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Transcriber's Office

Business and Labor Committee
March 09, 2010

[LB1090]

The Committee on Business and Labor met at 1:30 p.m. on Tuesday, March 9, 2010, in Room 2102 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a special hearing to amend LB1090. Senators present: Steve Lathrop, Chairperson; Brenda Council, Vice Chairperson; Tom Carlson; Amanda McGill; Ken Schilz; Norman Wallman; and Tom White. Senators absent: None.

SENATOR LATHROP: (Recorder malfunction)...is Steve Lathrop, state senator in District 12, and we are gathered today for a special hearing to amend the claims bill. We've been apprised since the hearing on the claims bill, which is LB1090, that the state of Nebraska has entered into a subsequent settlement, that the claims bill needs to be amended. And we will hear...that amendment will be introduced by committee counsel and then we'll take testimony. [LB1090]

MOLLY BURTON: Senator Lathrop, members of the committee, my name is Molly Burton, legal counsel, B-u-r-t-o-n, legal counsel for the Business and Labor Committee. We are here to hear, I believe it's, AM2050. It's an amendment to LB1090, approved claim bill. It's to add one claim that was settled after our February 22 hearing on LB1090, so it's one claim. I believe Mr. Wolfe is the victim, and it's a claim amount for approximately \$1.5 million. DAS has approved the first \$50,000 and then the Legislature needs to approve the remainder. Laura Peterson, the risk manager for DAS, is here along with members from the...legal counsel from the Attorney General's Office who actually settled the claim, if the committee members have questions. [LB1090]

SENATOR LATHROP: Very good. Thank you. Laura. [LB1090]

LAURA PETERSON: Good afternoon, Senator Lathrop, members of the Business and Labor Committee. My name is Laura Peterson, L-a-u-r-a P-e-t-e-r-s-o-n. I'm the state risk manager, here today in support of AM2050 to LB1090 which contains a tort claim recently settled by the Attorney General's Office while it was in litigation. The tort claim number was 2008-02412, was filed against the Department of Roads by Tom Wolfe. On October 14, 2007, Mr. Wolfe was driving on Interstate 80 in Cass County when a plowable pavement marker became dislodged, became airborne, flew through the windshield of Mr. Wolfe's vehicle and hit him in the head. As a result, Mr. Wolfe's vehicle left the roadway. Mr. Wolfe sustained both property damage and severe personal injuries as a result of the incident. Since the date of this accident, this type of pavement marker, which was originally installed between 1999 and 2001, have been removed from the roadway. The total settlement amount agreed to by the parties and approved by the district court is \$1.5 million. The amount included in the amendment is \$1,450,000 because we're issuing payment of the \$50,000 which we are allowed to pay under the Tort Claims Act at the time of the judgment and prior to legislative review. Because of the dollar amount of the claim, I request that you amend the claim into this

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year's approved claims bill. If we waited until next year's bill, we would owe judgment interest on the \$1.45 million from the judgment date until it was paid after legislative approval. Also, after further discussion with the parties, I would ask that the payee in the amendment be changed to Tom Wolfe and James Schaefer, attorney. That concludes my explanation of the amendment. I'd be happy to answer additional questions. There are also representatives of the Attorney General's Office, Department of Roads Section, and the Attorney General's Office available if I cannot answer questions or if they're more appropriately answered by the agency. [LB1090]

SENATOR LATHROP: Let me start out with just a few questions I have. Did you just say that the amendment needs to be amended? [LB1090]

LAURA PETERSON: Yes. [LB1090]

SENATOR LATHROP: And the amendment would be... [LB1090]

LAURA PETERSON: So that it would...the payee... [LB1090]

SENATOR LATHROP: ...so that it says in trust for Tom Wolfe and James Schaefer, his attorney? [LB1090]

LAURA PETERSON: Actually, it would just say payee...to be paid to Tom Wolfe and James Schaefer, attorney, as opposed to "in trust for." We would delete the language "in trust for." [LB1090]

SENATOR LATHROP: Okay. [LB1090]

LAURA PETERSON: It'll just be paid to Tom Wolfe and his attorney, James Schaefer. [LB1090]

SENATOR LATHROP: Okay. I want to make sure I get this, so that we don't have to pull this back from the floor. So it will be Tom Wolfe and James Schaefer, his attorney, as the payee. [LB1090]

LAURA PETERSON: Yes. [LB1090]

SENATOR LATHROP: The second...do you have the amendment in front of you? [LB1090]

LAURA PETERSON: Yes. [LB1090]

SENATOR LATHROP: The second one, it says on page 3, line 1, strike \$32,976 (sic) and insert \$1.482 million. [LB1090]

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LAURA PETERSON: Yes, because at the bottom of the...of the first...of the tort claim section of the claims bill, it lists the total amount to be paid in tort claims. [LB1090]

SENATOR LATHROP: I got it. [LB1090]

LAURA PETERSON: And so we're adding the \$1.45 million to that total. [LB1090]

SENATOR LATHROP: And one other thing. [LB1090]

LAURA PETERSON: Yes. [LB1090]

SENATOR LATHROP: Laura, didn't we miss a claim number the first time we went through the claims bills that needed to be amended as well? [LB1090]

LAURA PETERSON: Yes. [LB1090]

SENATOR LATHROP: And where is...what is that? Because I don't see that in this amendment. [LB1090]

LAURA PETERSON: That...it's not because I think the intent...there's the...is there would be...there's a committee amendment because in the original bill there were also some blanks where we needed to fill in the structured settlement payee for the...for those children. And so I think what they were...what we were planning to do is combine them all into one amendment: this one, that tort claim number that was left out, and the payees for those structured settlements. [LB1090]

SENATOR LATHROP: Okay, and you'll give Molly that information, and we'll make the amendment. [LB1090]

LAURA PETERSON: And I will get you that information, and we can review that amendment before it goes. [LB1090]

SENATOR LATHROP: Okay, very good. Any other questions for Ms. Peterson? Senator Carlson. [LB1090]

SENATOR CARLSON: Thank you, Senator Lathrop. Laura, where does this kind of money come from? [LB1090]

LAURA PETERSON: This particular claim will come from the Roads Cash Fund. This was a Roads project, and you can see in the amendment that it will be paid out of the Roads Cash Fund. [LB1090]

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SENATOR CARLSON: And how many times has anything like this particular thing happened? Maybe should ask the Roads... [LB1090]

LAURA PETERSON: Well, if you're talking about plowable pavement markers, there were only a few other claims, and they were limited to property damage. There were no personal injuries in those other cases. If you're talking about, you know, large dollar amount claims that are paid from the Roads Cash Fund, there's one other...it's not large in comparison to the \$1.5 million, but there is another Roads Cash Fund claim in the original bill, LB1090, and then, you know, several years ago we had, for example, the Seward school bus accident which was another large tort claim related to design of the roadway that was also paid out of the Roads Cash Fund. [LB1090]

SENATOR CARLSON: No, but I'm asking the particular thing that caused this. [LB1090]

LAURA PETERSON: The plowable pavement markers. There were no other personal injuries cases from plowable pavement markers before they were removed. There were a couple other...there was a tire that got damaged, and I think a bumper that got damaged, but there were no other personal injuries. [LB1090]

SENATOR CARLSON: Okay. Thank you. [LB1090]

SENATOR LATHROP: I see no other questions. I think we will have somebody from the AG's Office just come up and explain the claim...the injuries, the damages. Why don't you introduce yourself, and then we'll have you testify? [LB1090]

DAVID COOKSON: David Cookson, C-o-o-k-s-o-n, Chief Deputy Attorney General. I think most of you might be able to see that from here. This piece of metal came out of the roadway, hit the front of the car and then went through the windshield and lodged in Mr. Wolfe's skull. There were some liability questions because we weren't certain how, and to this date we probably will never know exactly how this came out of the road. But there were enough liability questions about maintenance and installation that we felt it was in the best interest to try to resolve the claim. The initial... [LB1090]

SENATOR LATHROP: What was his injury, David? [LB1090]

DAVID COOKSON: It's a brain injury, skull fracture, opened his skull up, brain came out... [LB1090]

SENATOR LATHROP: How old was this man? [LB1090]

DAVID COOKSON: He's in his fifties. [LB1090]

DOUGLAS KLUENDER: Fifties. [LB1090]

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SENATOR LATHROP: What did he do for a living? [LB1090]

DAVID COOKSON: He worked for Wolfe Electric. He was partners, I believe, with his brother or... [LB1090]

DOUGLAS KLUENDER: He was hired by his brother... [LB1090]

DAVID COOKSON: He worked for his brother in Wolfe Electric. He was an electrician. [LB1090]

SENATOR LATHROP: So he was a full-time... [LB1090]

DAVID COOKSON: Electrician. [LB1090]

SENATOR LATHROP: Yeah, honest to gosh... [LB1090]

DAVID COOKSON: Unable to do that anymore because... [LB1090]

SENATOR LATHROP: Oh, yeah. [LB1090]

DAVID COOKSON: ...after the accident there were some incidents...of demonstrated incidents where he incorrectly wired things because of his inability to think. [LB1090]

SENATOR LATHROP: Is he totally disabled? [LB1090]

DAVID COOKSON: I believe so, yes. [LB1090]

DOUGLAS KLUENDER: Yes. [LB1090]

SENATOR LATHROP: Never to work again? [LB1090]

DAVID COOKSON: Right. [LB1090]

DOUGLAS KLUENDER: Correct. [LB1090]

SENATOR LATHROP: What were his bills? [LB1090]

DAVID COOKSON: Doug, you want to just come on...grab that chair and come on up? [LB1090]

DOUGLAS KLUENDER: Okay. [LB1090]

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SENATOR LATHROP: Yeah, introduce yourself for the record and then we'll... [LB1090]

DOUGLAS KLUENDER: Yes. I'm Douglas Kluender with the Attorney General's Office, Road Section. [LB1090]

KATE WOLFE: Can you spell your last name, please? [LB1090]

DOUGLAS KLUENDER: K-l-u-e-n-d-e-r. [LB1090]

SENATOR LATHROP: And, Doug, just getting kind of the...what's the case worth? And this guy is a 50-some-year-old gentleman who was employed as an electrician? [LB1090]

DOUGLAS KLUENDER: Right. He was 50 years old, and he worked for a company in Omaha and Lincoln that has about 80 employees. He was subsequently laid off and then terminated, because he could no longer do his job, by his own brother. [LB1090]

SENATOR LATHROP: Okay. Did a vocational rehabilitationist evaluate his loss of earning capacity? [LB1090]

DOUGLAS KLUENDER: Yes. [LB1090]

SENATOR LATHROP: And is it a 100 percent loss of earning capacity? [LB1090]

DOUGLAS KLUENDER: Yes, it is. [LB1090]

SENATOR LATHROP: What were his medical bills? [LB1090]

DOUGLAS KLUENDER: About \$250,000. [LB1090]

SENATOR LATHROP: When did he...is he done with treatment or is he still in rehabilitation? [LB1090]

DOUGLAS KLUENDER: Yes. People with brain injuries...they reach a certain level of improvement, and then they're just stuck like that for the rest of their lives. There's nothing else that can be done. [LB1090]

SENATOR LATHROP: And that's typically at two years... [LB1090]

DOUGLAS KLUENDER: Yes. [LB1090]

SENATOR LATHROP: ...for a brain injury? How long has it been since this guy's wreck? [LB1090]

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DOUGLAS KLUENDER: It took him a little bit longer. He spent a substantial amount of time in the hospital and in therapy because of the...the nature of the injury. His brain was impacted and penetrated by the object. He had to be essentially taught to do a lot of things physical again. If you saw him on the street, you would not know that he had been injured, but if you knew him before or after a few minutes of talking with him, you would know that something wasn't right. [LB1090]

SENATOR LATHROP: Okay. So he's...what were his earnings like before he got hurt? [LB1090]

DOUGLAS KLUENDER: He earned about \$30,000 to \$32,000 a year. [LB1090]

SENATOR LATHROP: Is done earning, has \$250,000 in medical expenses. You mentioned that there were a couple of occasions where these things came loose and caused some damage. [LB1090]

DOUGLAS KLUENDER: Prior to the 2007 incident, there were two that we know of: one in 2003 where there were a couple of these devices laying on the pavement on Highway 92 and was run over by a car, flattening her tire. The state paid that claim for like \$125. In 2005, out in the Panhandle, a semi kicked one up into the tire of another semi, flattening it, and the state denied that one for lack of notice. [LB1090]

SENATOR LATHROP: But before this happened to Mr. Wolfe, the state would have been aware of two prior occasions... [LB1090]

DOUGLAS KLUENDER: Two prior occasions in the state. [LB1090]

SENATOR LATHROP: And for people that aren't lawyers on the committee, when the state has notice of a dangerous condition, they have a duty to remedy that. [LB1090]

DOUGLAS KLUENDER: Right, and that was the very issue that this case was going to be decided on. [LB1090]

SENATOR LATHROP: Did I also hear that other states had come to the conclusion that these were dangerous and had pulled them? [LB1090]

DOUGLAS KLUENDER: They came to the conclusion that they were dangerous, but also relatively ineffective after a period of time. The two states neighboring us that have removed theirs are Missouri and Iowa. Iowa installed it similar to us by using them on the freeways and rural intersections. Missouri put them everywhere, and the other injury cases come out of Missouri. [LB1090]

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SENATOR LATHROP: Okay. [LB1090]

DAVID COOKSON: One thing I would add on the negligence side was the manual for installation says you don't put these in a seam of the highway, you know, the seams between...and if you look at the pictures of this particular one, it looks to be placed directly in a seam. [LB1090]

SENATOR LATHROP: So we put it in...violated... [LB1090]

DAVID COOKSON: We potentially put it... [LB1090]

SENATOR LATHROP: ...we violated the instructions the way we installed it, and before it caused an injury to Mr. Wolfe, we were aware of the fact that they pop out of their hole. [LB1090]

DAVID COOKSON: Yeah. [LB1090]

SENATOR LATHROP: Okay. Are we being fair to this guy? [LB1090]

DAVID COOKSON: Yes. [LB1090]

SENATOR LATHROP: Because a million, million and a half doesn't sound like a sufficient settlement for a guy... [LB1090]

DOUGLAS KLUENDER: No. He was well-represented. James Schaefer out of Omaha represented him from the very beginning. The initial settlement demand that we received was for \$2.7 million and over a period of a couple of weeks we negotiated and reached that \$1.5 million. [LB1090]

SENATOR LATHROP: Okay. Does anybody else have questions? [LB1090]

SENATOR CARLSON: Just...and this doesn't have a whole lot to do with the injury, but I'm trying to think...what are they for? Do they mark a lane? [LB1090]

DAVID COOKSON: When you're driving at night, your lights will reflect off of this, and you will tell the difference between the two lanes on the eastbound or westbound side of the interstate. Or you also will notice, your tires will make a noise if you cross over the center line. [LB1090]

SENATOR CARLSON: Yeah, yeah, okay. [LB1090]

DOUGLAS KLUENDER: They're spaced at about or were spaced about 40 feet apart down the center lines of the expressways and freeways. [LB1090]

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SENATOR LATHROP: You...the states removed them, right? [LB1090]

DOUGLAS KLUENDER: They've all been removed. [LB1090]

SENATOR LATHROP: And when they went about removing them, some of them were already gone. [LB1090]

DOUGLAS KLUENDER: They found a lot were missing, nowhere to be seen. No one knew where they went. [LB1090]

SENATOR LATHROP: They just...they apparently got kicked up and went harmlessly into the ditch without going through and hitting somebody. [LB1090]

DOUGLAS KLUENDER: Correct. What we learned was asphalt was more likely to lose them because of the pothole effect of the freeze and thaw cycle loosened the asphalt around it. [LB1090]

SENATOR LATHROP: Is there any...I suppose...I may answer my own question, but is there any opportunity for a subrogation claim against the manufacturer? [LB1090]

DOUGLAS KLUENDER: Not against the manufacturer. I don't think there's any defect there. The defect was in the road. We had looked into, and have still maintained the option, of going against the contractor who installed them or had a subcontractor install them. We actually had them in as third parties in the lawsuit. We had no privity of contract with the sub, so he was allowed out, and we dismissed without prejudice as against the contractor. The problem for the state Department of Roads in this situation is that they accepted the job in 2000. [LB1090]

SENATOR LATHROP: Essentially endorsing the way the work was done. [LB1090]

DOUGLAS KLUENDER: Yes. [LB1090]

SENATOR LATHROP: Okay. So we don't get to go get reimbursed. [LB1090]

DOUGLAS KLUENDER: I think we'd be wasting our time to do it, unfortunately. [LB1090]

SENATOR LATHROP: Okay. And you couldn't get any contribution out of that contractor? [LB1090]

DOUGLAS KLUENDER: No, no. They lawyered up. [LB1090]

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SENATOR LATHROP: What? [LB1090]

DOUGLAS KLUENDER: They lawyered up pretty quick. [LB1090]

SENATOR LATHROP: Well, (laughter) okay. [LB1090]

SENATOR COUNCIL: Scoundrels. [LB1090]

SENATOR LATHROP: Any other questions? I see no other questions. Thank you for the explanation. We appreciate it. Any other testimony on the amendment to LB1090 for, against, or neutral? That will close our hearing on LB1190 (sic) and our hearing today. [LB1090]