, we have generally deferred to the
10 disability carrier working with the individual in an attempt to
11 get their funds back and that might be what's causing the
12 problem that's coming from the Division of Insurance, because
13 generally that money isn't available to get back from the
14 claimant who has used it, appropriately so, as their wage
15 substitute while this controversy was going on. So that's
16 probably caused more problems for claimants I would guess than
17 this fix would because it would allow the insurance company to
18 reimburse the disability carrier but yet still get their credit
19 for what the individual has had all along. So I think that's
20 the way it's generally done, is we stay out of it.

21 MR. AYLWARD: Mr. Chairman, if I could just ask one
22 more question of Sue. This is a little broader than this.
23 Under the present law, before the Wise case, was there a
24 problem with how you were paying the claim if it was a disputed
25 claim and you were denying that it was workers' comp and then

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1 it was determined at a later date to be workers' comp, were you
2 allowed to just pay under the schedule prior to this case?

3 MS. SIMONS: I think that's the general way it was
4 being applied, yes.

5 MR. AYLWARD: And this was brought about by the
6 department changing the way they had handled it?

7 MS. SIMONS: No, by the Supreme Court's reading of
8 this statute. The Supreme Court interpreted the statute
9 without the amendments to say that the employer somehow or
10 insurer somehow loses the benefit of the fee schedule by simply
11 denying that a claim is compensable, regardless of whether they

12 had -- just period. If you denied a claim, the Supreme Court
13 interpreted this as you no longer get the benefit of the fee
14 schedule.

15 MR. AYLWARD: Prior to this case, then, you did get
16 the benefit of the schedule in all cases?

17 MS. SIMONS: That I know of. I don't think anybody
18 else interpreted it the way the Supreme Court had. To my
19 knowledge, it was pretty much generally understood that if it
20 was determined to be compensable, you then went and paid
21 pursuant to the fee schedule, and James probably knows better.

22 CHAIRMAN DAUGAARD: Paul, just restate your
23 discussion. What you are saying, if I understand it correctly,
24 is that whether or not the claim was denied, if you covered it
25 at the outset, you got the benefit of the fee schedule. If you

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1 denied it and then later it was determined, yes, it was a
2 workers' comp claim, then you got the benefit of the fee
3 schedule, so in either case the fee schedule governed the
4 payments. But after the Wise case, employers now or carriers
5 now would have to say, gee, we have to err on the side of
6 covering so we get the benefit of the fee schedule because if
7 we err on the side or if we deny and we are later held to have
8 wrongfully denied, we are penalized by having to pay actual
9 rather than fee schedule limited payments, right?

10 MS. ROBERTS: To the provider, yeah.

11 MS. SIMONS: Right, and this also addresses the other
12 issue out there, being able to pay the provider directly and
13 not pay the claimant and his or her counsel, who then paid the
14 provider to have a go round and just leave the medical between
15 the provider and the insurer to handle all of this payment
16 situation.

17 MR. AYLWARD: This is probably a loaded question. As
18 an insurance attorney representative, if we change this law and
19 give you the benefit of the doubt both ways, does that give you
20 more incentive to deny claims?

21 MS. SIMONS: No, because there's plenty of other
22 avenues that you can be held your feet to the fire for denying
23 claims that are much more risky than a difference between \$40
24 and \$60. The Division of Insurance has their eye on you, as do
25 other common law avenues to proceed if you deny a claim,

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1 appropriately so.

2 MS. ROBERTS: If I could get back to the discussion we
3 are having on the whole disability benefits, I do understand
4 where the division is coming from on disability. I am
5 struggling with this council's role, and the Workers'
6 Compensation Advisory Council to me studies this system. If
7 there's a problem in the insurance code and with disability
8 benefits, I think that's a whole other arena and the division
9 maybe needs to do a bill to fix that. What we are looking at
10 is workers' compensation medical benefits paid by the fee
11 schedule for workers' compensation. So you are acting
12 confused, but I'm seeing black and white that medical -- that
13 the medical expenses that we are talking about in subsection
14 one would be the workers' comp medical expenses because they
15 are under 62-1-1.3, which is a workers' compensation statute.
16 If we throw in that disability benefits, we are talking about a
17 whole disability system. Am I wrong here?

18 MS. SIMONS: If I could just comment. I think it
19 comes in in that the first part of current 62-1 talks about
20 other insurance purposes. It's not -- even though I think this
21 was originally attempted to relate only to medical expenses,

22 it's written broadly enough that it says if the injury is
23 deemed not compensable, such injury is presumed related for
24 other insurance purposes, which would of course include
25 disability insurance, so if you want to limit it to medical,

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1 that's where you need to make your change and then if the
2 disability people want to deal with it, but that's why it
3 covers, it could be read to cover that because it says other
4 insurance purposes, which for comp could include disability
5 insurance.

6 MS. ROBERTS: Thank you. That answered my question.

7 CHAIRMAN DAUGAARD: Any others who want to offer
8 testimony as proponents?

9 MR. SHAW: Good morning, Mike Shaw for Property
10 Casualty Insurers. I have to agree with Sue, that this is an
11 important area that needs to be fixed and I think the
12 department's overall intent is something that the council
13 should consider. And we would urge that you tackle this issue
14 and present it to the legislature this year.

15 As I've sat back and listened further to the
16 discussion regarding Pam's changes on the inclusions of the
17 individuals, I think that perhaps you are right in both
18 instances, but I would -- it's still very confusing when you
19 add the disability part, especially in that area. As I think
20 Sue pointed out, disability benefits in terms of workers'
21 compensation are paid directly to the injured worker, so
22 there's no way they are being paid out, and it just doesn't fit
23 right now.

24 Randy may well have a really valid point on the
25 payments of those, but I guess I'd ask that you consider if you

1 are going to tackle the disability part, make that another
2 subsection here or make it another whole separate change, and
3 that way we know we are not going to mess something up
4 unintended.

5 So in my opinion, I like the word changes that you
6 have included here. If you would strike the "or disability
7 benefit" out of subsection one, I think that makes it better.
8 Now, I don't want to -- if Randy can work up some additional
9 language for a subsection there, that might be the way to go.
10 Thank you.

11 CHAIRMAN DAUGAARD: Thank you, Mike. Further comments
12 in support of this proposal. Proponents. All right, opponents
13 to the proposal.

14 MS. CHAMBERLAIN: My name is Cheryl Chamberlain and I
15 am an injured worker as well as the vice-president of the South
16 Dakota Injured Workers Coalition, and we oppose this issue with
17 the fee scheduling. It sounds like it's a relatively simple
18 issue, but it is not. How it actually affects the injured
19 worker is this. You go and you get medical treatment and then
20 the insurer has 30 to 60 days to decide if they are going to
21 pay the bill or not. The injured worker may or may not get a
22 denial in the notice. Six months later the bill still hasn't
23 been paid, but the injured worker is put in the situation of
24 being harassed by collectors, threatened with judgments,
25 interest, collection fees, and then if it decides to go to a

1 hearing, such as in the Wise case, which took two and a half
2 years to decide, you have two and a half years worth of
3 interest charges and fees that are assessed to the injured
4 worker, who may or may not be working at all or have no

5 insurance.

6 If it is not submitted to your private insurance
7 carrier within that first year, your private insurance carrier
8 can deny that claim because it was not submitted in the first
9 year, making the injured worker 100 percent responsible for all
10 fees and judgments placed on them while waiting for a decision
11 by the department. And that's what this rule here does, it
12 only benefits the employer and the insurer but victimizes the
13 injured worker. This happens to too many workers and it is one
14 of the number one complaints of injured workers across this
15 state.

16 Now, if the insurer and the employer are given two and
17 a half years to decide on a case, why is not the injured worker
18 also given the fee schedule to be responsible for without
19 interest and penalties? I mean, this council is to support the
20 injured workers as well as the insurer and the employer. But
21 we end up being victimized by stuff just like this.

22 MR. LIEN: Mr. Chair, not to put you on the spot
23 because I just read this this morning as well as you. Do you
24 have, in reading it, any suggestions on how it could be
25 modified to solve some of the concerns that you have?

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1 MS. CHAMBERLAIN: Well, I think in order -- then you
2 are going to have all the medical providers in here. If the
3 injured workers and the insurer and the employer are given the
4 fee schedule and they have to wait years to get paid, that's an
5 unfair business practice, to be honest, because as a
6 businessman, if you provide a service, you expect to get paid
7 and if you don't get paid, you can charge interest fees as a
8 businessman. So if a medical provider provides a service but
9 yet has to wait years for a decision to be made to get paid, he

10 should be either paid the fees and services by the insurer and
11 the employer, if it's good enough to put on the injured worker,
12 or if it is found that the injured worker owes, then the
13 injured worker should also pay the fee schedule.

14 MR. LIEN: If I understand your position, the
15 opposition is to the change, not to the statute in its existing
16 form.

17 MS. CHAMBERLAIN: I think if an insurer and employer
18 decides to challenge a bill, and usually it's not a doctor's
19 fee bill that is challenged, it is a major test, maybe a CAT
20 scan or an MRI, so as an injured worker, they decide, well,
21 it's three months here, what are we going to do with this bill,
22 maybe we should deny it, and I get a piece of paper that has a
23 check denied on it, at that point maybe I don't have insurance
24 or maybe I do, but I will have a \$1,000 to \$2,500 deductible
25 that I am responsible for plus the bill, but yet the insurer

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1 wants the fee schedule. If the insurer wants the fee schedule,
2 they need to pay the bill and then go back and take it to the
3 hearing process is what should be done. Pay the bill if you
4 want the fee schedule, then come back and say, no, we are going
5 to disagree with this and take it to court. That way they got
6 the fee schedule, the injured worker is not put in a collection
7 and judgment situation and then it can be heard and determined.
8 And then they can go after the individual's insurance and leave
9 the injured worker out of the collection business. We didn't
10 intend to get hurt and this is what we were told we needed to
11 do, is we needed to have this test done to find out, do you
12 have herniated or bulging disks or is this broken. We have no
13 control out of any of this situation, but yet we continue to be
14 victimized by stuff that wants to protect a specific group and

15 the whole situation is not looked at.

16 MR. LIEN: If I understand it correctly, then, your
17 position may be you are not against the existing statute, but a
18 modification putting the burden on the carrier first and then
19 arguing whether or not it was appropriate versus having
20 somebody else bear that burden and then worrying about whether
21 or not that was appropriate. It's who takes the first step.

22 MS. CHAMBERLAIN: Yeah, if they want the fee schedule,
23 pay the bill, then dispute it in court, but then you have
24 gotten the fee schedule. Because Wellmark Blue Cross in Rapid
25 City is not accepted at the emergency room, where most likely

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1 an injured worker is going to go as well.

2 MR. LIEN: Thank you.

3 CHAIRMAN DAUGAARD: Any others in opposition to the
4 proposal? Any other opponents? Discussion by -- let's -- is
5 there a motion to start us off, a specific motion? Any
6 comments? Maybe let's go there, because it's a little unclear
7 what the proposal may be.

8 MR. LIEN: Mr. Chair, I guess to start off, my
9 impression is that we need some form of modification to the
10 existing statute. There is some concern about wordsmithing it
11 on the fly, for lack of a better term. But I do sense that
12 there is some criticalness to it. So my first question is, is
13 there a way we can resolve this prior to the report going to
14 the Governor in a manner that's resolved to everybody's
15 satisfaction? If not, can it be put as a priority for one of
16 our agenda items at the first start of the session next year?
17 So I'm not suggesting either one, but just making an
18 observation that those are the two issues that have come to the
19 surface for me today.

20 MR. AYLWARD: Mr. Chairman, if we could go to -- there
21 was a couple other people opposed to this.

22 CHAIRMAN DAUGAARD: Thank you for reminding me of
23 that.

24 MR. AYLWARD: Mr. Janklow's letter we received, and I
25 have a couple of questions maybe James could answer of how the

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1 present law applies, and also I was looking back through Dennis
2 Finch's written testimony. We didn't -- he was here, I
3 believe, at one of the meetings, but we didn't get to this
4 issue. And he also had some opposition to this proposal.

5 If you go to Mr. Janklow's letter, the part that I
6 have a question on, he seems to imply that by passing a change
7 to this law, it will somehow affect injured workers' ability to
8 obtain an attorney because there will be less money in it for
9 attorneys, and could you explain, or am I reading what he says
10 wrong, James?

11 MR. MARSH: That's what he seems to be saying, but
12 frankly, I don't understand it. In my experience, what goes on
13 in the field is that attorneys, if we are only talking about
14 medical costs as a dispute, attorneys just don't take those
15 cases at all. They are usually interested in making a claim
16 based on some identifiable disability benefit and if you are
17 saying it's a med only, they won't touch it. So I don't know
18 that this -- I'm not sure I understand the comment, frankly.

19 MR. AYLWARD: I didn't understand it either.

20 MR. KINSMAN: Maybe the comment that he's making is
21 that even though you may have the significant disability claim
22 that makes it financially feasible for an attorney to take it,
23 that there are also meds and what you are doing is reducing the
24 gravy, so to speak, on top of it by whatever the fee schedule

25 amount is and that puts him in a different situation when he's

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1 trying to negotiate subrogation.

2 MR. AYLWARD: That maybe is what he implies.

3 MR. MARSH: It's possible.

4 MS. ROBERTS: The \$20 he was talking about, that would
5 be the gravy and if you can negotiate that amount, it might
6 help to settle something. That's exactly what Dennis Finch is
7 saying here, too. Does everybody have Dennis's letter?

8 CHAIRMAN DAUGAARD: Could you read that?

9 MS. ROBERTS: He made several points, but he said,
10 "Finally, and perhaps the most compelling reason to not make
11 this change is the fact that injured workers will very likely
12 have difficulty or perhaps never be able to find legal
13 representation in these types of cases. It, simply put, sets
14 up a situation where the employer has the best of both worlds,
15 i.e., deny the medical expense in a case where it is a close
16 call and take their chances, but if they lose the case, reap
17 the benefit of payment under the fee schedule. It is sort of
18 akin to having their cake and eating it, too, while
19 additionally serving to be extremely harmful to injured workers
20 who are unable to secure legal counsel."

21 CHAIRMAN DAUGAARD: Any other comments after Chris
22 essentially said he feels we should take it up, if we can, yet
23 this year or make it a priority next year; is that what I heard
24 you say?

25 MR. LIEN: Correct.

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1 CHAIRMAN DAUGAARD: Any other comments?

2 MR. STAINBROOK: I guess I, for one, would rather make
3 it a priority in 2008 so that we have an opportunity to get it

4 right, instead of going by the seat of our pants. I would
5 prefer to be able to take some time, look it over and then make
6 it a priority for next year.

7 CHAIRMAN DAUGAARD: Any other comments?

8 MS. HINDERAKER: I'd like to ask Mr. Marsh a question.
9 Based on the Wise decision, and I don't know the date of that
10 decision.

11 MR. MARSH: Latter part of last year, I believe.

12 MS. HINDERAKER: So subsequent to that, if after a
13 hearing an injury has been determined to be compensable, does
14 the department now instruct the employer and the insurer to pay
15 the full amount of the bill as opposed to the fee schedule or
16 how have they been paid since the Wise decision?

17 MR. MARSH: Our department judge would instruct the
18 insurer to pay according to whatever the billing was.

19 MS. HINDERAKER: And reimburse according to the
20 billing?

21 MR. MARSH: Right.

22 MS. HINDERAKER: So if a health insurance provider had
23 paid the bill in interim and then it went to hearing and at the
24 hearing it was determined that the injury was compensable, you
25 would now instruct the insurer who represents the employer to

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1 pay the entire amount of the bill to the attorney, yeah, the
2 attorney and the claimant, even though the health insurance may
3 have only paid \$45 under its private arrangements with the
4 provider?

5 MR. MARSH: Yes.

6 MS. HINDERAKER: So the department would be
7 instructing the employer/insurer to pay more than the health
8 insurance actually paid?

9 MR. MARSH: In some cases, yes. And ultimately what
10 would happen is that the health insurer and the workers'
11 compensation insurer would then have to sort out and the
12 claimant perhaps to sort out where this additional payment
13 goes, probably in circuit court if it gets into litigation,
14 because we have no authority over those kinds of disputes.

15 MS. ROBERTS: Well, and my biggest concern is that the
16 injured worker is not getting these excess payments, it's a
17 windfall to the providers. It's not -- in these cases if we
18 are ordering those payments, it would go to the provider, not
19 to the injured worker, correct?

20 CHAIRMAN DAUGAARD: The medical provider.

21 MS. ROBERTS: Right. And driving up prices to
22 everybody that's involved.

23 MR. AYLWARD: I think Ms. Chamberlain made a good
24 point, that the injured worker is caught in the middle of all
25 this and I would think that would be a great concern to this

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1 commission, is we don't want that, and I don't particularly
2 want hospitals to get a windfall or doctors. They seem to do
3 pretty well. But so do insurance companies. And the people
4 that really get caught in the middle of this are the employers
5 and the employee, and the employer ends up in a lot of cases
6 paying higher either in workers' comp or in health insurance,
7 if they are providing some type of health insurance. If the
8 injury is not compensable, it goes to the health insurance and
9 causes their health insurance to go up.

10 So to me the employer and the employee are the ones
11 that are getting caught in this and possibly Ms. Chamberlain
12 had a suggestion of some way to pay these up front and not
13 squeeze the worker, because I agree with her, I hear those

14 complaints, too, of if you hold the worker off long enough and
15 squeeze them, they are going to be put on the spot, they can't
16 afford to not say okay, I'll settle, because they don't have --
17 in a lot of cases they are not working and they don't have any
18 money to survive on. So I think this is a bigger issue than we
19 just started out looking at.

20 CHAIRMAN DAUGAARD: I guess one concern I would have,
21 if it's true what Ms. Chamberlain said, is typically it's a
22 test that's a contested matter, then it seems to me that by
23 leaving the law in its current state, the providers are almost
24 incented to have tests created, knowing that they are going to
25 get full payment, not limited to the fee schedule, for these

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1 tests. So the very -- if I'm an injured worker and I go in
2 there, I don't know what tests I should have, I rely on the
3 doctor or the hospital to tell me what test I need. I know the
4 acronyms, that kind of thing, that's it. So whether I should
5 have a PET scan or an MRI or a CAT scan, I don't know. So I
6 worry that the current law almost incentes the provider, it
7 certainly doesn't disincent the provider from tests if they
8 know that a denial that ultimately ends up being a
9 work-related, determined to be work-related is going to force
10 the workers' comp carrier or the employer to pay the full
11 amount of the bill.

12 MS. ROBERTS: That's a good point.

13 CHAIRMAN DAUGAARD: I don't like this current
14 condition. I don't think it helps the worker or the system.
15 Any other comments or thoughts? I do think that Mr. Shaw
16 brought up a good point, that there is some danger of
17 wordsmithing on the fly, where we are talking about both
18 disability and medical insurances in the same paragraphs. It

19 doesn't make sense where the individual is getting direct
20 disability payments. So I do think it does make sense to try
21 and separate out into separate subparagraphs the disability
22 coordination with workers' comp as opposed to mixing them in
23 these first two subparagraphs. Other than that, I would
24 personally support bringing this forward with the disability
25 pieces peeled out and separately stated as subparagraphs. That

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1 would be my personal preference.

2 MS. ROBERTS: Do we want to possibly hold off on
3 action and let staff work over the noon hour to come up with a
4 possible subsection three and distribute it around? Would that
5 work?

6 CHAIRMAN DAUGAARD: I don't think it's real
7 complicated.

8 MS. ROBERTS: I don't either.

9 CHAIRMAN DAUGAARD: I think you can use virtually the
10 same language but separate out, you just have to leave a few
11 words out or include a few words differently in each of the
12 subparagraphs. What is the council's reaction to that? If we
13 still don't want to go forward, at least we are making the
14 decision based on policy rather than confusing wording.

15 MS. ROBERTS: That sounds good.

16 CHAIRMAN DAUGAARD: Is that agreeable to look at this
17 again after lunch and see if the department can reword this
18 language that Randy Moses came up with? Again, it's certainly
19 not going to come into law just because we propose it, it's
20 still going to have to be massaged by the legislature and
21 amended, if necessary, to any further degree. I'm seeing no
22 objections, so that's what I'm going to do. We will defer
23 further action on this until after lunch and ask James to see

24 if he can wordsmith something with maybe Randy and maybe Mike,
25 would you help to some degree with James in wordsmithing the

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1 disability?

2 MR. SHAW: I just visited with Randy and I'm sure we
3 can come up with something and share it with Sue as well and
4 anyone else. You bet.

5 CHAIRMAN DAUGAARD: Thank you. The next item on the
6 agenda is issue four, willfull misconduct, VanSteenwyk case.
7 Don't let me forget that that is also addressed in Mr.
8 Janklow's letter. Again, this was a proposal that the
9 department is bringing forward, so either Pam or James, I'll
10 ask you to introduce it.

11 MR. MARSH: This involves the Supreme Court case of
12 VanSteenwyk vs. Baumgartner Landscaping, decided last fall. It
13 would be worth going back and touching on the salient points in
14 the decision. VanSteenwyk was an individual who worked for --
15 worked as a front end loader, was asked to take off one piece
16 on the front end loader and put on another, and as he did so,
17 his leg was crushed by a hydraulic arm on the loader. It was
18 found in the record that Mr. VanSteenwyk had been smoking
19 marijuana pretty steadily for the last 15 or 20 years and in
20 particular up until -- he wasn't sure exactly how many years it
21 was, as I recall. In any case, as recently as 12:30 the night
22 before his injury. His injury occurred sometime around 8:00
23 or 9 o'clock in the morning.

24 I'm a little surprised, frankly, in the notes that Mr.
25 Janklow makes about that case, because he notes specifically,

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1 he says about the third paragraph down, "He was not high or

2 impaired on the job, and his off-duty marijuana use had nothing
3 to do with the work place accident." I'm not sure if my
4 recollection of the case is faulty, but I believe the
5 toxicologist found specifically that VanSteenwyk was impaired
6 and would be for days after this claim occurred, so that's
7 simply a misstatement of the record, as I recall.

8 In any case, this person was impaired, but the experts
9 who testified in the case could not establish that that
10 impairment caused his accident. They were unwilling to, when
11 presented with that specific question. Our concern is that
12 this sets a very bad message for a work place and employers out
13 there. An employee apparently is able to become intoxicated
14 with alcohol or to use illegal drugs with impunity. It does
15 not necessarily relieve -- it's not a one size fits all where
16 we say this person is using drugs so we automatically lose.

17 Under our proposal, they would have the ability to
18 come back and rebut the presumption that they have acted
19 illegally or engaged in misconduct, which would deny them the
20 right to benefits. But it does send a very clear message that
21 in the work place at least, that kind of behavior is not going
22 to lead anywhere except trouble. It does limit the application
23 of this presumption rule strictly to alcohol and drug cases.
24 It does not apply to the use of safety devices or other types
25 of misconduct that are defined under the statute.

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1 And that is consistent, basically, with the overall
2 rule that's expressed in work comp, that intentional conduct
3 should take you out of the work comp arena as much as possible.
4 If I have an employer who intentionally injures an employee,
5 that is not a work comp claim. That's a lawsuit against the
6 employer for tort. If an employee engages in intentional

7 conduct like this, they should be expected to live with the
8 ramifications of their actions. That is the reason for the
9 proposal.

10 CHAIRMAN DAUGAARD: Any questions of James?

11 MR. KINSMAN: James, what about the argument that Russ
12 makes with regard to putting the burden on the employee to
13 prove a negative, which in the law is generally not done? And
14 clearly this does that. Once you establish the person has a
15 certain alcohol level or has a certain amount of illegal drug
16 use, the presumption is then that the cause of the accident was
17 contributed to by the alcohol use or drug use, and then how
18 does an employee go about proving that it did not?

19 MR. MARSH: To me, that is no different conceptually
20 than an employee having a pre-existing medical condition,
21 saying that I have a degenerative disk in my back and everybody
22 acknowledges that's not work-related and I also have a
23 potential work cause for my claim. The employee is given the
24 burden of establishing that the work was more important than
25 the nonwork or at least the same and in terms of establishing

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1 liability. So the fact that there is some other cause, his own
2 conduct, which contributes to the problem, to me conceptually
3 makes no difference.

4 MR. KINSMAN: In a situation where you have a
5 pre-existing condition, though, aren't you still proving that
6 the work was more of a cause?

7 MR. MARSH: Yes. Or at least the same.

8 MR. KINSMAN: So in this case, you would essentially,
9 if you are going to make it analogous, you are saying the
10 employee would have to prove that the work conditions were more
11 of a cause or whatever happened in the accident was more of a

12 cause than their alcohol or drug use?

13 MR. MARSH: Yes, you would have to show that the use
14 of the intoxicating substance was not a proximate cause of the
15 accident. It's not the same as contributing. Simply that it
16 was not a proximate cause, which it's not as difficult a
17 standard from the employee's point of view.

18 CHAIRMAN DAUGAARD: Any other questions of James?
19 James, as you write this, do you see this as changing -- it
20 seems to me under the current statute, the employer shares the
21 burden or has the burden. The burden of proof under this
22 section shall be on the defendant employer is the way the
23 statute currently reads, to prove that the employee's use of a
24 Schedule I or Schedule II drug or intoxicant is willfull
25 misconduct, and the statute or the Supreme Court further

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1 defined that to mean that it was a cause of the accident, it
2 just didn't happen to occur as well. And I worry that
3 infinitesimal amounts of illegal drugs or -- I think especially
4 in the case of illegal drugs, infinitesimal amounts will
5 prevent someone from claiming, not that I'm encouraging that,
6 but I do wonder if it's changing the burden.

7 MR. MARSH: And I don't want to present any illusions
8 in that regard. So many proposals we make are simply intended
9 to return things to where we thought they were before we made
10 the change. This does not. This is a change in the law over
11 and above whatever existed before VanSteenwyk. VanSteenwyk is
12 an expression of existing law and we would be changing it.
13 It's really then a policy judgment to me with the members of
14 the council whether something needs to be done or not.

15 CHAIRMAN DAUGAARD: Other questions of James? Other
16 proponents of this amendment as proposed by the department?

17 MS. SIMONS: Again Sue Simons on behalf of Dakota
18 Truck Underwriters. We are proponents of this change and I
19 believe this change is consistent with other states, last time
20 I looked anyway. And that is that the two specific instances
21 of misconduct are both, well, violations of the law in some
22 extent. If somebody comes to work and gets hurt and they have
23 got a blood alcohol level and they drove there, they probably
24 violated the law to get there. Almost every employer, if they
25 don't, they should have a policy that precludes the use of

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1 alcohol at work. So you have an employee that clearly has
2 violated that and we know medically that if you are at the
3 legal limit for intoxication for purposes of DWI, you are
4 impaired. That is why you can pick a standard and have it be
5 the law for DWI, because the medical evidence is really
6 undisputed that if you are at a .08, you are impaired. And all
7 that is is bringing that same medical evidence and standard
8 into the comp.

9 As to the use of drugs, I think it is important to
10 remember that it references illegal drugs, and once again, you
11 have got a situation where an employee has violated the law by
12 engaging in whatever that drug happens to be before they come
13 to your employment to do your job, and you gotta also remember
14 that in these circumstances, to deny a claim on willfull
15 misconduct, you have got to have that proof within 30 days and
16 maybe you can get another -- or 20 days and get another 30 days
17 to make that determination if this burden stays with the
18 employer. And all this is saying is that it's not an absolute,
19 as James pointed out, it's simply a presumption.

20 If they can come forward with a doctor that says I
21 don't think, for whatever reason, being at a .08 impaired this

22 person was a substantial factor in causing that accident, the
23 presumption is gone and you go back to fighting about it. So
24 it's not an irrebuttable presumption. It simply means in those
25 circumstances where an employee has gone to the hospital

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1 following an accident and a blood test shows that or they show
2 illegal drugs, then the burden should properly shift to someone
3 who has violated the law to prove that they are entitled to
4 work comp benefits, and we think this is an appropriate change
5 and one that should be supported.

6 CHAIRMAN DAUGAARD: Any questions of Sue? Any further
7 proponents? Opponents?

8 MS. CHAMBERLAIN: I oppose this ruling because it has
9 always been the employer's burden to prove and now it's going
10 to be placed on the employee to prove the burden. But I would
11 like to remind this council that when you read over Mr.
12 VanSteenwyk's transcript, I question the integrity of his
13 employer, who put him at this situation. He found that Mr.
14 VanSteenwyk and his copartner, who had smoked pot for 20 years,
15 were his best employees over this past year. This employer had
16 many opportunities to run a random drug test and did not. The
17 employer, to save man hours, which means money, put a worker in
18 a compromising situation and an accident potential which led to
19 a work-related accident. The employer never provided proper
20 safety instructions or equipment as well as disengaged a safety
21 system. Now, if the employer was a responsible employer, he
22 would have run drug tests, or did he just know that they smoked
23 pot and didn't care because they were his best employees? That
24 I have to ask. And that needs to be considered when we are
25 changing a law that has always been that the employee -- or

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1 employer is responsible and now we are shifting the burden to
2 the employee.

3 Many injured workers are put on many types of drugs
4 that cause them to be euphoric, sleepy, groggy, unable to
5 concentrate and sent back to work to meet the work comp
6 standards of return to work policy. But yet the system finds
7 that acceptable because we have returned the injured worker to
8 work. So is the work comp system and the employer and insurer
9 responsible when they put an injured worker on drugs and send
10 them back to work? Is that willfull misconduct as well? We
11 are a danger to ourselves, to our fellow employees, the people
12 that we drive to and from work, but yet we return to work so we
13 meet the work comp return to work standard.

14 Now, the employer, if it's their burden, it needs to
15 stay their burden and I recommend that you do not incorporate
16 this rule change because maybe too many employers are actually
17 putting their employees at very high risk for accidents that
18 have nothing to do with off-duty recreational activities and
19 are failing to accept responsibility to keep their employees
20 safe. That's all I have to say.

21 CHAIRMAN DAUGAARD: Questions. Any questions? Thank
22 you very much. Any other opponents to the proposed language
23 change? Motions by the council or discussion by the council.

24 MR. KINSMAN: I'm just curious, Mr. Chair, James, is
25 the statute referenced in your change? Does that reference the

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1 .08, is that the DWI statute, so it's not any alcohol level,
2 it's .08?

3 MR. MARSH: Right.

4 CHAIRMAN DAUGAARD: Any other questions or discussion?
5 Is there a motion?

6 MR. AYLWARD: Mr. Chairman, I'm going to make a motion
7 that we not send this forward. I believe the burden should
8 stay where it's at and if there's a reason why they should be
9 denied, they will be. If not, it should stay the way it is. I
10 move that we -- I don't know if that's correct, but move that
11 we not send this forward.

12 CHAIRMAN DAUGAARD: Is there a second to that motion?

13 MR. STAINBROOK: I agree with Paul. Most employees
14 have a hard time getting their workers' comp claim going anyway
15 and to put more burden on them to do that, I believe it should
16 stay with the employer also, so I'm going to second Paul's
17 motion.

18 CHAIRMAN DAUGAARD: Discussion on the motion.

19 MR. LIEN: Just a quick question, Mr. Chair, kind of
20 in more of a procedural sense. The motion is to not include it
21 in the report?

22 CHAIRMAN DAUGAARD: Right.

23 MR. LIEN: If it is stricken, does it mean it will be
24 included in the report or will we have to have another
25 follow-up motion to do that?

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1 CHAIRMAN DAUGAARD: No, I would suggest that we would
2 have some discussion about this issue and then the report would
3 note that we elected not to recommend legislative change. So
4 the discussion would be within the report, that would be my
5 preference.

6 MR. AYLWARD: I think so.

7 MR. LIEN: Thanks.

8 CHAIRMAN DAUGAARD: It's not as if we didn't discuss
9 it.

10 MS. ROBERTS: To clarify, the draft that we have has
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11 all of the discussion, anything that wasn't passed and then
12 just the recommendation.

13 CHAIRMAN DAUGAARD: Further discussion. We'll take a
14 vote.

15 MS. TREBESCH: Paul.

16 MR. AYLWARD: Yes.

17 MS. TREBESCH: Randy.

18 MR. STAINBROOK: Yes.

19 MS. TREBESCH: Carol.

20 MS. HINDERAKER: No.

21 MS. TREBESCH: Connie.

22 MS. HALVERSON: No.

23 MS. TREBESCH: Chris.

24 MR. LIEN: No.

25 MS. TREBESCH: Dennis.

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1 CHAIRMAN DAUGAARD: No. All right, well, presumably
2 we will have another motion now.

3 MR. LIEN: I'll make a motion that the language as
4 drafted be included as a recommendation in the Governor's
5 report for this year.

6 CHAIRMAN DAUGAARD: Is there a second?

7 MS. HINDERAKER: I'll second it.

8 CHAIRMAN DAUGAARD: All right, any discussion? Take
9 the vote.

10 MS. TREBESCH: Paul.

11 MR. AYLWARD: No.

12 MS. TREBESCH: Randy.

13 MR. STAINBROOK: No.

14 MS. TREBESCH: Carol.

15 MS. HINDERAKER: Yes.

16 MS. TREBESCH: Connie.

17 MS. HALVERSON: Yes.

18 MS. TREBESCH: Chris.

19 MR. LIEN: Yes.

20 MS. TREBESCH: Dennis.

21 CHAIRMAN DAUGAARD: Yes. It's ten to 12:00, let's
22 break for lunch now and we will return at 1 o'clock and at that
23 time we should have the language on the issue two redrafted and
24 we will look at that.

25 (Whereupon, the meeting was in recess at 11:50 a.m.,

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1 and subsequently reconvened at 1:05 p.m., and the following
2 proceedings were had and entered of record:)

3 CHAIRMAN DAUGAARD: Call the meeting to order. Has
4 every member of the council received and had a chance to look
5 at the redraft of the payment pursuant to fee schedule, issue
6 two item? Does any member want to spend a little more time
7 reading it before we talk about it? Okay, who is the chief
8 author of this, is that you, James? Will you lead us through
9 it?

10 MR. MARSH: I typed it.

11 MS. ROBERTS: Those three wrote it back there.

12 MR. MARSH: They wrote the language, I typed it up.

13 MS. SIMONS: We are rewriting it back here.

14 CHAIRMAN DAUGAARD: Who is going take a stab and lead
15 us through it?

16 MR. MOSES: I'm elected of the threesome there. Okay,
17 what you see before you is a rewrite and we actually had
18 additional suggested language after meeting after lunch. The
19 rewrite that you have before you tries to address the issue of
20 breaking out the disability component here into subsection

21 three. So subsections one and two just deal with the medical
22 charges issue where there is reimbursement either to a provider
23 or individual and encompasses the medical fee schedule issue.

24 Sub three, then, is real strict with disability and
25 allows for payment back to the health insurer if a disability

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1 claim is later determined to be work comp. And then the
2 payment is limited just to the amount that would otherwise be
3 payable under work comp and those payments would be considered
4 in determining what the employer's total liability would be.

5 Now, with that, there was a couple of suggestions I
6 just caught as I came in, I'm sorry, I had to leave for lunch
7 and come back, but on sub one where it says "or any other
8 discount arrangements," we thought that was a little bit loose
9 and it should say "any other contractual discount arrangements"
10 so it's not discount arrangement but it has to be contractual,
11 otherwise the provider doesn't have to honor it. If it's
12 contractual, they have to honor that discount and we want to
13 make sure their feet are tied to the fire as well. Then that
14 same phrase, "or any other contractual discount arrangements"
15 should be added on the end of two because it's the same
16 situation.

17 CHAIRMAN DAUGAARD: You would add "or any other
18 contractual discount arrangements"?

19 MR. MOSES: Yes, to the end of sub two. One last
20 thing, on sub three, strike the words "in determining" on the
21 second to the last line and then insert "as an offset against."
22 So strike "in determining" and add "as an offset against" so
23 the sentence would read, "Any payments made to the health
24 insurer pursuant to this subdivision shall be considered as an
25 offset against the total obligation of the employer."

1 CHAIRMAN DAUGAARD: Would you address -- I think I
2 asked this question of my council members here. If disability
3 payments have been paid by a health insurer, my first knee jerk
4 reaction was shouldn't that be disability insurer?

5 MR. MOSES: The reason we say health insurer is
6 because under our statute they are called health insurer.
7 Health insurance encompasses medical and disability under the
8 insurance title.

9 CHAIRMAN DAUGAARD: Thank you. Any questions of Randy
10 about either of them? Motion.

11 MR. MOSES: I think we have an agreement among all
12 three of us that worked on it, DTU folks and PCI, as far as
13 this alternative.

14 CHAIRMAN DAUGAARD: Any questions of Randy about this
15 rewrite? Any other folks want to testify in favor of this
16 rewrite? In favor? Any in opposition. Yes.

17 MS. CHAMBERLAIN: My concern with this once again is
18 it says that the amount payable under the fee schedule is
19 still -- it still limits the employer no matter the time frame
20 of the medical bill to pay only by the fee schedule, but that
21 protects them, but there's nothing here to protect the injured
22 worker from the judgments, the penalties that are associated
23 with an unpaid medical bill that's waiting to be determined.
24 And that occurs in section one and section two as well, and so
25 how is this taking care of the injured worker and not just the

1 insurer? That's what I would like to know.

2 CHAIRMAN DAUGAARD: Any questions or does anybody wish
3 to respond to that? I guess I was asking you to testify

4 against the bill, but you have raised a fair question.

5 MS. CHAMBERLAIN: I am, for the fact it's still under
6 the medical fee schedule. That's still allowing the employer
7 and insurer to pay under the medical fee schedule, whether it
8 is determined in 30, 60 days or two and a half or five and a
9 half or 10 years later that the bill is owed by the employer
10 and insurer, but you still have the injured worker suffering
11 the ramifications of this unpaid medical bill.

12 CHAIRMAN DAUGAARD: I guess I would respond that this
13 is an attempt to identify who pays, how much and to whom, but
14 it doesn't address one way or another any penalty for delay,
15 which is covered in another part of the statute.

16 MS. CHAMBERLAIN: But it doesn't cover the injured
17 worker if it is found that this bill is due to the injured
18 worker. What do they pay? Do they pay the associated interest
19 and judgment fees with a bill that is two and a half, five, 10
20 years old, but yet the employer and insurer are only held
21 accountable for the medical fee schedule? I disagree with the
22 language that the medical fee schedule be placed in there or
23 that the injured worker be given the medical fee schedule as
24 well for payment of this bill, because it is a disputed bill,
25 that they have no choice whether they want it disputed or not.

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1 CHAIRMAN DAUGAARD: I guess I'm not -- you are
2 suggesting that the worker should be entitled to pay the
3 provider at the medical fee schedule.

4 MS. CHAMBERLAIN: Just like the employer or the
5 insurer is granted that right, so should the injured worker,
6 because the injured worker has no choice whether this bill is
7 going to be paid or not. That is determined specifically by an
8 employer and an insurer. And this bill does not protect the

9 injured worker.

10 CHAIRMAN DAUGAARD: I guess I'm hearing you say you
11 are against the bill or against the proposed change because you
12 feel that the existing law, after the court case, will incent
13 more employers to approve claims even though -- or to pay
14 claims even though they are in dispute for fear that they lose
15 the ability to use the fee schedule by not paying them and
16 disputing them. Is that what you are saying?

17 MS. CHAMBERLAIN: I think by eliminating the medical
18 fee schedule, it will eliminate less claims that are denied,
19 that are -- how do I want to say this -- it will eliminate the
20 claims that are denied just to deny to put the worker in a bad
21 situation to make them not get medical treatment or to comply
22 with case management programs. And I think that it would
23 eliminate that hassle for the injured worker. But if you are
24 going to give the medical fee schedule, I think that the
25 medical fee schedule should be also given to the employee if

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1 they are found that this is their bill, because I really think
2 that it's unfair that an employee has to wait for this
3 determination, like I said, whether it's two and a half years,
4 five years or 10 years down the road, and can be assessed all
5 kinds of penalties, but the employer does not get assessed that
6 and can deny claims just to deny them. And the injured worker
7 has no option in this. The doctor says we have to have this
8 test to determine this, the employer or insurer doesn't want
9 the test run, the test gets denied and the injured worker is
10 sitting there in the middle fighting with an adjuster and the
11 provider as to why payment hasn't been made and suffers all the
12 ramifications of a bill that's to be denied.

13 MR. MARSH: May I address that, Mr. Chair?

14 CHAIRMAN DAUGAARD: If you would like.

15 MR. MARSH: There may be a misunderstanding about how
16 sections like this operate or would operate in practice, at
17 least as we would see it. What this bill does is to establish
18 what it would call baseline. The insurance company pays this
19 much to start with. It doesn't take into account how much time
20 passes after an obligation becomes owed before it's paid.
21 There's a separate section in the code that's not in our comp
22 title at all under Title 21 that says that when an obligation
23 goes unpaid, be it an insurance company, employer, whoever is
24 responsible for it, as time goes on, they are assessed an
25 interest value on top of it, so if I have a medical bill that

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1 sits out there for six months, should have been paid six months
2 ago and I didn't do it, our department has the authority to
3 impose an interest factor on those bills so that that time
4 value gets compensated for.

5 That isn't clear from this provision, I understand,
6 but every day when the department judge issues a ruling, they
7 say, this benefit is owed plus interest at the prevailing rate,
8 which I think is spelled out here, 54-3-16, that says you pay
9 10 percent per annum on top of whatever benefit is obligated.
10 So it's not as if the employee has to sit out there for five,
11 10 years and have nothing to show for it simply because this
12 says the reimbursement is limited to the fee schedule. The fee
13 schedule sets the base amount and the interest is tacked on
14 top, if that makes sense.

15 MS. CHAMBERLAIN: It's been my personal experience
16 that that hasn't happened, so that's why I'm asking with a
17 two-year battle over medical bills, that didn't happen, but
18 there was no hesitation to assess interest fees, there was no

19 hesitation to threaten judgments while this ongoing battle was
20 occurring, and it is something that I would say 99 percent of
21 the injured workers complain of. So I am asking that this
22 council, wanting to pay this medical fee schedule, that should
23 also be given to the injured workers to end up being
24 responsible for the injured -- or the medical fee schedule as
25 well for an undisputed bill.

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1 MR. MARSH: There's standings that ultimately that's
2 how it works, at least that's how it's intended to work. If an
3 insurance company is to pay for a medical bill or claimant is
4 to pay for a medical bill, they are only obligated to pay up to
5 the amount of the fee schedule, no more. If the claimant is in
6 a position where they are paying over that, our rules
7 specifically say a provider is prohibited from balance billing,
8 they can't charge for more.

9 MS. CHAMBERLAIN: But they will charge an injured
10 worker. They won't charge the employer, they won't charge the
11 insurer. Those folks are fortunate enough to be given the
12 medical fee schedule, but as a worker, I am not, whether it is
13 work comp insurance or Blue Cross/Blue Shield or I have no
14 insurance. I mean, if I have Blue Cross/Blue Shield and they
15 accept the payment, then it will be at the Blue Cross/Blue
16 Shield rate. If I have no insurance, which a lot of times
17 injured workers don't, because they have lost their job or they
18 are not working or they are working decreased hours, if they
19 are working.

20 MR. MARSH: I just need the council to understand that
21 this is not a practice that our laws or rules endorse, okay.
22 It may happen in the field, I don't know, but in terms of what
23 our laws or rules allow, that's not something that it calls

24 for.

25 MS. HINDERAKER: Mr. Chairman, may I ask a question?

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1 I'm not sure if Ms. Chamberlain is addressing a situation where
2 the injury is not compensable.

3 MR. KINSMAN: That's what she's talking about,
4 ultimately someone determines it's not a work-related injury,
5 so then by virtue of that fact, the injured worker is now
6 liable for that medical cost and she's saying that even in a
7 situation where it's not work-related determined by the court
8 or by the administrative law judge, that they ought to get the
9 benefit of the fee schedule; is that what you are saying?

10 MS. CHAMBERLAIN: I am saying that. To give you an
11 example, let's say you get injured and you go to the doctor and
12 he says, oh, you have a muscle strain in your back and you
13 treat with this doctor for six months and he gives you a
14 variety of different drugs to help you out with the pain and
15 it's not helping and it's not going away. Now the doctor says,
16 you know, I think we should order an MRI of your spine. Well,
17 you know, all of a sudden the insurance company panics because,
18 hey, we just had a back strain and now we are thinking
19 something else is wrong and now you want an MRI that is
20 probably \$2,000. So the MRI comes back and shows that you have
21 herniated disks, you didn't just have a back strain. Well, now
22 that may be a bill that they would dispute, maybe, maybe not.
23 This is a hypothetical situation.

24 There comes the problem. Now all of a sudden, hey, it
25 is actually found out what your problem or your pain was and

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1 why this drug didn't work or this drug didn't work, but that
2 may occur six, eight months down the road before it's actually

3 discovered. Now it becomes a bill that is disputed for some
4 reason. Now, that most likely, if it shows something, the
5 insurance company would not deny it, but it has been known that
6 they will deny tests that do prove that, just because they
7 don't want the accountability of the tests to be run.

8 MS. HINDERAKER: Thank you for that clarification. I
9 guess my point was I don't think this council can deal with
10 something that's not a work comp compensable injury situation.
11 I'm sympathetic to what you are talking about, but I don't
12 think that's under the purview of this council. We can't
13 recommend law that's outside of work comp, can we?

14 CHAIRMAN DAUGAARD: Any other questions of Ms.
15 Chamberlain? Thank you. Any other opponents? We are close to
16 council decision. Do we have a motion one way or another?

17 MS. HINDERAKER: I'll move that we recommend the
18 additions as follows and one, two and three as presented by the
19 department, with the little wording additions we added since
20 this was typed as added.

21 CHAIRMAN DAUGAARD: Is there a second? I'll second
22 it. Discussion. I would agree with what Carol -- the point
23 Carol made just a minute ago. In the universe of injuries, if
24 you think about it, there are some injuries that are very
25 plainly work-related. They obviously occur during the course

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1 of employment. There's obviously no defense that the employer
2 can raise and all parties looking in and understanding the
3 facts are going to say, this is a work-related claim or injury
4 that is clearly covered under the workmen's comp law.

5 Then there are injuries that are very clearly not
6 work-related. I'm at home on a Sunday afternoon, I'm mowing my
7 lawn, I trip in a pothole and I break my leg. Very clearly I'm

8 not at work, has nothing to do with work and it's not a claim
9 that should be considered under the workmen's comp law.

10 And yet then there are claims that are somewhere in
11 the middle and that reasonable people will disagree on whether
12 this or that was work-related or not or whether this expense
13 was required of a work-related injury, medical expense, and the
14 problem that is caused if we try to say that the medical fee
15 schedule applies to claims that are ultimately determined to be
16 not covered is that you bring in the universe of injuries. You
17 bring in that lawn mower on a Sunday afternoon injury, because
18 all I have to do is say, hey, this is work-related. Well,
19 ultimately they are going to find that it's not work-related,
20 but just by claiming that it's work-related, suddenly I can get
21 the fee schedule to cover my injury and the medical expenses
22 related to that injury.

23 That's the problem with trying to establish, and again
24 I'm sure there are lots of claims that are in good faith made
25 by injured workers and there are medical expenses that a

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1 reasonable party can differ on. Should that MRI test have been
2 made or not? Gosh, the injured worker can't know. I wouldn't
3 know, I'm not a medical professional. So the test is run and
4 the charge is made and ultimately somebody decides that was not
5 a covered expense. And so the injured worker or the provider
6 is stuck with the expense. That's not a good outcome, but I
7 don't think that we can go so far as to try and incorporate all
8 injuries as being subject to the medical fee schedule just
9 because someone has claimed at some point that it's
10 work-related and it's a medical expense governed by the fee
11 schedule. We just can't do that.

12 Now, that being said, I do think this really doesn't

13 address that. This solves two problems. One problem we just
14 heard about this morning from Randy and that is some insurers
15 are deciding not to offer their products in South Dakota
16 because their ability to offset or recover claims that
17 ultimately are determined to be workers' comp claims is
18 hampered and it's a big production for them to recover it, so
19 they are not offering their insurance products. I think that's
20 not good and the changes that are suggested in this language
21 will address that. I think that's good for the market, period.

22 The other thing it addresses is it clarifies that if
23 an employer in good faith denies coverage and it's later
24 determined that it's a work-related injury and workers' comp
25 does apply, then that employer is still, as they were under the

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1 pre Wise case law, is still governed by the fee schedule,
2 whether it's determined before or after the denial that it's a
3 workers' comp case. That's the way it was before the Wise case
4 and I think to put it back into the condition it was is worthy
5 of my support.

6 Any comments or any other discussion? Paul and then
7 Chris.

8 MR. AYLWARD: Mr. Chairman, thank you. I don't
9 disagree with everything you said, and I agree partially, and
10 Randy brings up an interesting problem. However, I think I
11 agree with -- I kind of enjoy saying this -- I agree with Mr.
12 Janklow. I don't know if I've ever said that before. I agree
13 with Mr. Janklow and Mr. Finch that this fix is going to make
14 it harder for injured workers to get an attorney to help them
15 in certain cases. And I don't know how to fix most things, I
16 agree partially with what you said, so I'm going to oppose this
17 just because I think it hurts workers in the long run. And I

18 think this council needs to be mindful that we can't just
19 always be worried about insurance companies and employers, we
20 need to worry about injured workers also, and ultimately what
21 hurts an injured worker hurts the employer, too, so I could be
22 wrong, but I'm going to vote against this because I think it
23 hurts workers.

24 CHAIRMAN DAUGAARD: Thank you, Paul. Chris.

25 MR. LIEN: Thank you, Mr. Chair. I echo the thoughts

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1 of the chairman and the way I look at it is we have 62-1-1.3
2 that addressed if an employer denied claims and it was later
3 determined they shouldn't have, somehow whoever paid for it
4 needs to be compensated. This lays out the method for
5 compensation. It kicks it into the workers' compensation
6 system, removing the employee and the employer from the system,
7 and it goes to the fee schedule.

8 My question to Mr. Marsh is, do you see any concerns
9 of once that determination is made, that Mr. Stainbrook brought
10 up, that the employee, if they paid for it, would have any
11 problems going back to the medical care provider and saying, I
12 need to be -- the schedule needs to be based on the fee
13 schedule of payments from the medical care provider and
14 whatever was out of pocket to me is reimbursed? I think
15 there's another statute that covers that, correct?

16 MR. MARSH: Not specifically within the comp title,
17 other than the general reg that says an employer -- a provider
18 can't balance bill.

19 MR. LIEN: Once it's put into the workers'
20 compensation system and it's determined to be work-related,
21 that care provider is subject to the fee schedule and that's
22 all they can bill, correct?

23 MR. MARSH: Correct.

24 MR. LIEN: That's my only question.

25 MS. ROBERTS: Ultimately to explain it to you, also,

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1 Randy, we have an investigator in the division that would stand
2 behind that and work with the employee to work through this
3 problem if there was an issue between the provider and the
4 injured worker. So the department would be behind the
5 employee, too.

6 MR. STAINBROOK: For clarification, I'm an employee, I
7 get injured, I get medical bills, \$600 from the doctor, I pay
8 the doctor that \$600. I think it's a work comp claim, my
9 employer says no, it's not. Under this, first of all, I think
10 there's a huge incentive for the insurance company to say, it
11 doesn't matter if I pay this claim today or pay it ten years
12 from now, I know all I'm going to have to do is pay the fee
13 schedule. So the incentive to them is to deny claims and try
14 and back it off on the individual. I'm an individual, I pay my
15 \$600, the claim is disputed and then later on it's found that
16 it is a compensable injury. I've already paid my \$600, work
17 comp would only pay \$400, how am I going to get my \$200 back?
18 I as an individual have to go back up to the hospital and say,
19 I want my \$200 from you, hospital. And the hospital magically
20 says, oh, well, come up to my office, I'll write you a check
21 for \$200? In reality, it doesn't work that way. That
22 individual probably fights tooth and nails for months after
23 months, possibly years to get that \$200 back from that
24 hospital. Yes.

25 MS. ROBERTS: If it happens, we'll work with you.

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1 MR. STAINBROOK: I guarantee you it does.

2 MS. ROBERTS: To clarify, it's not changing existing.
3 This bill would not change the way that existing relationship
4 is either. Does that make sense?

5 CHAIRMAN DAUGAARD: I think the other point that we
6 have to remember is that when the employer denies the claim and
7 refuses to pay, they are not just risking the money, but they
8 are risking interest on the money at the 10 percent rate, so if
9 employers are making better than 10 percent on their money,
10 then they have an incentive to delay, but I would venture to
11 say that most employers, they can't manage their cash well
12 enough to earn over 10 percent and so their better incentive is
13 to pay and then recoup.

14 MS. ROBERTS: If the willfull statutes kick in, that's
15 big time penalties. If they blatantly just deny simply to be
16 denying, that's a willfull case and there's major consequences
17 to that.

18 MS. HALVERSON: I have a question as to how urgent
19 this is, because it seems like in the past at our meetings,
20 when things have been put together at the last minute, some of
21 these changes were just made two seconds before we started
22 again, contractual or any other contractual arrangements, I
23 don't know if I understand exactly what that means, and then
24 even the offset wording, those have been things that in the
25 past we have just said we need more time and delayed those.

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1 MS. ROBERTS: If I could respond. This will be a work
2 in progress. What the council is in fact would be recommending
3 from here would be the concept. The language, if it gets into
4 legislation, would be changed as the process goes through even
5 up to actually by the legislature. So what we would be doing

6 here is just talking in concept about this proposal, so I would
7 not worry about individual words at this point.

8 CHAIRMAN DAUGAARD: I think we strive for precision,
9 but I think every time you get a legislative proposal, it's
10 always subject to more eyes and more thinking and more
11 perspectives and people will see things that others didn't and
12 I think our responsibility is to understand the concept in
13 general and make it as close to precision and perfection as we
14 can get it, knowing that the legislature will take their
15 mallets to it also and craft it further, if necessary. I hear
16 what you are saying, Connie. It's always good to have it out
17 on the table. This was an issue that was on the table at our
18 first meeting and we deferred it, now it's been discussed
19 again. So it's certainly something that the industry and
20 observers are having the opportunity to see in action, see
21 being developed. It's not something we hear about and act upon
22 in one meeting.

23 MR. STAINBROOK: Can I just ask one question of Mr.
24 Moses? You said that insurance companies don't want to come
25 into South Dakota and sell their products because they have to

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1 pay over and above the fee schedule and may not get that back?

2 MR. MOSES: If I may.

3 MR. STAINBROOK: Why don't they want to come and sell
4 insurance products?

5 MR. MOSES: Let me give an example with a disability
6 carrier I dealt with personally. They had a disability product
7 and they wanted to not have the language of 62-1-1.3 in there
8 because they said, well, if we pay that money out first and if
9 there's a dispute, by law we have to pay that money first under
10 our disability policy, we have a heck of a time on the back end

11 if it's later determined to be work comp getting that money
12 back. And that's because of that they said, well, what we are
13 doing is we are then in essence paying for workers'
14 compensation coverage on our disability policy and that's not
15 how it's priced and that's not how we want to sell it. So
16 because of that difficulty in reimbursement, they said, we just
17 don't think we can offer this particular product in South
18 Dakota under the current statutory framework.

19 MR. STAINBROOK: They were concerned about getting the
20 disability back from the individual they paid it to?

21 MR. MOSES: The individual, yes, that's correct. And
22 the fact that they couldn't intervene even in front of
23 Department of Labor and have labor order that payment back to
24 them that they may have already paid to that injured worker.
25 They would have to go to circuit court, as I understand it, and

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1 so they have no mechanism other than a long court process to
2 get reimbursed on their payment they made under the disability
3 claim. Health insurers have the same kind of problem, regular
4 health insurers on like a hospital bill, something like that,
5 would have similar kinds of problems, although I have not had
6 major medical carriers say, I'm absolutely not writing it.
7 They certainly don't like it, they certainly think it adds
8 costs, but I haven't had them actually refuse to issue a policy
9 because of that.

10 MR. STAINBROOK: To make my point, if it isn't
11 compensable by workers' comp, then the individual has gotten
12 the payments that he should have got.

13 MR. MOSES: That's exactly right.

14 MR. STAINBROOK: If it is compensable by workers'
15 comp, the problem is trying to get that money back from the

16 individual.

17 MR. MOSES: Or their work comp carrier.

18 MR. STAINBROOK: Or the work comp carrier. Is it any
19 easier for that injured worker to pay out the money, he's
20 paying these medical bills, and try and get that money back if
21 it's determined that it's compensable? You are telling me the
22 insurance companies are having a hard time getting their money
23 back if it's determined that it's work comp related.

24 MR. MOSES: The last part I agree with, I'm not sure I
25 understand the first part.

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1 MR. STAINBROOK: The first part is I'm saying it's
2 just as hard for an injured worker to pay out a lot of money in
3 medical bills and get his money back as it is an insurance
4 company to get their money back. Maybe I'm not explaining it
5 well.

6 MR. MOSES: I think the difference is, correct me if
7 I'm wrong, James, under current law you have the authority to
8 order that payment directly to that injured worker. Under
9 current law you can't order a payment directly to that health
10 insurer who has already paid the claim, correct?

11 MR. MARSH: Right, that has to go through circuit
12 court.

13 MR. MOSES: I think that's the difference.

14 MR. AYLWARD: One other question for Randy. I kind of
15 heard the discussion you were having over here earlier. Are
16 disability plans, does it exclude work compensable injuries?
17 So in other words, if I have a disability plan and I get hurt
18 at work, do I get nothing from my disability plan?

19 MR. MOSES: That is correct. Disability plans have
20 exclusions for workers' compensation. What this current

21 statute does is say even though it's excluded, if that work
22 comp carrier denies the claim initially, that disability
23 coverage has to pay it because of the way the existing law
24 reads and then worry about getting their money back later. So
25 the worker gets money one way or the other. That's what the

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1 whole intent of the thing is, you are not leaving the worker
2 hanging. One of the two is going to pay, then they fight it
3 out later. We are just trying to make that process for
4 fighting it out later move a little smoother.

5 MR. AYLWARD: But that is -- let me say this
6 correctly. Is it by statute that disability plans exclude work
7 injuries or is that just how insurance companies write them?

8 MR. MOSES: It's not -- I think it's permissible,
9 allows for certain kinds of disability policies, like
10 disability income policies to exclude it, but no, it doesn't
11 require they be excluded. And in fact you might find some real
12 small nickel and dime policies that might cover it, but
13 generally speaking, it's the industry practice, that's what's
14 in the policies.

15 CHAIRMAN DAUGAARD: Is it a complete exclusion or is
16 it in some cases an offset?

17 MR. MOSES: I think it's 100 percent offset where it's
18 not specifically excluded. To the best of my knowledge, most
19 disability income policies do not want to pay any portion of
20 work comp.

21 CHAIRMAN DAUGAARD: That's not the way you stated it.
22 Don't want to pay anything for an injury that's covered by work
23 comp, is that what you mean to say?

24 MR. MOSES: Yes. Pardon my lack of precision there.

25 MR. STAINBROOK: They may have a policy that pays over

1 and above the workers' comp portion. I have some people that I
2 represent where if it's a work comp claim, they might not get
3 the full weekly disability, but they get a portion of a
4 disability that they get regardless of work comp payments.

5 MR. MOSES: There may be a level above work comp,
6 that's correct, where a disability carrier may elect to cover
7 it. They don't have to. That's possible that they can elect
8 to as a supplemental type product.

9 CHAIRMAN DAUGAARD: Other questions of Randy.

10 MR. AYLWARD: That kind of confused me. But there's
11 nothing in statute that prohibits both payments; is that
12 correct? I can have a disability policy or by contract, as
13 Randy says, that would cover both ways?

14 MR. MOSES: There's nothing that precludes payment
15 from both statutorily, that's correct.

16 MR. AYLWARD: Because we have in fact in most of our
17 contracts where a person can draw the worker comp injury plus,
18 we have negotiated other benefits plus, so there's nothing in
19 law, okay.

20 CHAIRMAN DAUGAARD: Any other questions of Randy while
21 he's here? Further discussion among the council. There's a
22 motion and a second. The motion is to send this document to
23 the Governor with the recommendation that this language be
24 suggested as a change in statute. Any further discussion?
25 Call the roll, Sarah, please.

1 MS. TREBESCH: Paul.

2 MR. AYLWARD: No.

3 MS. TREBESCH: Randy.

4 MR. STAINBROOK: No.

5 MS. TREBESCH: Carol .
6 MS. HINDERAKER: Yes.
7 MS. TREBESCH: Connie.
8 MS. HALVERSON: No.
9 MS. TREBESCH: Chris.
10 MR. LIEN: Yes.
11 MS. TREBESCH: Dennis.
12 CHAIRMAN DAUGAARD: Yes. We will have a tie vote so
13 we will carry this over and if we get a teleconference and we
14 have a larger quorum or an odd numbered quorum, then we'll look
15 at this again. That brings us to our public hearing item on
16 the agenda, open to public testimony on any items of interest
17 the public may have. Does any member wish to bring an
18 additional issue for consideration at this and future meetings?
19 Seeing none, I think the last item, then, is our annual report
20 to the Governor.
21 So Pam just mentioned that it was due October 1st and
22 so I'd ask the department to create a draft based upon what we
23 did at our last meeting and what we did at this meeting, and
24 I'm wondering what the wishes of the council are about getting
25 together face to face a final time or if you would like to try

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1 and do this by teleconference. What's your wishes? What are
2 your wishes? Anybody have any preference one way or the other?

3 MS. ROBERTS: I'll kind of explain what we would
4 propose to do. Within the next week we will get the draft out
5 to all of you and in the draft what we are hoping to do is have
6 you reply to us and if there's edits or minor suggestions, that
7 we would make those and let everybody know and if they are
8 substantive, we would do that by conference call or whatever.
9 We have done the last -- I think all of the five reports that

10 we have done we have always done by conference call at the end,
11 just because there's not a lot of opinions in the report, it's
12 a factual compilation of what we have done. There probably
13 shouldn't be a lot of discussion necessary.

14 MR. LIEN: My observation in the past is it's worked
15 well to do the draft and pass it to everyone for review and
16 then if we have any comments, we have been doing it e-mail and
17 sharing with each other and if it was substantive to talk
18 about, the phone conference was great, but if there isn't any
19 substantive disagreement, I'm thinking all you need is
20 signatures, which got passed around last time. I'm suggesting
21 what you have done in the past has worked from my perspective
22 very well.

23 CHAIRMAN DAUGAARD: We didn't have a teleconference
24 last time because the only edits were insubstantial, minor
25 things.

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1 MR. AYLWARD: That seems to work.

2 MR. STAINBROOK: Fine by me.

3 CHAIRMAN DAUGAARD: Question, what about this last
4 issue that we had a tie vote on? It seems to me we are going
5 to have to have a teleconference to determine that issue, carry
6 it forward or discard it.

7 MS. ROBERTS: Or we could leave it in the report that
8 it failed for lack of a majority vote I would think and it
9 would be in the report. Either one of the departments or the
10 Governor or legislator could come forward and then during
11 public testimony, just as the council, it would just be like it
12 was a tie vote.

13 CHAIRMAN DAUGAARD: That appeals to me. Is that
14 agreeable with everyone?

15 MR. LIEN: I like the fact that the history and the
16 discussion is included in the report and the tie vote stood.

17 MR. AYLWARD: It failed to pass.

18 CHAIRMAN DAUGAARD: All right, anything further on the
19 annual report? If not, I think we are concluded for this year.
20 Again, I want to thank all the committee members for their
21 service this year. I want to thank those who reupped for
22 another three years. I appreciate your willingness to serve
23 again. Without objection, I'll call the meeting adjourned.
24 Any objection? All right, adjourned. Thanks, everyone.

25 (Whereupon, the proceedings were concluded at 1:53

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1 p. m.)

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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 1st day of September 2007.

Carla A. Bachand, RMR, CRR
Freelance Court Reporter

