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Business and Labor Committee  
February 14, 2011

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[LB152 LB153 LB238 LB346 LB506]

The Committee on Business and Labor met at 1:30 p.m. on Monday, February 14, 2011, in Room 2102 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB238, LB346, LB506, LB152, and LB153. Senators present: Steve Lathrop, Chairperson; Tanya Cook, Vice Chairperson; Tom Carlson; Burke Harr; Jim Smith; and Norm Wallman. Senators absent: Senator Ashford.

SENATOR LATHROP: Welcome to the Business and Labor Committee. It looks like a bunch of faces that have been here before, but very briefly, my name is Steve Lathrop. I am the Chair of the committee and the State Senator from District 12. Today we take up five bills it looks like, and we'll take them up in the order that you found the agenda out front. That will bring us with Senator Conrad on her bills first. A couple of things for those of you that have not been here before: We have the light system. You'll get a green light when you sit down; you'll have three minutes to talk in total. The yellow light will come on after two minutes and that would...should tell you to wrap it up. I don't want to be discourteous and so I hope I won't have to say something when it turns red because you'll stop at that point. But if not, I'll...just to keep things moving along and so that we don't end up here staying too late, I'll remind you when the light turns red to please summarize what you have to say. You'll then be afforded an opportunity to answer questions if the senators have any. No cell phones, please. If you got them, turn them off or put them in the vibrate. This isn't a committee where you can't text, although I think there are some in the body where you can't even text in the audience. Anyway, we're not going to enforce that today. And let me introduce my colleagues or those of us...the guy with the heart in front of him, apparently has got his Valentine already or done his shopping, is Senator Carlson from Holdrege. Senator Harr is not here yet but I expect him momentarily; the same with Senator Ashford. Doug Koebernick is sitting in for my legal counsel who is in a meeting with Senator Ashford and some others right now. Kate is the administrative assistant and does a great job. She will insist that you fill out a sheet before you testify so she can make a good record. And then we have Senator Cook from Omaha and Senator Smith from Papillion. We'll begin with LB238 and that brings us to Senator Conrad.

SENATOR CONRAD: Good afternoon. [LB238]

SENATOR LATHROP: Good afternoon. [LB238]

SENATOR CONRAD: I think it's sad that we have a small group here today but in some ways good because that means more candy for the rest of us. So thank you Senator Carlson in advance. [LB238]

SENATOR CARLSON: You're welcome. [LB238]

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SENATOR CONRAD: In all seriousness, my name is Danielle Conrad. I represent north Lincoln's Fighting 46th Legislative District in Nebraska's Unicameral Legislature. That's D-a-n-i-e-l-l-e C-o-n-r-a-d. Chairman Lathrop, the always courteous, always impartial and always fair Chair of this fine committee, and members of the Business and Labor Committee, I am here today to introduce LB238. LB238 was brought to me by the Nebraska Association of Trial Attorneys and it relates to the Nebraska Workers' Compensation Court appeals process. Current law states that the first level of appeal from a decision by a single judge of the Compensation Court at the original hearing or trial goes to a review of a three-judge panel of the court. Appeals from that level then go to the Nebraska Court of Appeals, and ultimately, potentially, to the Nebraska Supreme Court. This bill would simply remove the three-judge panel review requirement and instead allow direct appeal to the Nebraska Court of Appeals, thus streamlining the appeals process and creating a more efficient system. I would like to note for the record, I would like to thank representatives from the court who will be testifying later, who proactively contacted my office to talk about potential opposition, to share concerns and ideas related to the legislation, and I look forward to working with them as this process continues forward. But I do want to note that their professional courtesy is definitely appreciated by my office and I think is a good model for others to work through this type of legislation, to be followed by others. I'm happy to answer any questions; however, there are those behind me that practice more frequently in this area and could answer more specific questions. At this point, I will reserve the right to close and to urge your favorable consideration of the matter. [LB238]

SENATOR LATHROP: Thank you, Senator Conrad. [LB238]

SENATOR CONRAD: Thank you. Yes. [LB238]

SENATOR LATHROP: Is there anybody with any questions? I see none. Thanks. [LB238]

DANIELLE CONRAD: Thank you. [LB238]

SENATOR LATHROP: Those who are in favor of the bill or proponents, please step forward one at a time. If you're filling out a form, you can complete that after your testimony just so that we don't take your three minutes up filling out a form. [LB238]

LEE LOUDON: Okay. Yeah, sure. Good afternoon members of the committee. My name is Lee Loudon. I'm here on behalf of the Nebraska Association of Trial Attorneys. We are in support of LB238 because it would streamline the process of appeals in the Workers' Compensation Court. Right now the appeals from the trial court decisions to the review panel take up, I think on average, around six to nine months from the day of the decision of the trial court and then getting a decision from the review panel. I represent mostly workers' compensation claimants. The hardest thing they have during

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this time period is just paying bills. A lot of them aren't working at all and they have no way to pay their mortgages, sometimes buy food. It's really an extremely difficult time for them. So the effort is an idea to try to get some resolution to their claims as quickly as possible to keep them out of having to file for bankruptcy and lose potentially everything they have. Removing the review panel would free up the Workers' Compensation Court judges to handle more, also of other claims faster and more expeditiously. And hopefully it would also allow the judges to get to other parts of the state, the western part of the state, more often as well. And that's why we support LB238. [LB238]

SENATOR LATHROP: Great. Thanks, Lee. Any questions for Lee? I want to ask a couple of questions because some of my colleagues here had not sat through work comp hearings and are not familiar with the process, but basically in work comp if someone has been hurt in the scope and course of their employment they can make a claim against their employer for work comp benefits, and those benefits include medical benefits and certain indemnity benefits or benefits to compensate you for time missed from work or your loss of earnings ability. Would that be true? [LB238]

LEE LOUDON: Yes, Senator. [LB238]

SENATOR LATHROP: Okay. And my question, at least with respect to this bill, is in the process you try your case to a single judge of the Work Comp Court, and if you or the other side don't like the results, it's then appealed to the three-judge panel. And if you don't like that, you then go to the Court of Appeals or the Supreme Court. [LB238]

LEE LOUDON: Right, Senator. [LB238]

SENATOR LATHROP: And this would take the three-judge panel piece of the appeal process out of the equation. [LB238]

LEE LOUDON: That's right, Senator. So then the appeal would...yeah. [LB238]

SENATOR LATHROP: Okay. All right. With that background, now I want to ask you a substantive question about this bill and that is if we go straight...instead of going to the three-judge panel but went straight to the Court of Appeals, how long is that going to take? You said it takes eight months to get a decision, or six to eight, out of a three-judge panel. How long does it take to get a decision out of the Court of Appeals? [LB238]

LEE LOUDON: I know there's a judge from the Court of Appeals here that might be able to answer that better than I, but I'm thinking somewhere in the neighborhood of six months. [LB238]

SENATOR LATHROP: Okay. So you're thinking for the same time period you might as

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well just go straight to the Court of Appeals and skip the... [LB238]

LEE LOUDON: Right. [LB238]

SENATOR LATHROP: Okay. [LB238]

LEE LOUDON: And I know there's a concern about that we'd be suddenly dumping all the cases are now going to the review panel onto the Court of Appeals or Supreme Court and that would delay their docket and it would have a ripple effect. All the cases that end up in the Supreme Court and Court of Appeals would be slowed down. So in other words, it would be transferring the delay in the review panel on up the chain, and we don't want to do that. There were some statistics we got showing that about 50 cases are appealed I think from the trial court level up to the review panel. And so the concern would be are those 50 cases then going to be in the Court of Appeals or Supreme Court? And I don't think so. I don't think all of those will be appealed...that would have been appealed to the review panel would be appealed up to the review panel and the Supreme Court. I can give you a... [LB238]

SENATOR LATHROP: And you're speaking really fast and let me make sure that my colleagues understand your point... [LB238]

LEE LOUDON: Okay. [LB238]

SENATOR LATHROP: ...and that is if we had 50 cases that go from the one-judge to the three-judge panel and if we went straight to the Court of Appeals, you don't think all 50 of those same litigants would appeal to the Court of Appeals because it's a more involved process. [LB238]

LEE LOUDON: Right, right. [LB238]

SENATOR LATHROP: Okay. I think we understand the issue. [LB238]

LEE LOUDON: Okay. [LB238]

SENATOR LATHROP: Now we'll hear from some more folks, but... [LB238]

LEE LOUDON: Okay. [LB238]

SENATOR LATHROP: Any other questions? Senator Carlson. [LB238]

SENATOR CARLSON: Yeah, thank you, Senator Lathrop. When somebody is injured, is the process the same regardless of the extent of the injury or how clear-cut something may be? Is the process the same? [LB238]

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LEE LOUDON: The rules are the same. There's maybe more discovery that goes on the more complicated the injury, maybe more taking statements from doctors or from vocational specialists, Senator. [LB238]

SENATOR CARLSON: If somebody is injured and the employer knows and agrees that injury was legitimate, it happened, get them paid. Does that make a difference how quickly something is handled? [LB238]

LEE LOUDON: Yes. If the employer agrees to pay the compensation, a lot of times no dispute even rises to the level that it needs to...that a lawsuit needs to be filed, that's right. [LB238]

SENATOR CARLSON: So if no dispute arises it's because it's been settled quickly and there's no need for it. [LB238]

LEE LOUDON: I think that's generally true, Senator. [LB238]

SENATOR CARLSON: Okay. [LB238]

SENATOR LATHROP: Yeah, that's a good point. The only people that go and have a trial in the Work Comp Court are the people that have a dispute. [LB238]

LEE LOUDON: That's right. [LB238]

SENATOR LATHROP: And with a pretty simple process, most things resolve without ever having a trial or going to the Work Comp Court. [LB238]

LEE LOUDON: Absolutely. [LB238]

SENATOR LATHROP: Okay. Thanks, Lee. [LB238]

LEE LOUDON: Thank you. [LB238]

SENATOR LATHROP: Appreciate the background too. [LB238]

ROD REHM: Good afternoon. [LB238]

SENATOR LATHROP: Good afternoon. [LB238]

ROD REHM: My name is Rod Rehm. I'm a lawyer here in Lincoln, and I'm appearing on behalf of NATA also. I want to give you an example of a case, a real live case that we won a hotly disputed trial in front of the Workers' Compensation Court in May of 2009.

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And it was factual issues only, where the question was, did the facts support the plaintiff recovering total permanent disability and having a back surgery completed. And there was competing evidence on both sides of the court, and I'm talking about this for the nonlawyers because the standard of review of this decision is it can't be overturned if it's a fact question if there's any evidence supporting the winning side, in plain language. There was a lot of evidence on the side of the guy. The insurance company for the employer appealed the case to the three-judge panel. That took six to nine months to get a decision. It was about a one-paragraph decision back from the review panel saying affirmed, facts to support the award. They appealed to the Court of Appeals. That court has a summary procedure where you can file something less than a brief to get a case kicked out quickly, which we did. And the Court of Appeals agreed with us and just threw it out, didn't even give the other side the right to have the case argued in front of the Court of Appeals, which is to their credit. And it's an expediting procedure that they have that I don't think the Workers' Comp Court has. Then the insurance company wasn't satisfied with that. They appealed to the Supreme Court over that summary dismissal of their appeal. Bottom line is it took 18 months to get the guy his money. And by the time the 18 months had passed, he had lost his home, he had filed bankruptcy. And when he got back to the doctors that he'd been allowed to get treatment from, they basically...first of all, the insurance company didn't allow him to have the MRI to check out if there had been progression in his injury until there was all kinds of chest beating on my part and so forth, get the MRI, get some nerve tests, and the doctors say, it's too late; we can't fix you anymore. That's what happens with these long appeals. And any (inaudible)...I can understand the Court of Appeals being concerned about getting more cases. But if that kind of person could have had his decision in 9 months instead of 18 months, maybe he could get fixed. Now he can't. That's why NATA is behind something like this. [LB238]

SENATOR LATHROP: Okay. Good. Thanks for the example. And just a second, make sure no one has any questions before you get away, Rod. Any questions for Mr. Rehm? I see none. Thanks for coming down. [LB238]

ROD REHM: Thank you. [LB238]

STEVE HOWARD: Good afternoon. I'm Steve Howard, H-o-w-a-r-d, of the law firm Dowd, Howard and Corrigan, appearing today on behalf of the State AFL-CIO in support of LB238. I join in the comments of Mr. Loudon and Mr. Rehm. Just to pick up on those, you know what happens when a person is off work waiting for those dollars to come in, they rely upon public tax dollars often, in one form or another. So that delay causes people to seek state assistance, Medicare. State tax dollars step in and replace the insurance dollars. Sometimes in the end that's repaid, but this would hopefully streamline the process so that the dollars that are paid for the care and for the weekly support are tied back to the work-related injury. I would also point out, you know, there's no other court that has this three-judge, that I can think of, that has this three-judge

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panel. You know, if you try a case in district court, a divorce case or a criminal case or a car accident or something, there's not a three-judge panel that reviews what the judges did. And this is unique to the Workers' Compensation Court. It was a compromise. The lawyers in this room will recall back from 1993, I believe LB757, and it's acknowledged that this may create an extra burden at the Court of appeals level. One would think that the net effect at the end of the day would be a reduction in costs. A reduction in costs, if certain cases are going to go to the Court of Appeals and Supreme Court anyway, it would seem to be less costs at the administrative level of the Workers' Compensation Court. It's hard to put a dollar amount on that, but also defense costs. The costs of workers' compensation premiums paid by employers in the state are sometimes...or in some degree, rather, tied to defense costs. And with one less level of appeal, it would seem that there would be one less level to have a dispute on. And so, again, I can't come with some statistics that really would show what those would be because I'm not privy to the bills that are sent by defense counsel. But anyway, that's another side of it. Also I would just point out and I think the point has been brought up that I don't think that the committee ought to just look at x number of cases that are disposed at the three-judge panel. It tends to be the more serious cases, not that every case doesn't have a degree of seriousness, but it tends to be when the stakes are higher that there are more and more appeals. So on behalf of our membership, we would encourage the committee in support of LB238. That's really all I've got. Thank you very much. [LB238]

SENATOR LATHROP: Very good. Thank you, Steve. Are there any questions for Mr. Howard? I see...oh, Senator Carlson does. [LB238]

SENATOR CARLSON: Thank you, Senator Lathrop. Your opening statement about going through public dollars, now if you shorten the process from 18 months to 9 months, 9 months is still a long time. How does it really help? [LB238]

STEVE HOWARD: Well, I guess it would...folks have savings and they reach a point...and not everyone has savings, but they sort of reach a point where, you know, they've borrowed enough and they've got to turn for food stamps, for other forms of aid. I mean cutting it in half would seem to be worthwhile--18 to 9. [LB238]

SENATOR CARLSON: Okay. [LB238]

STEVE HOWARD: And those are loose numbers. Sometimes it can take a lot longer. [LB238]

SENATOR CARLSON: Okay, thank you. [LB238]

SENATOR LATHROP: Very good. Thanks, Mr. Howard. [LB238]

STEVE HOWARD: Thank you very much. [LB238]

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SENATOR LATHROP: Any other proponents? Anyone here opposed to LB238? Welcome. [LB238]

RICHARD SIEVERS: (Exhibit 1) Good afternoon, Mr. Chairman, Senators. My name is Richard Sievers. I'm a judge on the Nebraska Court of Appeals, and I appear today on behalf of both the Court of Appeals and the Supreme Court. Both courts are opposed to the portion of the legislation that removes the three-judge review panel from the workers' compensation procedure. I put together some materials that I'd like to have the senators have, and the first piece of it is some statistics that Judge Van Norman of the Compensation Court graciously put together for me as to the number of appeals to the three-judge panel and then what happens to those appeals once they're finished. And what they show on an average over the last five years is about 90 appeals that go...90 cases a year that go to the review panel, and right now about a third of those go on up to the Court of Appeals. So if you just assume that all of those cases went directly to the Court of Appeals, you would increase our caseload by about 60 cases a year. Why that's important and we're opposed to it is that workers' compensation cases are by statute treated as advanced cases. But they're not the only cases that are treated as advanced cases. Criminal cases are likewise advanced. All cases involving children, whether they come out of the juvenile court or the divorce courts, are treated as advanced cases. There's some others--water law cases--but you have that category of advanced cases that we are required to put at the front of the line. So if you start adding into that, you're going to impact how we can manage our docket with respect to all of those other cases. The other thing that's attached to the statistics is an article that Judge Irwin and I wrote just in the last couple of months about some of the summary procedures that we're doing. And our court right now is disposing of 93 percent of the cases that we have filed within 60 days from the date the appeal is filed until the mandate is issued. And a lot of that time is taken up with briefing and preparation of the record, but we're getting 90-plus percent of our cases done. I see this bill as having a substantial impact on that. We're at...both courts are at this point because of a hiring freeze on law clerks. Our court staffing is down 16 percent; the Supreme Court's is down 14 percent. So at this time to add these additional cases seems to me to increase our workload and reduce our efficiency. [LB238]

SENATOR LATHROP: All right. Thanks, Your Honor. Anybody have any questions for Judge Sievers? One thing that struck me when I saw this--and I do a little bit of work in Work Comp, not a lot--but what struck me was that three-judge panel, you don't have to...I've seen guys show up there with no brief at all, I mean none. And it strikes me that some people look at it like, well, let's appeal it to the three-judge panel, what's the harm? It isn't going to cost anything. I don't have to spend any money doing it. I don't even have to write a brief--just show up and king of argue or maybe bring a case with me. And I'm wondering if the three-judge panel isn't there if the cases that were headed to the Court of Appeals under the current system would have gotten there anyway and

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the rest would have just sort of gone away because folks would not look at it like, well, there's no harm in appealing it. [LB238]

RICHARD SIEVERS: Well, I think that... [LB238]

SENATOR LATHROP: Do you follow me? [LB238]

RICHARD SIEVERS: I do. And I think the statistics show that the review panel presently weeds out about 60 out of those average 90 cases per year. Mr. Howard alluded to 1993 when this first...when the review panel was first created, and at that time I was Chief Judge of the Court of Appeals and we opposed the bill at that time for the reason that we simply couldn't handle the workload. And I guess we don't think it's any different today. It may be worse in the sense that our staffing is down. So I think, you know, it's...I think you're accurate that some of those appeals would not come to us because what we require of people appealing is greater than what the Workers' Comp Court requires. So they have to work harder, do more. They can't just show up. They got to write a brief. [LB238]

SENATOR LATHROP: Right. [LB238]

RICHARD SIEVERS: And they have to write the right kind of brief so. [LB238]

SENATOR LATHROP: Put some energy into it. [LB238]

RICHARD SIEVERS: They do, they do. [LB238]

SENATOR LATHROP: All right. Well, we appreciate your thoughts and your answer to the question and your service to the state on the Court of Appeals. [LB238]

RICHARD SIEVERS: You bet. [LB238]

SENATOR LATHROP: Thanks, Judge. [LB238]

RICHARD SIEVERS: Thank you all. [LB238]

SENATOR HARR: Maybe not his service. (Laughter) [LB238]

RICHARD SIEVERS: That's where you started. Remember, Senator? [LB238]

SENATOR LATHROP: All right. You guys can solve that one in the hallway. Anyone else here in opposition to LB238? Hello, Katie. [LB238]

KATIE ZULKOSKI: Good afternoon, Senator Lathrop, members of the Business and

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Labor Committee. Katie Zulkoski, Z-u-l-k-o-s-k-i, and I am here in opposition to the bill as we see it as a question of judicial resources in the state. And we do appreciate Senator Conrad and her willingness to talk to the parties and work through these issues. [LB238]

SENATOR LATHROP: And the we in "we" is... [LB238]

KATIE ZULKOSKI: The Nebraska State Bar Association, I apologize. [LB238]

SENATOR LATHROP: Okay. I wanted to make sure the record reflected that. Okay. Any questions for Katie? Senator Cook. [LB238]

SENATOR COOK: Yes. I missed the part where you said your opposition was related to a question of what? [LB238]

KATIE ZULKOSKI: Judicial resources, and we think the current system is a good use of the resources in our state and the way that that is aligned. [LB238]

SENATOR COOK: All right. Thank you. [LB238]

SENATOR LATHROP: Okay. Thank you. Anyone else here in opposition? [LB238]

MIKE FITZGERALD: My name is Mike Fitzgerald. I'm on the Workers' Compensation Court. I live at 4260 Garryowen Road, P38, Fort Calhoun, Nebraska, 68023. I'm the fellow who writes the opinions that poor Judge Sievers has to read. I think one of the things...and I say I'm here against it, I'm kind of neutral too. One of the things you need to know is do we provide a service and assist the Supreme Court and/or Court of Appeals when they decide the cases based upon the review panel's opinions? When I write for the review panel, if I think that case is going to get appealed or there's a possibility it's going to get appealed, it's a different way I write them. And I write to educate the Supreme Court and the Court of Appeals on why we're doing what we're doing and to help them start their recess project because they may not agree with what I wrote and that's fine. I mean I've been reversed more than enough, but I think that they need to know where we're coming from. We are a specialized court. If you look at the United States Bankruptcy Court, they have an intermediary level of appeal in there for a bankruptcy appeal court. And that's because it's a specialized court which then goes to the Court of Appeals, the same reason is that we would help the court decide the case and give them some more, a little bit broader citation to the law. We write a little bit more, we cite more cases than a trial judge does. Trial judges tend to decide the facts and give you a little bit on the law. The Court of Appeals or not the Court of Appeals but your review panel should write a little bit more. I wish Judge Sievers would have said you guys help us out (laugh). [LB238]

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SENATOR LATHROP: I think I heard that in there somewhere. It was implied. [LB238]

MIKE FITZGERALD: Ask the Supreme Court and the Court of Appeals if what we're doing is worthwhile. If it isn't worthwhile, well then maybe we ought to do away with it. But I think we're helpful. [LB238]

SENATOR LATHROP: Well, let me, if I can, Judge, let me ask a few questions that I was starting to go down that road with somebody else and that is how many times do you think you straighten out some relatively small mistake made by the trial judge and avoid an appeal to the Court of Appeals? What's the frequency of that occurrence? [LB238]

MIKE FITZGERALD: Not very often because usually they get us within the ten days and so we can correct a lot of things within the ten days. Most of those are mathematical errors and listings of medical bills. Weekly benefit awards we'll make mathematical errors routinely. We have the right to correct those within the ten days. [LB238]

SENATOR LATHROP: Okay, that I can appreciate. So some kind of a nunc pro tunc takes care of that. [LB238]

MIKE FITZGERALD: Yes. [LB238]

SENATOR LATHROP: Then how many appeals...if there's a certain percentage of these that are going to the Court of Appeals anyway and you're just a six-month stop along the way, how many do you think are resolved that would otherwise have gone to the Court of Appeals? Can you estimate that? [LB238]

MIKE FITZGERALD: No, I can't because I don't have any figures. All I know is I sat on 27 cases last year and wrote 24 opinions. That's all I can tell you. And those are either majority opinions or concurrences or dissents. [LB238]

SENATOR LATHROP: And you're talking about... [LB238]

MIKE FITZGERALD: Me. [LB238]

SENATOR LATHROP: That's on the three-judge panel. [LB238]

MIKE FITZGERALD: Yes. And there's six of us that do that. [LB238]

SENATOR LATHROP: The primary argument that you bring with you today, if I understand, is that when you write an opinion in a three-judge review, you're going to put more information in there to help the Court of Appeals or the Supreme Court if they get ahold of that case. [LB238]

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MIKE FITZGERALD: That's correct. And so you have to ask the Court of Appeals and the Supreme Court, is this of some value to you? If it isn't, then maybe you don't need us. [LB238]

SENATOR LATHROP: To some extent it's kind of hard to sort out how many fewer appeals we'd have to the Court of Appeals if you weren't in place, the three-judge panel. [LB238]

MIKE FITZGERALD: Right. I don't know how you sort that out. [LB238]

SENATOR LATHROP: And that would be...you think it's speculation. [LB238]

MIKE FITZGERALD: I do. You know, there's probably, say, 5 or 6 out of the 27 I sat on this year that guys just appealed because the 14 days was going to run out and they show up and there's no brief and so it's affirmed, no briefs. [LB238]

SENATOR LATHROP: And those are the people that I was talking to Judge Sievers about... [LB238]

MIKE FITZGERALD: Right. [LB238]

SENATOR LATHROP: ...which is so you have five people that do that, and they had no intention of going to the Court of Appeals regardless of what the three-judge panel did. And they're wasting your time, frankly, and they'd be wasting the Court of Appeals' time. The question is whether they'd even bother appealing to the Court of Appeals. [LB238]

MIKE FITZGERALD: Well, they'd have 30 days and so they have more time. But if somebody has a client that makes them appeal, they appeal. [LB238]

SENATOR LATHROP: Okay. Well, that's helpful. Any questions for the judge? I see none. [LB238]

MIKE FITZGERALD: Thank you. [LB238]

SENATOR LATHROP: Thank you. Always good to hear from you. Anyone else here in opposition? Anyone here in a neutral capacity on LB238? [LB238]

GREG COFFEY: Senator Lathrop, members of the committee, Greg Coffey, C-o-f-f-e-y, and I'm just here on my own behalf. I'm an attorney with Friedman Law Office here in Lincoln, Nebraska. And as I'm listening to the discussion, a couple of observations pop into my mind. First of all, as Mr. Rehm was discussing earlier, there's really no mechanism for a summary affirmance to the Workers' Compensation appeal panel the

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way there is to the Court of Appeals. And that might be a mechanism by which you can get rid of some of them. In my experience, a lot of the appeals that I see filed after I've prevailed at trial are strictly on issues of a question about the evidence or whether there's sufficient facts in the record to support the award. And really there is no way to overcome a factual finding. The only way that you can overturn a judgment is if the trial court made a mistake of law, not a mistake of fact. If there's any evidence in the record that supports the trial judge's findings, they're going to get affirmed on appeal. And so a certain number of those appeals are strictly on factual issues. If there was a mechanism for summary affirmance, in other words if the bill could be amended so that a mechanism for summary affirmance could be provided, that might take care of the concerns on both sides. But it is, nevertheless, true. I had a trial in front of Judge Fitzgerald in February a couple of years ago, where my client, the only issue was she needed a shoulder surgery. And he awarded a shoulder surgery. The defendant appealed to the review panel. It was strictly on a factual issue, a difference in factual findings. There was facts on her side that supported the award. They appealed at two levels. So we ended up going up to the Court of Appeals anyway, even though there was a review panel decision that found in our favor. And in the end it was, you know, a year and a half before we got a final decision that allowed her to go forward with her surgery that she needed. So I think the concerns that the proponents of this bill are talking about are real, but there may be a mechanism that can address the judges' concerns that we not just get rid of the review panel. One other issue if I have time: motions for orders nunc pro tunc. I have one right now that there was a mistake in the way that the award was crafted, but it wasn't something that could be corrected with a nunc pro tunc because the Supreme Court's rules on nunc pro tunc say that it has to be a scrivener's error. It has to be like a, you know, a typographical error. In my case it was in one part of the award it said my client was found to be permanently and totally disabled. In another part of the award, in the (inaudible) credible part of the award it said she's entitled to 300 weeks of benefits, which is not what permanent total allows for. So in order to fix that, I couldn't do that with a nunc pro tunc. I've got to go to the review panel, and I'm fairly certain that once I get to the review panel that will be fixed and it won't need to be appealed any further. [LB238]

SENATOR LATHROP: Okay. Did you fill out a sheet? [LB238]

GREG COFFEY: I will. [LB238]

SENATOR LATHROP: Okay, because I got to tend to those things too. Any questions for Mr. Coffey? And just for the nonlawyers, the nunc pro tunc is a process that the courts permit to correct a mistake in their order that's...you called it a scrivener's mistake; it can be an obvious mistake, but it's certainly not as broadly allowed as it used to be when I was just starting out. So that's what a nunc pro tunc is. Thanks. Anyone else here in a neutral capacity? That will close...no, it won't. We've got to hear from Senator Conrad. [LB238]

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SENATOR CONRAD: Thank you. Just in closing, a few quick points. Number one, thank you again to the folks that took the time out to come down today and share with you real-life impacts and stories about how important this legislation is in ensuring that we can have a system that is as efficient as possible as we move forward. Again, also want to extend my gratitude to Judge Sievers and those who contacted my office proactively to discuss specific concerns. And, of course, we're always willing to work with them because the issues surrounding caseload and judicial resources are real and we need to be receptive to those issues. But we, as senators, must also err on the side of protecting the rights of the citizenry that have business before these courts and that count on us to be their voice in this body in terms of the administration of justice. The reason we have a specialized court in terms of the Workers' Compensation Court is to ensure efficiency so that we can help to reduce state costs, that we can help to keep litigation costs manageable for all parties that are represented and have business before these courts and these bodies. And it's pretty rare that you have a piece of legislation before this committee, in particular, that has the benefits to reduce frivolous litigation, help to find cost-savings for both business and labor interests in terms of their litigation costs, and that can improve government efficiency and find justice for our citizenry in an efficient manner. So with that, thank you for your kind consideration. [LB238]

SENATOR LATHROP: (See also Exhibit 13) Thank you, Senator Conrad, for introducing the bill and for the witnesses that you had appear in support--and those that appeared in opposition. On to LB346, and that brings us to Senator Conrad once again. [LB238]

SENATOR CONRAD: Yes. Thank you, Chairman Lathrop, members of the committee. My name is Danielle Conrad, D-a-n-i-e-l-l-e C-o-n-r-a-d. I represent the Fighting 46th Legislative District here in our Nebraska Unicameral Legislature, here to introduce LB346. Quite simply, LB346 would allow the Nebraska Workers' Compensation Court to issue a contempt order and to sanction or to otherwise enforce conformity with a contempt order. Currently, the Nebraska Supreme Court has ruled that the Comp Court does not have the authority to issue contempt orders, and this bill would rectify that to make the court more effective in doing its work. There are persons following me who have specific experience and expertise in this arena, and I think you will enjoy hearing their perspective on why this legislation is needed. Thank you. [LB346]

SENATOR LATHROP: Thank you, Senator Conrad. Any questions from the committee? I see none. First proponent, please. Mr. Shasteen, welcome to the Business and Labor Committee. [LB346]

ROLF SHASTEEN: (Exhibit 2) Mr. Lathrop, thank you for your greeting. Members of the committee, I believe that you're about to receive a copy of a Supreme... [LB346]

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SENATOR LATHROP: We need to have you give your name and spell your last name for us. [LB346]

ROLF SHASTEEN: Rolf Shasteen. What else do you need, Steve? [LB346]

SENATOR LATHROP: Spell it for us, please. [LB346]

ROLF SHASTEEN: R-o-l-f S-h-a-s-t-e-e-n. More? Is that enough? [LB346]

SENATOR LATHROP: That's it. [LB346]

ROLF SHASTEEN: Okay. You're about to receive a copy of a Supreme Court decision, which was a bit of a bolt out of the blue, to say the least. It's a very narrow holding. On page 711, I highlighted the part that's causing the problem. Since the inception of the Workers' Compensation Court on the date, I don't know, but it was some time last century--rather early--it's always been assumed that the Workers' Compensation Court--and by assumed, it's been assumed by the judges of that court, it's been assumed by the defendants, and it's assumed by the plaintiffs and their representatives that, obviously, a court had the authority to enforce its own rulings, otherwise, you have a toothless tiger. So we all lived like that until an extremely clever defense counsel made the argument that there is no specific grant of power to the court to perform that particular function, in which he is correct. Of course, it makes no sense in view of 48-162, which sets out the powers of the court, which cannot be implemented unless you have contempt power. Let me give you a simple example. You are a litigant before the court--I don't care if you are a plaintiff or a defendant. You want a witness to come to court. You ask the court to send a subpoena; the court sends a subpoena. The witness refuses to come: I'm not coming. What do you do? Well, you're supposed to have a motion to show cause why you shouldn't be held in contempt of court for failure to obey the order of the court. At that hearing--and I've had a few of them in this court and others--what happens is, the judge gnaws on the person. They go, sorry, didn't understand how important it was. He says, well, you're in contempt, but you can purge that contempt by complying with my order. They do; it goes away. They show up for whatever proceeding or provide whatever document or whatever it is the court told them to do. The Comp Court can't do that. And so if anybody wants to have a witness, the Comp Court can issue an order for them to be there, but it can't do anything to them if they don't follow that order. And if you can imagine anything more incomprehensible than trying to explain to a layman why a subpoena is worthless, you'll have to reveal it to me. And that's the whole argument in a nutshell. [LB346]

SENATOR LATHROP: Okay. [LB346]

ROLF SHASTEEN: Questions? [LB346]

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SENATOR LATHROP: Senator Cook. [LB346]

SENATOR COOK: Who are you representing today, Mr. Shasteen? [LB346]

ROLF SHASTEEN: Me. [LB346]

SENATOR COOK: Okay. [LB346]

ROLF SHASTEEN: I'm just a...I mean I asked Senator Conrad to...I mean this is a train wreck. I practice in the Comp Court all the time. I asked Senator Conrad to introduce the bill to solve this problem. It's a very narrow problem but it needs to get fixed. Does that help? [LB346]

SENATOR COOK: Thank you. [LB346]

SENATOR LATHROP: Yes. Senator Carlson, did you have a... [LB346]

SENATOR COOK: A little bit. [LB346]

SENATOR LATHROP: ...question? [LB346]

SENATOR CARLSON: No. [LB346]

SENATOR LATHROP: Oh, all right. Thanks. I appreciate it, Mr. Shasteen. Anyone else here as a proponent of LB346? [LB346]

STEVE HOWARD: Steve Howard, S-t-e-v-e H-o-w-a-r-d. I appear on behalf of the state AFL-CIO, and we support empowering Comp Court judges with contempt powers. The part of the discussion that probably needs filled in is, what do you do if you want to enforce a subpoena or enforce an order? You have to take that--this is the only process I know about--and register it at the district court level. District court is the court of general jurisdiction. If there's a divorce case or a felony criminal case or misdemeanors, car accident case, contract cases, those are at the court of general jurisdiction--that's the district court. And so we have that sort of convoluted process. It doesn't happen a lot, but I've had to go to the district court before to get a Comp Court order enforced. And so there you are with a district judge that says, well, they have a heavy caseload themselves, and they're being asked to enforce something that is on the Workers' Compensation Court level. The Work Comp judges have the greatest knowledge at the trial level of what is needed and what is necessary. It's a faster way to do it if you empower them with contempt powers, and it just seems to make sense. At the risk of speaking for someone else, I have, in conversations, been given to understand that there is a concern about certain personalities or someone having power--contempt

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powers--and I'll let someone else maybe elaborate on that. But I would just suggest that the--respectfully--that the committee and the Nebraska Legislature ought not be in the business of worrying about one judge or another having the authority to do things that judges ought to be able to do. I'm being very careful when I say that, but this just comes from conversations. And maybe I'm way off base. But these judges ought to have power to enforce the orders that they enter all the time. They ought to be able to get witnesses there. They ought to be able to secure payment. If you get an award and the employer owes the employee dollars and they're not being paid, that has to go be registered in the district court as a judgment--and greater contempt power would hopefully cure that. And so the state AFL-CIO supports LB346. Appreciate your listening to my comments. [LB346]

SENATOR LATHROP: Very good. Thanks, Mr. Howard. Any questions? I see none. [LB346]

STEVE HOWARD: Thank you. [LB346]

SENATOR LATHROP: Thanks for your testimony. Next proponent of LB346. I see none. Anyone here in opposition to LB346? I see none. No one has come forward. Anyone here in a neutral capacity on LB346? [LB346]

DALLAS JONES: Good afternoon. Dallas Jones, D-a-l-l-a-s J-o-n-e-s. I'm an attorney at Baylor Evnen law firm here in Lincoln, and I am appearing on behalf of the Nebraskans for Workers' Compensation Equity and Fairness. I'm testifying in a neutral capacity today for two reasons principally. One, while I appreciate what Mr. Shasteen said, I believe that the Workers' Compensation Court already has the power that Mr. Shasteen seeks to give to it. Section 48-162, in fact, speaks to a judge's power of commitment in the context of witnesses who are refusing to testify or some such thing. I won't get into a long legal argument why there are other legal decisions which support my position. I submitted a brief on that to the Supreme Court on Friday in a case where a judge very much should have the power of contempt in that context for a person who was threatening people, the safety of all involved in a case. The second reason, however, that I'm here, in addition to the fact that I think they already have it, is if you wish to move forward with this bill, my suggestion to make it cleaner and avoid any definitional problems as to what contempt means, is to reference a section which is already in state law, 25-2121, which talks about the powers of all courts of records to essentially manage its docket and so on. It's a very clean statute and speaks to all of the concerns that the proponents addressed when they were supporting the bill. [LB346]

SENATOR LATHROP: Thanks, Dallas. Any questions? Senator Harr. [LB346]

SENATOR HARR: Thank you, Senator Lathrop. You've said you think that these powers already exist. Is there an issue of whether these powers actually do exist then?

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[LB346]

DALLAS JONES: Well, there certainly is, because I'm in the Supreme Court arguing that they do and the other side is arguing that they don't. [LB346]

SENATOR HARR: Okay. [LB346]

DALLAS JONES: So I have to concede there is an issue. It's my position as a matter of law that it does. [LB346]

SENATOR HARR: Would this bill help clarify that issue then? [LB346]

DALLAS JONES: It certainly will. [LB346]

SENATOR HARR: Okay. [LB346]

DALLAS JONES: Yeah, if no change is made, it will give...confer some powers of contempt, whatever that means. [LB346]

SENATOR HARR: And this, in front of the Supreme Court, was that decided under the Supreme Court or on a Court of Appeals level? [LB346]

DALLAS JONES: It is not, but it's likely to be bypassed. [LB346]

SENATOR HARR: Okay. [LB346]

DALLAS JONES: The Court of Appeals is likely to be bypassed on this issue. That's my prediction. [LB346]

SENATOR HARR: So we may have a resolution soon enough anyway. Within a year. (Inaudible.) [LB346]

DALLAS JONES: As soon as it gets...if the Supreme Court can get around to resolving that, yeah, it will be...it will be no question after this session is over. [LB346]

SENATOR HARR: Thank you. [LB346]

SENATOR LATHROP: Well, there will be no question, one way or the other. [LB346]

DALLAS JONES: Yeah, the Supreme... [LB346]

SENATOR LATHROP: It'll be settled law... [LB346]

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DALLAS JONES: Yes. [LB346]

SENATOR LATHROP: ...when they speak, but we don't know which way they're going to come down on it. [LB346]

DALLAS JONES: Yes, that's my point, is the Supreme Court... [LB346]

SENATOR LATHROP: Dallas, I appreciate you being here and the perspective of your group. I do have a question for you. You don't have any quarrel with conferring contempt powers on the Work Comp Court to enforce any of their orders, whether it's an order to appear, as in the case of a subpoena; or an order to pay a bill, for example; or to show up at a vocational rehabilitation's office? [LB346]

DALLAS JONES: That's correct. No, we do not and, as a matter of fact, believe that's necessary; have assumed that that has always been the case and interpreted the Burnham decision as being a narrow... [LB346]

SENATOR LATHROP: I would have thought that too; I would have thought that too. And I appreciate your suggestion that we incorporate 25-2121 into the process and probably clean it up some, so. Any questions after that? Okay. Very good. Thanks, Dallas. [LB346]

DALLAS JONES: Okay. Thank you. [LB346]

SENATOR LATHROP: Anyone else here...what are we on? Neutral capacity. [LB346]

GREG COFFEY: Mr. Chairman and members of the committee, my name is Greg Coffey, G-r-e-g C-o-f-f-e-y. I'm here on behalf of the Nebraska Association of Trial Attorneys to express our adamant neutrality on (laughter) LB346. I don't want to reiterate what Mr. Jones has just said, but the Burnham decision that was passed around earlier has created some confusion about the extent to which the Compensation Court may or may not have contempt powers. And given its apparent conflict with the language in Nebraska Revised Statute 48-162, it seems to us that the parties may want to get together and take a further look at this before moving forward with passing legislation. The decision in Burnham was on a particular legal point. It seems to suggest that the Compensation Court lacks any sort of contempt powers, but it was on a very narrow issue having to do with the ability to collect on a judgment. It didn't deal with whether the Compensation Court has the power to compel witnesses to appear and that kind of thing. Section 48-162, on the other hand, seems to very clearly convey that the Compensation Court has those authorities, and it appears to us that the Burnham decision may not be as broad as what Mr. Shasteen was concerned about--potentially. [LB346]

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SENATOR LATHROP: All right. Any questions? I have to say I'm puzzled by the neutral testimony, because it sounds like it's testimony in support. And you would agree with Mr. Jones that this opinion, Burnham, has created some question marks in the court's contempt authority? [LB346]

GREG COFFEY: Well, our neutrality, Senator Lathrop, has to do with the fact that we already knew that we had to register judgments with the district court, and that's been known for a long time. And in the discussion at the legislative committee meeting for NATA, we talked about lawyers who have had to register their judgments, and that's just something that we've done. As to whether or not the Burnham decision really says that the judges of the Compensation Court lack any sort of ability to compel the witnesses to attend, we're not sure that that's really the direction that Burnham went--that the decision went. That's why we're neutral. [LB346]

SENATOR LATHROP: Well, I know, but you guys can sit in the NATA legislative committee meeting and chat about it, but if the court issues an opinion and says what it says, then we have an opportunity to clear it up. [LB346]

GREG COFFEY: Sure. [LB346]

SENATOR LATHROP: Right? [LB346]

GREG COFFEY: Yes. [LB346]

SENATOR LATHROP: And do you agree with Dallas that the reference to 25-2121 would make this a cleaner bill? [LB346]

GREG COFFEY: I agree with that. [LB346]

SENATOR LATHROP: Okay. Good. Any other questions? Good. All right. Well, thanks for coming down. We appreciate your testimony. Anyone else here in a neutral capacity? [LB346]

MIKE FITZGERALD: Mike Fitzgerald, 4260 Garryowen Road, P38, Fort Calhoun, 68023. I kind of thought I still had contempt powers at least as far as it goes to discovery, because in the rules of the court we adopt the rules of discovery. In one trial court opinion, when I was relatively new on the bench, I wrote that we weren't bound by the rules of discovery, only to be corrected by Judge Hannon on the Court of Appeals in no uncertain terms. The rules of discovery do provide for a court to hold someone in contempt. The Supreme Court approves our rules. Obviously, if the Supreme Court approves our rules, and our rules adopt the rules of discovery, we probably have some contempt authority for failure to obey a discovery order. But one of the things that bothers me is the subpoena of witnesses. I don't know and I really didn't pick up on that.

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And we...really, this is a...I saw these bills this morning. We...they were never circulated; we never had them, so we didn't get a chance to take a very good look at them. I don't know if I have contempt if the fellow thumbs his nose at our subpoena. So maybe you ought to give some thought to putting something in there. [LB346]

SENATOR LATHROP: Okay. [LB346]

MIKE FITZGERALD: I would tell you this, though. Section 25-2121 talks about criminal contempt. And really, if somebody thumbs his nose at our subpoena, it's more in the nature of a civil contempt, and so I think somebody needs to do a little research to figure out what we're talking about. [LB346]

SENATOR LATHROP: We'll sort that out. [LB346]

MIKE FITZGERALD: Okay. [LB346]

SENATOR LATHROP: Let me ask a question on the contempt. Do you have...let's say that you've ordered an insurance carrier to pay a particular medical bill, and they don't pay it. Do you have the authority to hold them in contempt for failure to pay that bill? [LB346]

MIKE FITZGERALD: No. If you're going to collect that bill, you go to the district court and collect it under 48-188. [LB346]

SENATOR LATHROP: Well, is that something... [LB346]

MIKE FITZGERALD: You have to transcribe the judgment. [LB346]

SENATOR LATHROP: Do you agree that that should remain the process... [LB346]

MIKE FITZGERALD: Yes. [LB346]

SENATOR LATHROP: Okay. (Laugh) You're adamant about that. [LB346]

MIKE FITZGERALD: Because we... [LB346]

SENATOR LATHROP: My thought is...my thought is...just let me say what I'm going to say. [LB346]

MIKE FITZGERALD: Okay. [LB346]

SENATOR LATHROP: I...let's say that it's something that kind of, part, you should pay it and, part, is this procedure still necessary? So you might be, as the person hurt, coming

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into court, and saying, hey, the judge ordered you to approve that particular shoulder surgery, for example, and you haven't done it. Okay? And the insurance company may say, well, I've got a good reason for that. Now you're going to put us in a different tribunal that can't deal with the question about whether the intervening facts have changed what should be the order of the court, and send it up to the district court--which you've got to admit is going to be a hassle compared to just coming back to you--for an order of contempt. [LB346]

MIKE FITZGERALD: Except the final order is that they pay for the surgery. And the district court does not have authority to go around and have another hearing on whether or not the surgery is reasonable and necessary. [LB346]

SENATOR LATHROP: True. [LB346]

MIKE FITZGERALD: Once the amount of the judgment is entered, then they have to fulfill. [LB346]

SENATOR LATHROP: And you don't think it makes it work smoother and quicker if you just empower the Work Comp Court to hold somebody in contempt--the plaintiff, the defendant, the insurance company--to enforce its own orders? [LB346]

MIKE FITZGERALD: Well, it depends on what the order is. You're talking about a collection order, which is specifically dealt with in 48-188...go to the...take it over to the...where you actually...if you get an order from the county court, you can't execute on that order against real estate unless you take it over to the district court. It's the same procedure as you have from a county court appeal...or not appeal, but execution...collection of a judgment. [LB346]

SENATOR LATHROP: Okay. [LB346]

MIKE FITZGERALD: And, I mean, that's kind of the way I can...that's the way I look at it. [LB346]

SENATOR LATHROP: And if you, from the...in one of your orders that goes unappealed...in my hypothetical, if you order an insurance company to pay a bill or authorize a surgery, you can't enforce that and you don't want to be able to enforce that. [LB346]

MIKE FITZGERALD: No, I don't. But our clerk's office isn't...our clerk's office, in the rules for the clerks, the statutes that govern the clerks really don't give the clerk authority to collect money and to pay it out, as most courts have. You know, we would have to set up accounts and collect money and then pay it out and have trust accounts. [LB346]

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SENATOR LATHROP: Yeah, I'm not suggesting that the Work Comp Court become a collection agency or even handle money, but if you give an order to do something and somebody doesn't do it, you could drag them back into the Work Comp Court with the right authority and say, you will do this or you will sit in jail over the weekend, or you will pay a civil penalty of X. [LB346]

MIKE FITZGERALD: We do have that though. We have the penalty and the attorney fee issue. We can add...and one of the things in Burnham was that we kept stacking penalties and attorneys fees on that insurance company like there's no tomorrow. But you have to go collect those in the district court. [LB346]

SENATOR LATHROP: Okay. Judge, I always appreciate it when you come down. Are there any questions from members of the committee? Okay. I see none. [LB346]

MIKE FITZGERALD: Thank you. [LB346]

SENATOR LATHROP: Thank you. Anyone else here in a neutral capacity? Senator Conrad to close. [LB346]

SENATOR CONRAD: Thank you, Chairman Lathrop, members of the committee. Senator Cook, in response to your question to our first testifier, Mr. Shasteen was probably a bit too modest. But who he is, is from my experience and perspective, a tireless advocate on behalf of working families who are injured, and that's how I first got to know him and that's why he brought this legislation to me. So there's a little background there on the proponent. Finally, this legislation is also about judicial efficiency, quite simply, which I think is something that we can all agree is a good thing. And you heard today from a variety of very seasoned, experienced, and bright attorneys who represent all different interests before these bodies. Recognize the fact that there is significant confusion in relation to the scope and application regarding the court's powers in current statute, rules and regs, and in the wake of the Burnham decision. And so I think rather than taking a wait-and-see approach, this Legislature should fully embrace and exercise our authority and ability to set what is the public policy for this state. And we should do so according to what is only common sense. Of course, the court should have the ability to enforce its orders. It's important to the rule of law; it's important for, again, judicial efficiency; and it's important that we have a clear path for litigants before this judicial body and others. Thank you. [LB346]

SENATOR LATHROP: (See also Exhibit 14) Thank you, Senator Conrad. Always a pleasure to have you here. That will close our hearing on LB346 and brings us to LB506 and our own Senator Wallman. Good afternoon, Senator Wallman. [LB346]

SENATOR WALLMAN: Good afternoon, Chairman Lathrop and members of the

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committee. My name is Norm Wallman, W-a-l-l-m-a-n, and I represent Legislative District 30. Mr. Chairman, I know you like to run a tight ship so I'll keep this short and sweet. I'm here to introduce LB506. This bill would change how wages are determined when calculating death benefits for a retired worker who dies as a result of an occupational disease. The wage rate at the time of last employment would be the wage rate used for a worker who contracts an occupational disease. And there will be people following me that can explain this better. [LB506]

SENATOR LATHROP: Very good. [LB506]

SENATOR WALLMAN: Thank you. [LB506]

SENATOR LATHROP: Thanks, Senator Wallman. Any questions? I see none. Thank you. We'll take the first proponent of LB506. [LB506]

ROD REHM: Chairman Lathrop, Rod Rehm, R-e-h-m, R-o-d. I neglected to do that last time. LB506 is directed at the decision of Olivotto v. DeMarco that was handed down in...Olivotto... [LB506]

SENATOR LATHROP: Can you spell that for us, Rod? [LB506]

ROD REHM: O-l-i-v-o-t-t-o v. DeMarco, 273 Nebraska 672. I talked to your legal counsel about it. [LB506]

SENATOR LATHROP: She reminded me. It's right here in front of me, so. [LB506]

ROD REHM: Occupational diseases are the date of injury is found to be the date that your disability begins. And in DeMarco there was a person that worked around asbestos for years and years and years. He retired, got sick from mesothelioma, which is linked only to exposure to asbestos--it's the only known cause of that condition--when he was retired and he had no income. And the way our statutes are written, the benefits that his widow was to receive were based on his earnings when he became disabled. And since he had no income, she was entitled to nothing. It's just a real harsh result and it happens all around the United States--or it has--and many states have taken approaches like the one suggested in LB506. This is not a huge area that I think will impact the cost of our system. I'm old enough to remember some commercials for Quaker Oats, where some nice old guy stood up and says it's the right thing to do. I mean this is just kind of one of those right-thing-to-do bills. There's a gap in the legislation where people are dying--not a lot of them, but it happens. I've had it happen in my practice. We recently had it happen with the...there's a cancer cluster, in my opinion, at the Goodyear plant in Lincoln where we ran into a large number of people that were dying of signature leukemia from exposure to chemicals used in the rubber industry. All those cases came in our office after Olivotto, and there's nothing we could

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do for them except get involved with some very expensive products liability litigation where the costs are just astronomical. The way the law is now, shifts the cost of medical off, because as a practical matter nobody...we can't get paid to collect medical on workers' comp the way the statute is set up now to basically...and there's no money for the widow and the kids, and although the kids don't usually get involved in this, the widows do suffer. Pensions stop when the worker dies; Social Security is reduced; the widow's benefits are usually less. I mean it's just a harsh result. And this is a way to correct a harsh result. [LB506]

SENATOR LATHROP: Very good. If I understand the point you're making, Rod, and that is that because there's a delay between the exposure... [LB506]

ROD REHM: Right. [LB506]

SENATOR LATHROP: ...if you're working at a particular plant and you're inhaling asbestos dust, it may take 20 years for the disease to manifest itself and ultimately kill a person, and by then they're retired. [LB506]

ROD REHM: Correct. That happens frequently. And then in this group of cases that we had at Goodyear, virtually all the people were...had been working there for 30 years, plus. It takes...you know, exposure to the chemicals day in and day out, and then it gets them at a later date. And by that time, because of the...and there's nothing particularly wrong intellectually with this Olivotto decision. I'm not criticizing the Supreme Court, because the decisions on occupational illness lead to this conclusion. It is the logical next step. It just needs to be corrected in fairness to the limited number of people that are impacted by this decision. [LB506]

SENATOR LATHROP: Okay. Senator Harr. [LB506]

SENATOR HARR: Thank you, Senator Lathrop. And you touched on it but I'm not quite sure if you answered it. Who pays the medical bills in this situation? [LB506]

ROD REHM: Well, Medicare does on some cases. I mean, depending... [LB506]

SENATOR HARR: Well, let's say it's...let's, just for fun, say it's a retired firefighter, since we like to pick them, who retired at 45... [LB506]

ROD REHM: Right. [LB506]

SENATOR HARR: ...and now he's 56. Found out he was in some fire that had all kinds of harsh chemicals. Who would be responsible for the medical bill there? [LB506]

ROD REHM: Well, unless workers' comp was found...unless it was found to be a

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workers' comp condition, it's going to be whoever is taking care of him--the employer or, you know, the... [LB506]

SENATOR HARR: But where's the incentive to go to workers' comp? If he goes...who goes--I mean for the attorney. Do they get paid for medical (inaudible)? [LB506]

ROD REHM: No. No. There isn't any incentive to speak of. I mean he would...if he's earning no money at the time, I mean it's a 55-year-old guy. Let's assume he has zero income. His widow would get up to \$6,000 to bury him. That's it--under the Olivotto decision. [LB506]

SENATOR HARR: Other than it's the right thing to do to represent him, of course. [LB506]

ROD REHM: We'll, yeah, you can say that, but the problem is, is these cases are tremendously expensive, even in the Workers' Comp Court, which is a specialized court that allows you to introduce evidence through written reports. It might cost you, in order to establish the occupation...all the other elements of occupational disease in a contested case, it could cost \$30,000, \$40,000, \$50,000 to fight that case. And those costs are not recoverable for the widow. So the economics of this do not favor fighting the battle, and the cost just gets shifted off the employer. Now the firefighters example may not be the best example because it's the public going to pay for it one way or the other, probably, because a lot of the firefighters are self-insured, the municipalities are. But in the private industry world, the taxpayer picks it up, a lot of times, depending upon the retirement benefits, whether the employee has health through the employment or not, you know. Very often they don't. More often than not they don't. [LB506]

SENATOR LATHROP: Okay. [LB506]

SENATOR HARR: Okay. Thank you. [LB506]

ROD REHM: Yes. [LB506]

SENATOR LATHROP: Senator Carlson. [LB506]

SENATOR CARLSON: Thank you, Senator Lathrop. I'm going to carry on with Senator Harr's example a little bit. So he retires at 45, and this is 23 years, so now he's 68. There's no statute of limitations on something like this. [LB506]

ROD REHM: Well, no. The statute of limitations would be two years from the time that you knew or should have known you had an occupational illness. I mean that's another problem with bringing this kind of case. They're complicated cases. But if he hadn't been diagnosed with the day of injury was going to be when he's diagnosed with it or

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the day where he becomes aware of it, and usually, depending upon the condition, that's pretty close to the time they go. I mean, although there is a pretty good rate of recovery on many cancers, but a lot of these things that get people in the work place are very...very, very bad conditions. Mesothelioma is a classic example of that. I mean literally no one survives. It kills them all. [LB506]

SENATOR CARLSON: Well, and obviously it affects people in different ways in the degree to which they're exposed must affect people in different ways. In my county we just had a young man, 33 years old, die of that, and they can't even figure out where he would have been exposed to it. So he must have been an individual that, if he was, it didn't take much to affect him, and others can seemingly work in it for years and maybe it never does manifest itself. [LB506]

ROD REHM: Yeah. I don't know the facts of that case. I know that people can get it from...women die from it from laundering their husbands' clothing. People that work in shops get it from working on brake pads. Brake pads have asbestos in them. It's pretty...you know...but I can't comment on that guy's case. I mean I feel bad. But there may not be any remedy whatsoever for him. If he was 67 when it happened and he was retired and earned no money, because then the way it's set up now is it's no benefits for his widow. [LB506]

SENATOR CARLSON: But if...if...in this case, 23 years elapsed and he wasn't obviously earning money, well, there must have been some earnings that kept him going for 23 years. I don't understand how after this length of time there's rationale to go back and try and capture earnings from 23 years earlier. [LB506]

ROD REHM: Well, and a lot of the states have enacted legislation like this. They focused on the fact that the widow loses his pension, for instance, and the widow's benefits are less than he was getting as being married to a person on Social Security. And so there are losses. And, you know, there's six or seven ways to deal with it. Some of them are more generous than the one that's in this bill. This bill ties it back into the wages when he last got exposed, in effect. We have a fairly longstanding body of law that says the person that has to pay for an occupational disease is the--or the employer--is the one where the last injurious exposure was. And so that always...not always, but often goes way back in time, I mean. The bill is written in a way, I think, that tries to pick a number that doesn't appear to be a windfall by any means, but I mean if a man was entitled to...or was making \$10 an hour, 40 years ago, in a trade where they're now making \$60, this is hardly a wildly generous approach. It's just an effort to give something to the family for the...and to make the people that are responsible for the death, pay for it. [LB506]

SENATOR CARLSON: Well, in a case like this, here's another thing that I think can come up. He's retired, and if he had a pension and he had to make a choice on either

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single life annuity or joint life, and if he made a decision on single life because it paid a little more, then dies and there's nothing there for the spouse, well, it would be looking for some other source, if...all those kinds of things can enter in also, I think, that.. [LB506]

ROD REHM: I agree. I mean we all...there's all kinds of choices we all have to make and we're not asking to try to enact a bill that corrects bad decisions about pensions and so forth. But just that's an argument to explain, you know, why there would be a need for this. [LB506]

SENATOR CARLSON: Thank you. [LB506]

ROD REHM: Yes. [LB506]

SENATOR LATHROP: Senator Harr. [LB506]

SENATOR HARR: Thank you again, Senator Lathrop. I guess I'm showing my ignorance. I'm not quite sure what this bill does. I understand that it pays your wages of what it would be. But what are the damages? Is it your compensation for 23 years, or is it from the point that you get the wages from the point you... [LB506]

ROD REHM: If a worker dies from a work-related accident, the widow is entitled to benefits at whatever the weekly rate is for her lifetime or two years after she remarries. [LB506]

SENATOR HARR: Yes, now I get it. [LB506]

ROD REHM: So that's what it is. [LB506]

SENATOR HARR: Thank you very much. [LB506]

ROD REHM: And the wage...right now, because of the way the law on occupational disease has evolved and the way our statutes are written, there's no money for the widow for somebody who is earning nothing when they get sick and become disabled. [LB506]

SENATOR HARR: Thank you. [LB506]

SENATOR LATHROP: Senator Smith. [LB506]

SENATOR SMITH: Thank you, Senator Lathrop. Mr. Rehm, going back to your earlier exchange with Senator Harr about the medical coverage: that is already provided by the employer. Is that correct? [LB506]

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ROD REHM: Well, not necessarily. I mean it could be by some employers. But no, not necessarily. I mean it depends upon the employer. If you have an employer that has full coverage for their retirees, then, yeah, the employer would pay for it. But that's what...there aren't very many retirement packages that have that. So otherwise, it would probably fall off on Medicare and the supplements that the worker is paying for himself. [LB506]

SENATOR SMITH: Thank you. [LB506]

ROD REHM: Yes. [LB506]

SENATOR LATHROP: I think that does it. Thanks, Rod. [LB506]

ROD REHM: Thanks. [LB506]

SENATOR LATHROP: Appreciate you coming down. We are on proponents of LB506. [LB506]

STEVE HOWARD: Proponents? Yes. Steve Howard, H-o-w-a-r-d. I won't take up too much time because it seems that the subject is pretty thoroughly exhausted. But the state AFL-CIO wishes to put on the record its support of LB506, and just to reiterate that theme that dollars ought to be tied back to the risk. Employers pay insurance premiums to ensure for different risks. Different occupations carry different premiums, and these ought to be workers' comp dollars as opposed to some other dollars, because that ties the risk back to the reason that the premiums were paid. I don't think I could add anything to what Rod Rehm had to say beyond that except to point out these benefits...these medical benefits aren't paid automatically. There's no incentive for a lawyer to want to help out, and the employer or the insurer on a workers' compensation case, they don't just say, oh well, you've got mesothelioma; we're going to voluntarily start paying. In fact, under that last injurious exposure rule, if a person were exposed to asbestos at three or four different employers, it's the last one that ends up being responsible. They tend to litigate those issues. Employers tend to point the finger at one another, and so it's not an easy, turn the switch and all of a sudden workers' comp is paying, so. I don't have anything else to add. We support this bill. [LB506]

SENATOR LATHROP: Good. Thanks, Steve. [LB506]

STEVE HOWARD: Thank you. [LB506]

SENATOR LATHROP: Any questions? I see none. Proponents. Anyone here in opposition to LB506? [LB506]

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DALLAS JONES: Good afternoon. Dallas Jones, D-a-l-l-a-s J-o-n-e-s, of Baylor Evnen law firm here in Lincoln, Nebraska. I am testifying in opposition to this bill on behalf of Nebraskans for Workers' Compensation Fairness and Equity, the Lincoln Chamber of Commerce, and the Omaha Chamber of Commerce. I am testifying in opposition to the bill today for the very reason that Senator Carlson raised. This is a substantial departure from the very concept of what the Workers' Compensation Act is intended to be in terms of how it deals with indemnity benefits. Plain and simple, what the Workers' Compensation Act is intended to do is to compensate employees and their families, in death situations, for the loss of support. If an employee has retired 23 years, obviously has not worked for 23 years, and that employee unfortunately dies because of a compensable condition, there is no loss of support. When you look at the death benefit statutes in the workers' compensation series of statutes, which is 48-122 through 124, repeatedly you will see the words "loss of support", "loss of support by earnings." The focus of the act is to ensure that in those unfortunate cases where the employee dies as a result of something happening at work, dependents who have actually lost something by virtue of this employee no longer supporting them are those people that the act says we intend to compensate. Again, in the Olivotto situation, there is no loss of support. Mr. Olivotto had not been earning wages for 23 years because of a condition personal to him and unrelated to his work; hence, the Supreme Court decided what it decided. Senator Smith, the question about medical bills that you raised. If it is a compensable condition--and that's what we are talking about here are compensable occupational diseases--of course, the employer is obligated to pay those medical expenses. That's precisely what the employer had to do in the Olivotto matter, was to pay those medical expenses. But again, it did not pay the indemnity benefits because there was no loss of support by virtue of this gentleman's unfortunate death. [LB506]

SENATOR LATHROP: Senator Harr. [LB506]

SENATOR HARR: Thank you, Senator Lathrop. And that's...I agree with everything you're saying. My question, though, is--and this is what I asked earlier--is sure, you're responsible for medical bills, but who is going to bring that action forward? And if you disagree, who is going...if the plaintiff's lawyer isn't getting paid, they're not going to bring it forward. So how is that settled? How is...if there is a dispute, how is it settled? [LB506]

DALLAS JONES: Well, it's a hard question because it's a very broad...fair question, but a very broad question. If it is a very questionable claim where you have somebody who claims a condition which is the result of--could be the result of many, many things--without a doubt, Senator, that's going to be disputed. In many cases, the employer is not likely going to voluntarily agree that whatever this person has, decades later, was because of some exposure while the person was at work. Will that employee be voluntarily paid benefits? I think it is fair to assume that that employee, if you talk about that narrow case, will not. [LB506]

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SENATOR HARR: Yeah. And I'm not...yeah. I guess my problem is I'm not looking for benefits (inaudible) loss of wages. That's... [LB506]

DALLAS JONES: Yeah. I should be clearer. [LB506]

SENATOR HARR: A loss of pension, all that. I understand that. I'm just worried about...and, you know, this gets back to we're facing a...about budget deficit. We have budget problems. And it doesn't seem fair that the state should be picking up charges when the state (inaudible) through Medicare, Medicaid, whatever, when the state is not responsible because the underlying cancer occurred at a previous job. And it's easy for the employer to sit back and say, you know what? Not my fault; done. The other side is never going to hire an attorney because there is no compensation for that attorney. So it's easier for them to just summarily say no, and then there's no recourse and the state is stuck with the bill. And so I guess my issue is I...while I agree with you, I have a problem with the pension part of it. There's no doubt, but...the medical benefits. And I haven't found a solution for that yet. [LB506]

DALLAS JONES: And I don't have an answer for you for the pension part of it, because that's not an area of my expertise and I don't really feel capable of telling you how to fix that. [LB506]

SENATOR HARR: Yeah. [LB506]

DALLAS JONES: I do want to add one thing about the medical bills though. I don't think there's much doubt that when claims are litigated and there are medical bills that are recouped by virtue of a lawyer's effort, the lawyer has a claim against the...generally speaking, there will be an arrangement in many cases where the employer...excuse me, the employee's attorney has an arrangement with the medical care provider because that employee's efforts have resulted in some payments being made to the providers. What you say is generally true, that it is less attractive for a lawyer to go after medical bills only. No question about that. But to say that there is never a case where an employer will take that case, I don't know that that's right either. [LB506]

SENATOR HARR: Okay. [LB506]

SENATOR LATHROP: I will, just from my own experience, admit that I've had people call me and say, you know what? These people are supposed to pay for this, and they're not. And there's no indemnity benefit, but it's just wrong so I've done it. The reality is in the circumstance that we're talking about, if you have somebody who is receiving Medicare, they're on Medicare because they've retired, and they come up with mesothelioma, and let's say that they worked changing break pads their whole life where we know that there's asbestos and likely exposure. And you say, okay, you've

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been retired; there is no indemnity benefit that you're going to get under the rationale and the Olivotto case, right? And the lady says, yeah, but...the widow says, yeah, but you know, all of these bills for the treatment of the mesothelioma that, you know, my husband had before he died were paid for by Medicare. And you say, well, okay I can do that work for you and I can go try to recoup the medical expenses from his employer at the time he worked at the brake factory or worked changing brakes, but you have to hire the experts, you have to take the depositions. It isn't that the lawyers are necessarily unwilling to do that kind of work, but the cost of hiring the doctors, getting opinions from the doctors...and then you say, well, my best guess is it'll cost \$5,000 worth of opinions and depositions. And they go, "To repay Medicare? (Laugh) That's kind of Medicare's problem, not mine." And then it never happens, and the employer or the work comp carrier ends up not paying for the medical expenses. So that's kind of how we end up not getting the medical expenses paid for by the person that should be paying them, which is the employer at the time of the exposure, just because it becomes...the bills are getting paid by Medicare, in all probability, and the widow says, I'm not spending \$5,000 of my own money to get Medicare paid back. That's kind of how it works. [LB506]

DALLAS JONES: It would work that way, certainly, Senator, I guess, if you wish to create an incentive for counsel to take on that narrow type of case--let's just be up-front about it--and create a rule that says we're going to pay plaintiff's counsel some amount of money to do that without basically changing and altering the basic sense of the system. [LB506]

SENATOR LATHROP: Fair enough. I appreciate that. But it isn't just creating incentive, because nobody...nobody that runs a business, whether you sell insurance or you try cases for a living, no one is going to spend their own money on their clients' expenses without any expectation that it will be paid back. Right? [LB506]

DALLAS JONES: I presume that's correct, which is why I said... [LB506]

SENATOR LATHROP: Okay. [LB506]

DALLAS JONES: ...let's create a direct incentive then for plaintiff's counsel to take those cases and litigate them. [LB506]

SENATOR LATHROP: And then you'd support that then? [LB506]

DALLAS JONES: I don't know that I would (laughter) because I don't believe my clients... [LB506]

SENATOR LATHROP: (Laugh) I'm kind of thinking that Work Comp Equity and Fairness would be back on that one too. [LB506]

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DALLAS JONES: I believe that Work Comp Equity and Fairness would also point out many of the reasons why we're in this boat, which is it is a no-fault system. Let's not forget that. [LB506]

SENATOR LATHROP: Okay. Thanks, Dallas. Did that prompt any other questions? I see none. Thanks for coming in. [LB506]

DALLAS JONES: Very good. Thank you. [LB506]

SENATOR LATHROP: That was opposition. And now to pile on: Welcome, Bob. (Laugh) [LB506]

ROBERT HALLSTROM: Chairman Lathrop--not at all--members of the committee, my name is Robert J. Hallstrom. I appear before you today as registered lobbyist for the National Federation of Independent Business. I also represent the Nebraskans for Workers' Compensation Equity and Fairness, and am authorized to express opposition for those groups as well as, although I don't represent them, the Nebraska Chamber of Commerce and Industry and the Nebraska Cattlemen's Association. I don't think there's a lot more to be said about this particular issue, but I would be happy to address any questions that the committee may have. [LB506]

SENATOR LATHROP: The Cattlemen? [LB506]

ROBERT HALLSTROM: Yes. [LB506]

SENATOR LATHROP: Do they have exposure out on the ranch to asbestos or mesothelioma? [LB506]

ROBERT HALLSTROM: I would assume there might be some type of exposure that they could have. [LB506]

SENATOR LATHROP: There must be some, huh, or you wouldn't be here. All right. Thanks, Bob. Senator Carlson. [LB506]

SENATOR CARLSON: Thank you, Senator Lathrop. Bob, would you just address a fairness issue, maybe, in either direction. [LB506]

ROBERT HALLSTROM: Well, I think, Senator, one of the issues that we have here, and it brings to mind an issue that's been before this committee a couple of times, is the issue of things that happen post retirement. Senator Lathrop probably recalls that we've had bills before the committee, like many other states, to put provisions into law that would allow for a credit or an offset for Social Security benefits--a bill that you had

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introduced. And it would seem that if we're going to change the rules of the game to allow things that happen post retirement, that all of those types of issues perhaps should be looked at anew. And perhaps the Cattlemen's Association, Senator, was for your newfound location on the Ag Committee. Perhaps that was the angle. [LB506]

SENATOR LATHROP: Ag Committee. There's my Chairman right there, my colleague on the committee. Thanks, Bob. [LB506]

ROBERT HALLSTROM: Okay, thank you. [LB506]

KORBY GILBERTSON: Good afternoon, Chairman Lathrop, members of the committee. For the record, my name is Korby Gilbertson; that's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n, appearing today as a registered lobbyist on behalf of the Property Casualty Insurers Association of America in opposition to LB506. In an effort not to pile on I will simply say that we would like to be on the record also as in opposition to this legislation. I'd be happy to try to answer any questions. [LB506]

SENATOR LATHROP: Very good. Thanks, Korby. And I certainly don't mean to discourage anybody from speaking their full mind on these issues. Whew. Anyone else here in opposition? Anyone here in a neutral capacity? Senator Wallman, do you care to close? Senator...oh, I'm sorry, wait a minute. The court. [LB506]

MIKE FITZGERALD: My name is Mike Fitzgerald, Workers' Compensation Court. This thing needs to be addressed a little better. First of all, there's really two dates we worry about. That's the date of the last injurious exposure. That's the day we determine the insurance company that pays the bill that insured the employer on that date. The amount of the payments that he will receive or she receives is determined as of the date of the accident, which is different than the date of the last injurious exposure. The date of the accident is when they become disabled and have some loss of earning power or become disabled. When they're working...say, the fellow is still working today, then the date of the determination of the amount of the weekly benefits due the employee and his dependents is what he was earning at the time. When you're not working, there is no loss of earning power. There is no loss of access. There is no less of earning power. And that's why the Supreme Court said you get no benefits, because he wasn't working at the time of the accident--the date he became disabled. That's it. Now I would tell you this: When you write this, the bill says dependents, and so for a dependent you go back. But for the employee that we have today that gets hurt or suffers the occupational disease--and is working--then he...does he get today's wages? And then when he dies, we go back with the dependents and figure out the dependent's wage, or do we use his wage? Those are things for you to think about. The copy of the...you know, we're talking about only dependents, which is the surviving spouse. And technically, the way this is written, a person could argue, Mr. Employee, who becomes disabled today and isn't working, gets zero. When he dies, his dependents then start to get money. I mean

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that's...because that's the way it's written. Now, you know, I got these things this morning, so you're not getting the best. But anyway, those are things for you to think about. And so when you write it, you know, some of this stuff is going to have to go till next year because it requires some thought. [LB506]

SENATOR LATHROP: Well, we can give stuff thought here. Hang on a second, Judge. Senator Harr. [LB506]

SENATOR HARR: I was just going to say we'll miss you next year when you aren't in the same building. (Laugh) [LB506]

MIKE FITZGERALD: I might come back. [LB506]

SENATOR LATHROP: That was like a legislative kick in the pants I think. (Laugh) [LB506]

SENATOR HARR: Hey. [LB506]

SENATOR LATHROP: (Exhibit 3 and 4) Thanks, Judge. Anyone else here in a neutral capacity? And Senator Wallman waives close, so that brings us to...before we close the hearing, though, I have a letter from the Nebraska Association of Public Employees in support of LB506 and one from the Grocers in opposition to LB506, and those will be entered in the record and their opposition and support will be reflected accordingly. That will close our hearing on LB506 and bring us to LB152 and LB153, which are my bills. Good afternoon, Madam Vice Chair and members of the Business and Labor Committee. My name is Steve Lathrop. I am the state senator from Legislative District 12. Lathrop is L-a-t-h-r-o-p, and I'm here today to introduce LB152. LB152 would exempt inpatient trauma services from the DRG fee schedule established by the Legislature with the passage of LB588 back in 2007. Originally, the provisions of LB588 were delayed for inpatient trauma until 2010. Last year, LB872 extended the date to 2012. The reason for singling out inpatient trauma was the exorbitant costs of these services, and delaying implementation would allow us to analyze our experience related to workers' compensation premiums after LB588 passed. I've been informed that the analysis is not forthcoming because needed comparative information pre-LB588 is not available. We have been extending this annually, waiting for information from the work comp premium gurus to determine whether what we did pass in LB588, when Senator Cornett was Chair, has actually had an impact on premiums. And what I understood was we would have that information this year, and now--as I understand it. And I expect Korby will come up here and talk about this, since she represents the people that do these studies. What I'm told now is, well, we've had the experience but we don't have anything to compare it to before. And I think ultimately the question we were trying to answer was: When we put the hospitals on a fee schedule, did it make a difference in our premiums or did the work comp insurance companies just make more money? So

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that's why I've offered LB152, and I look forward to hearing what the proponents and opponents and those in a neutral capacity have to say. Thank you. [LB506 LB152]

SENATOR COOK: Thank you, Senator. Are there questions from the committee? Don't see any. [LB152]

SENATOR LATHROP: Okay. [LB152]

SENATOR COOK: How about the first proponent for LB152. [LB152]

FRED SALZINGER: Hi. My name is Fred Salzinger; that's S-a-l-z-i-n-g-e-r. I guess, Vice Chairman Cook and members of the Business and Labor Committee, I want to thank you for letting me make these comments. I'm here today to support LB152 to make permanent the existing workmen comp fee schedule exemptions for reimbursement for inpatient trauma services. This patient care is currently reimbursed under established fees...of fees established by the Compensation Court. It represents no change in the historical form of reimbursement and recognizes the unique character and cost of trauma care. This is usually trauma...this is trauma provided to people with very serious injuries that could result in permanent disability or death. These are very high-cost cases. They stay in our hospital for a long time and...and just...they need...and the trauma centers have the type of care and the level of care needed to take care of these patients. All told, 19 hospitals statewide provide some inpatient trauma care. I want to thank Senator Lathrop for sponsoring the bill, and I'd be happy to answer any questions. Oh, by the way, I'm here representing Creighton University and Creighton University Medical Center and speaking on their behalf. [LB152]

SENATOR COOK: Are there any questions of Mr. Salzinger? Seeing none, thank you very much, sir. [LB152]

FRED SALZINGER: Thank you. [LB152]

SENATOR COOK: Next testifier in support of LB152. [LB152]

BRUCE RIEKER: (Exhibit 5) Vice Chairman Cook, members of the committee, my name is Bruce Rieker; that's R-i-e-k-e-r. I'm vice president of advocacy for the Nebraska Hospital Association here in support of LB152. There was some mention already as to the exorbitant costs associated with this. I want to reiterate that there are incredible costs associated with providing trauma care, and I want to make sure that you understand that we're talking about the costs, not the charges that our hospitals would charge for this. But because it was under the fee schedule that was constructed under LB588, in 2007, we are reimbursed based upon that fee schedule, and so there's a mechanism in place for us to be reimbursed that way. Since the passage of LB588, as Senator Lathrop mentioned, it has been part of the, what shall I say, gentleperson's or

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gentleman's agreement that with the reduction in reimbursements to hospitals for workers' comp services, that we would be able to see the data as to what sort of savings were passed along to business. In 2007, it was estimated that our, the 87 hospitals that we represent, would be reimbursed or the reduction in our reimbursement for work comp services would be \$29 million less per year. Part of the promise or the statement to us was that those savings would be passed along to the employers. Well, as we're here representing 87 hospitals that employ 43,000 people and the magnitude of workers' compensation insurance coverage that we purchase, we have yet to see any declines in that particular area of our expenses. As far as the hospitals that are most affected by this is, as Mr. Salzinger said, 19. Actually we have 20 now. There has been one added to the list. But they would be your larger hospitals that incur the bulk of this. We have 65 critical access hospitals across the state; two what I call "in-betweeners"; but then we have 20 that provide these services. We have five that are trauma centers, certified trauma centers. Creighton University, as Mr. Salzinger testified, and the Nebraska Med Center in Omaha, BryanLGH here in Lincoln, Good Samaritan in Kearney, as well as Regional West out in Scottsbluff are certified trauma centers according to our statewide trauma plan. But that doesn't preclude the other 16 of the largest hospitals, whether it be Norfolk or North Platte to Grand Island, all of our larger hospitals also incur this. So there's a question as to whether or not any of the savings have been achieved. The exorbitant costs that go with trauma are something that we are here before you to support this bill to make sure that with all the complicated outliers and other factors that go into the formula for reimbursing us, that we can at least be able to be reimbursed at a level that helps us continue to provide those services. [LB152]

SENATOR COOK: Thank you. Are there questions from the committee? Senator Carlson. [LB152]

SENATOR CARLSON: Thank you, Senator Cook. Bruce, the figures you gave here, in 2007 there was supposedly \$29 million not paid out to hospitals that could have been? Is that the savings? [LB152]

BRUCE RIEKER: It was purported that...we calculated the \$29 million. But it was purported based upon the efforts for those that wanted to reduce worker compensation reimbursement to healthcare providers that we adopt this fee schedule. The fee schedule that was adopted in 2009 cost our hospitals \$29 million in reimbursements. We calculated that. [LB152]

SENATOR CARLSON: Okay, in 2009. [LB152]

BRUCE RIEKER: Or, excuse me--2007. It's cost us \$29 million per year, each year, since this went into effect. [LB152]

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SENATOR CARLSON: Now...and you were hoping that would manifest itself in workmen's comp rates? [LB152]

BRUCE RIEKER: Absolutely. [LB152]

SENATOR CARLSON: To whom? [LB152]

BRUCE RIEKER: Well, to us and others. We employ 43,000 people, and if we're going to give up reimbursements...and part of the premise was that as this was advocated to the Legislature that this would result in lower workers' compensation costs, we said we would like to experience that reduction in our workers' compensation expenses. To date we have not seen that. [LB152]

SENATOR CARLSON: Okay. And I understand what you're saying there. So that's really hospital employees,... [LB152]

BRUCE RIEKER: Right. [LB152]

SENATOR CARLSON: ...and you didn't see that savings. Was there savings to the businesses that provide the workmen's comp, or do you know? [LB152]

BRUCE RIEKER: Well, I do not know. [LB152]

SENATOR CARLSON: Okay. [LB152]

BRUCE RIEKER: There was a reduction in our reimbursements. Where the rest of the money...whether the insurance companies have it or whether the businesses experienced it, we do not have the data to tell you. [LB152]

SENATOR CARLSON: So in your view there is a discrepancy here. Who's the culprit? [LB152]

BRUCE RIEKER: Well, somebody that's holding the money in between, and I would say it was probably the insurance companies. That's the culprit we contend that it is. [LB152]

SENATOR CARLSON: Okay. Thank you. [LB152]

SENATOR COOK: Thank you, Senator. Senator Wallman. [LB152]

SENATOR WALLMAN: Thank you, Chairman Cook. Yeah, Bruce, thank you for coming down here. Do you have figures and facts of how your...you would have workmen's comp in your hospital, right? [LB152]

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BRUCE RIEKER: Absolutely. [LB152]

SENATOR WALLMAN: Now did those premiums go up dramatically or stay flat, do you know? [LB152]

BRUCE RIEKER: They've gone up over the last three years. But it's impossible without the data that needs to be produced as a result of those changes in 2007 for us to be able to calculate what was attributable or not attributable to those changes. [LB152]

SENATOR WALLMAN: Well, thank you. [LB152]

BRUCE RIEKER: You bet. [LB152]

SENATOR COOK: Any other questions from the committee? I don't see any. Thank you, Mr. Rieker. Next testifier in support of LB152, please. [LB152]

STEVE HOWARD: Steve Howard, H-o-w-a-r-d, representing the state AFL-CIO. We support LB152. The concern for membership of the AFL-CIO is access to services. You know, even though there...hopefully the safety committee's injuries are going down. We still have a great concern to keep the hospitals open and access to services, especially, for the most serious cases, the most serious injuries, which would be the subject of this bill. That's the greatest concern. And so the AFL-CIO of Nebraska voices its support of LB152 to make permanent what is otherwise we're operating under right now. So that's all I've got. [LB152]

SENATOR COOK: Thank you, Mr. Howard. [LB152]

STEVE HOWARD: Thank you. [LB152]

SENATOR COOK: Are there questions from committee members before we Mr. Howard...? Okay, thank you very much. Next testifier in support of LB152. Seeing none, testifiers in opposition to LB152. [LB152]

KORBY GILBERTSON: (Exhibit 6) Vice Chairwoman Cook and members of the committee, my name is Korby Gilbertson. It's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n. I'm appearing today as a registered lobbyist on behalf of the Property Casualty Insurers Association of America. Before I start in on my opposition testimony to LB152, let me make a few comments based on the questions that Senator Lathrop brought up. I do represent NCCI, which is the National Council on Compensation Insurance, and they are the rating group for Nebraska as well as a number of other states across the country. I need to clear up a few things that the previous testifier said. Actually, in Nebraska, NCCI does the rate setting for the insurance companies. Rates in Nebraska

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have actually gone down the last three years. I'd be happy to bring in those rate filings for you, but the overall rate percentages have actually gone down the last three years in Nebraska. Secondly...and there are...they do an annual report to the state where a number of people attend from the state and insurers. It's open to whomever would like to go. They do an all-day presentation. I would encourage any of you who are interested to attend it. But NCCI does not take any position on legislation because they are rating organization. They do not do anything on legislation. They just provide information and track that up. I was part of the discussions on the original fee schedule bill that was passed in 2007. I think there are a number of opinions right now as to what agreements were made with regards to trauma admissions fees. I can assure you the one thing I know for sure is that a permanent exemption from the fee schedule was never part of anyone's agreement that was going to go on. Unfortunately, data is still not available from NCCI. However, during the fee schedule discussion to begin with, I think it became very evident for all of who are involved, there's data out there. Everyone just needs to be willing to share it. The hospitals have data that they don't want to share. There are insurers that have information that they don't want to share. I think that if we want to look forward and deal with this issue--which, trust me, I'd like better than anyone else to not have to come back every year to talk about it--I would think we should work on it and look at what we can do. There's 17 states with a DRG-based fee schedule. I have a sheet for you here. Not one of those states exempts trauma centers from the DRG fee schedule outright. There are two that give different allowances. Colorado allows an allowance for trauma centers if it's determined that the trauma call was medically necessary, and then Illinois has a separate schedule for trauma centers. So with that, I'd be...my client would be very much willing to sit down and discuss the fee schedule overall with regard to the trauma centers, but an outright exemption is not something we would support. I'd be happy to try to answer any questions. [LB152]

SENATOR COOK: Thank you, Ms. Gilbertson. Are there questions from the committee?  
Senator Carlson. [LB152]

SENATOR CARLSON: Thank you, Senator Cook. Korby, in work comp rates there are three things that can happen, I think. One, the rates can go up; the rates can stay the same; or the rates can go down. Sometimes if they stay the same that's not too bad. But you are saying that you have evidence that those rates did go down across the state each of the last three years. [LB152]

KORBY GILBERTSON: The overall rate filings that NCCI does with the state, yes, they have gone down. I think one thing I should point out that's very interesting in the NCCI data every year is that everything that affects work comp rates has stabilized or gone down. The number of accidents has gone...the severity has gone down. The costs of the medical care has continued to go up very fast...at a very high rate in Nebraska. And that is one thing that has continued to cause rates not to decline as much or stay steady. And obviously, every insured is different based on their own experience. So that

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might be one thing that Mr. Rieker was talking about for his particular clients. However, I do think we agree on one thing: the costs for these things are exorbitant. [LB152]

SENATOR CARLSON: Thank you. [LB152]

SENATOR COOK: Thank you. Other questions for the testifier? Seeing none, thank you very much. [LB152]

KORBY GILBERTSON: Thank you. [LB152]

SENATOR COOK: Next testifier in opposition to LB152. [LB152]

ROBERT HALLSTROM: (Exhibit 7) Senator Cook, members of the committee, my name is Robert J. Hallstrom. I appear before you today as a registered lobbyist for both Nebraskans for Workers' Compensation Equity and Fairness, and the National Federation of Independent Business. I have also been authorized to express opposition on behalf of the Nebraska Chamber of Commerce and Industry, the Lincoln Chamber of Commerce, the Greater Omaha Chamber of Commerce, and the Nebraska Cattlemen's Association. All of those groups, along with NFIB and the Work Comp Equity group, are here in opposition to LB152. I think it's probably good for the committee to be aware of the process for those of you who may not have been around in 2007 when the work comp reform was adopted. It was primarily designed to address the hospital fee schedule, and at that time the business community was interested in providing coverage for all hospitals under the diagnostic-related group reimbursement system. We were not able to accomplish that. A compromise was reached in which 90 percent of those DRGs were covered under the system...or 90 percent of services were covered under the DRG system for only the large hospitals. The small and medium hospitals remain subject to the existing medical fee schedule set by the Workers' Compensation Court. At the eleventh hour, Creighton University, among others, came in suggesting that inpatient trauma services should also be excluded from the DRG system and covered under the medical fee schedule. The ultimate compromise provided for a two-year exemption which has then, as Senator Lathrop indicated, been carried on for subsequent periods of time. We feel that the time has come to carry out the deal that was reached...(noise)...I hope that wasn't a gun (laughter)...back in 2007. A couple of things I'd like to suggest to the committee. I think Senator Lathrop is exactly right, the discussions at that time centered around two issues. The one that Senator Lathrop has noted for the committee is that it's certainly fair to look at whether or not the savings that have accrued from the change in the medical fee schedule reimbursement level have accrued to the benefit of the business community as opposed to the insurers, and that information is not available yet to this date. However, that's a different issue than whether or not the inpatient trauma services should be covered by this. As Ms. Gilbertson pointed out, it was never a question of whether or not we were going to ultimately cover inpatient trauma. It was a question of when. It was not dependent upon

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what the costs were. My recollection of those discussions were that it was a double whammy to get DRGs to regular hospital inpatient costs, and at the same time hit Creighton particularly hard with regard to their inpatient trauma services, so a delay was necessary to allow them to look at that sticker shock, if you will, and to do some cost shifting to accommodate the new DRG system that was ultimately going to be adopted. We think the time has come to put that into play. We will continue to look at whether or not those benefits have accrued to the business community, but I believe with the rates having gone down for three years in a row, while I can't pinpoint that they're related to that, it's had to help in some respect. I'd be happy to address any questions. [LB152]

SENATOR COOK: Thank you, Mr. Hallstrom. Are there questions of committee members? Senator Wallman. [LB152]

SENATOR WALLMAN: Yes. Welcome here. In regard to these DRGs...and I was in this committee when we worked this out. We had a lot of discussion. And I don't know if it was fair or not, but at that time I felt we were making up some difference with Medicaid. And these hospitals take Medicaid patients. And so where do you think we are on that with the rates? [LB152]

ROBERT HALLSTROM: Well, Senator, I think...again, I can't pinpoint that the medical fee reimbursement level for hospitals being reduced by the DRG system for those large hospitals has led directly to all of the reduced rates that we've seen over the past three years, but I've got to think that it's helped. One of the concerns--and you'll see a little bit more in our testimony on the next bill--is that we simply don't want to see the concerns about Medicare or Medicaid reimbursement levels being foisted entirely on the backs of the employer community under excessive charges for workers' compensation. And I think if you go back to 2007 and you see some of the data that reflected the same services for a health-related claim and a workers' compensation claim in the same hospital for the same service or procedure being billed out at two or three times more than what it was for health claims, showed you that there were abuses going on and cost shifting that the employer ultimately was paying for. That's part and parcel of what we were trying to address by going to the DRG system. [LB152]

SENATOR WALLMAN: Thank you. [LB152]

SENATOR COOK: Thank you. Any other questions from committee members? [LB152]

ROBERT HALLSTROM: Thank you. [LB152]

SENATOR COOK: (Exhibit 8) Seeing none, thank you, Mr. Hallstrom. Any other testifiers in opposition to LB152 this afternoon? Any testifiers in a neutral capacity? Seeing none, I have a letter that I will read into the record. It is a letter of support from the Nebraska Association of Public Employees. It's a letter of support for LB152 and for

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LB153. With that, Senator Lathrop, are you going to close and then open? [LB152]

SENATOR LATHROP: Yeah, I'm going to close on LB152. And I have to tell you that as I sat and listened to the testimony, it sort of...I remembered more and more of it, because I was on this committee in 2007, and that included White and Chambers, some people that are gone. It also included Senator Cornett was chairing the committee, and I expect that I'll sit down with Senator Cornett to test my recollection, but this is what happened as I recall. And let me first say that the trial lawyers don't have a dog in this fight, which is this really is a question about hospitals that do trauma work and the work comp insurers. And LB588 essentially was thought as a measure to control hospital costs. The doctors were on a fee schedule. We needed to put the hospitals on a fee schedule so that there was something besides just their charges going out there, that the work comp carriers and the self-insureds could say, look, I don't have to pay what you're sending me the bill for. We have a process here and we put them on a schedule. The reason...and, by the way, when that happened, Liberty Mutual, for one, I remember their CEO coming from Massachusetts and testifying on this one, and we were told that it would, by doing this it would reduce premiums or make that...or let me make that more clear. It would result in a savings to employers, okay? In other words, our concern on the committee was, well, if we set a fee schedule, we're nicking the hospitals that have their business in the state of Nebraska. Creighton, all of the hospitals, anybody that provides care to a work comp-injured person would have their revenue reduced. And what we wanted to do when we passed this was to make sure that that savings was realized in the form of a better premium for our employers here in the state of Nebraska. If we're going to cut what's paid to the hospitals, we wanted to make sure that it came out the other end in the form of more favorable premiums. That was at work, and two other things were at play at the same time. We had hospitals that do the trauma work that came in and said, you need to understand our situation, and it really was when I got educated on cost shifting and hospitals. You take the trauma hospitals, most of which are located in places where they are providing care for the uninsured, right? Like Creighton and the Med Center. And essentially what they said, the appeal they made to us was before you go and buy into this, wholesale, let me tell you that we're getting killed on the Medicaid and the uninsured down at Creighton, down at the Med Center, you name it, the trauma hospitals, which are generally situated in places where they're providing care to places where you get either no reimbursement or poor rates of reimbursement. And we said, here's what we'll do. We'll let you recover or we'll exempt out the trauma, so places like Creighton and the Med Center would not have to be subject to this fee schedule on trauma DRG fee schedule, and then we'll look over and see what the history is on whether we're actually saving money on the premiums or--and I'm not being condescending when I say this--or is Liberty Mutual taking the money back to Massachusetts and our hospitals are getting less money and our employers aren't getting the savings on their premium. And so there wasn't an agreement to just put this off two years while they got used to it; the agreement was that NCCI would do a study and say, yeah, we're actually saving money and it's passing

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through to Nebraska employers in the form of lower premiums. And each year we have extended this out a year because NCCI has, up to this year, told us we don't have enough data about what we're...about our experience with this new system to say if we're actually saving money and that that savings is then going into lower premiums to Nebraska employers. In other words, if there's a savings, is it going to the carriers in the form of more profits, or is it going to our employers in the form of lower premiums? That was the study that was supposed to happen. And it sounded, when I heard Korby testify, that they are having trouble gathering the information. Maybe the hospitals aren't talking to NCCI so that NCCI can do the study that we thought would take place. I think what we need to do with LB152, whether we eliminate the trauma codes from the DRG, this LB588 process, or whether we extend this one more year, we need to find an answer to that question, because before we start nicking our Nebraska hospitals we need to make sure that it's actually saving money to our Nebraska employers and not just going to work comp carriers outside of the state of Nebraska. Now they're not the only people that have a dog in the fight. There's self-insured. And most of those folks are the people that Mr. Hallstrom and Dallas represent, which is Nebraska Work Comp Equity. Those are typically self-insureds, and of course, they're going to realize a savings right away. But we're balancing some policy considerations, and one is, before we clip the hospitals, are the premiums going down because of it, okay? So we'll work on the issue a little bit more and maybe try to clarify it, and I'll talk with Korby. You know, I'm sure that she's trying to come up with the numbers and work on it, and we'll see what we can do in that respect. [LB152]

SENATOR COOK: Thank you, Senator. Senator Carlson has a question before (inaudible). [LB152]

SENATOR CARLSON: Thank you, Senator Cook. This is for the record. So as we think back of what the testifiers have indicated, this is what I think I heard, and I think it's important if we're going to give some consideration to extending this another year. I think that I heard Bruce Rieker say that the premiums have not gone down in three years, and I know I heard Korby agree that they have gone down in three years. So we must have a pretty strong opinion there, and it would be pretty important that let's hash that out. [LB152]

SENATOR LATHROP: Right. And one of the--exactly, exactly. One of the questions...and I don't know if that's work comp premiums went down in a hospital...or went up in a hospital and everybody else got lower premiums. That's one interpretation of what we've heard today. [LB152]

SENATOR CARLSON: And that would be pretty important. [LB152]

SENATOR LATHROP: That would be one thing. Sure. The other is, if premiums have actually gone down, is it because of what we passed in LB588, or is it because of

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something else? And I think NCCI, they're a pretty sophisticated outfit; I think they can parse that out and tell us. But either we move this down another year and wait for that data, or if it's not coming then we got a policy judgment to make. [LB152]

SENATOR CARLSON: Thank you. [LB152]

SENATOR COOK: Thank you. Other questions? Senator Lathrop, you're welcome to open on LB153. [LB152]

SENATOR LATHROP: Okay. Oh, I'm trying to remember what this was and now it's coming back to me. (Laugh) I knew it was related to bills for hospitals' expenses. Thank you, Vice Chair Cook. Steve Lathrop, L-a-t-h-r-o-p. I'm the state senator from District 12 and I'm here to introduce LB153. LB153 also relates to LB588, which we passed in 2007 and we've been discussing for the last 20 minutes. LB588 established a Medicare-based fee schedule for inpatient hospital services. Glenn Morton, the court administrator of the Work Comp Court, brought me a concern which developed since we passed LB588. The concern relates to reimbursement of hospital services since the passage of LB588--and this is a different one than we just discussed in LB152. Section 48-120.04 creates the DRG inpatient fee schedule. That schedule does not cover all hospital-related services, and Section 48-120(1)(b) requires the Work Comp Court to establish a fee schedule for these DRG-exempt services. Section 48-120.04(4) relating to inpatient trauma, and (6) relating to other non-DRG services, specifically states that these services are to be reimbursed according to the court's fee schedule pursuant to 48-120, or as contracted. The problem--and I know you're waiting for this one--the problem and the reason for the bill is that Section 48-120(1)(a) also states that services are not to exceed, and this is a quote, "not to exceed the regular charge made for such service in similar cases." End quote. This language predates LB588. And these sections appear to be a conflict, leaving a question of which controls: the fee schedules or the regular charge paid for similar medical services. LB153 removes the "regular charge" language, and clarifies that reimbursements are to be paid according to the medical fee schedules. The AG's Office has written an opinion which confirms the presence of the conflict. The opinion can be found in your binder. According to this opinion, legislative action is needed because the conflict and the ambiguity of these statutory sections makes enforcement difficult. I've met with Glenn Morton, Bob Hallstrom, and Dallas Jones, and I understand there are differing views. I hope to work with the involved parties to come to a solution if that's possible, and I'm happy to answer any questions. I will say...and I will attempt to answer any questions, but I think Glenn Morton is going to be able to put his finger on this, and as I said, he's the court administrator up in the Work Comp Court. [LB153]

SENATOR COOK: Thank you, Senator Lathrop. We're going to get some questions answered from the next testifier, is that the idea? [LB153]

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SENATOR LATHROP: Yes. [LB153]

SENATOR COOK: Okay. Thank you. [LB153]

SENATOR LATHROP: Okay. Thanks. [LB153]

SENATOR COOK: First testifier in support of LB153. Welcome. [LB153]

GLENN MORTON: (Exhibit 9) Welcome, and thank you. Thank you for your welcome, and thank you, Senator Cook and members of the committee. I'm the administrator of the Nebraska Workers' Compensation Court. My name is Glenn Morton; it's M-o-r-t-o-n, G-l-e-n-n for the first name, and appearing today in support of LB153. And I would, first, again like to thank Senator Lathrop for introducing the bill at the request of the court. LB153 is intended to address what I consider and I think what is a very serious problem for our work comp system, and that's the question as to how payment for medical, surgical, and hospital services are computed and what has to be paid for those services. Currently, there is, as Senator Lathrop said, there's an ambiguity and an uncertainty in the statutes as to how such payments are to be determined, and disputes frequently come up between providers who provide those services and those who pay for them. Of course, the providers who provide the services are the hospitals and the physicians. And as Senator Lathrop said, most recently, since LB588, many of the complaints have been from hospitals and that's the motivating force here. But I'd also point out that this has been an issue for the 20-some years I've been with the court, and it applies to all providers, physician services, and so on, as well as hospital services. So it's a major issue. The insurers...the payers we're talking about, as Senator Lathrop mentioned, they are insurance companies, they are large self-insured employers that are approved for self-insurance by the court, and there are some intergovernmental risk management pools. Those are the entities that have to provide insurance coverage. Employers have to obtain coverage and they obtain it through one of those three ways--three sources. Most employers get it through private insurance companies. Those private insurance companies contract with third-party administrators to handle those claims; maybe in some cases, pay those claims. Those third-party administrators may contract with another company to review the bills, and those companies, for tough cases or large cases, may contract with further companies to further review those bills. Now all those down the line folks are saying they are making recommendations as to what should be paid, all right? They say, we don't determine what gets to be paid; the insurance companies...the payers determine that. But in practice, it's those people who do pay it, right. Seeing as I already have a yellow light, I'll just direct you mainly to my written testimony. But the bottom line is, the issue is payment of the usual and customary, what's often called a UCR--usual, customary, and reasonable--as opposed to payment under the fee schedule, either the DRG fee schedule under LB588 or the schedules adopted by the court. There is language...in my opinion, I think there are previous bills--LB588 is one--but also LB187 from way back in 1987 when the court was

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given authority to adopt a fee schedule, there was legislative intent that said the fee schedules are to be mandatory and they are a predetermination of what is fair and reasonable. Right. Despite that legislative history and despite the provisions in the bills, the insurance companies and these payers are still applying usual and customary or what is called UCR or what they think is fair and reasonable based on what they claim is in the statute as well. So thank you. I'm done (inaudible). [LB153]

SENATOR COOK: Thank you, Mr. Morton. Are there questions from committee members? Senator Carlson. [LB153]

SENATOR CARLSON: Thank you, Senator Cook. And I don't know if you were...if you had more you wanted to say. If so... [LB153]

GLENN MORTON: Oh, a lot more, but it's...I'll respond to questions and it will probably come up. Thank you. [LB153]

SENATOR CARLSON: Okay. Well, I don't have a question but if there was something else you wanted to get in, go ahead. [LB153]

GLENN MORTON: I thank you. Again, I...you know, we could go through and we could point out the different places in the statutes that say that...and I believe say how the payment is to be made. Payments have to be made according to the hospital schedule or our own schedule. There is clear language that says payments "shall be." Right. But there's also language that says, right now, that payment...and the basic provision for medical services is the employer is liable for all reasonable medical, surgical, and hospital services, meaning physicians...I don't know what...how...why those are split out. It's basically physician and hospital services. Subject to regulation by the Compensation Court not to exceed the regular charge in similar cases. Right. Now despite all the other language in various places that are included in the attachments I gave you that says payment shall be under the fee schedules, the bill review companies are looking to that regular charge language to say that we can apply our own proprietary usual and customary determinations. Typically, they will not tell anyone...they won't tell me, they won't tell the providers how they determine that usual and customary. They say it's proprietary; we won't tell you. We won't tell you our methodology; we won't tell you how we got to it. We're just chopping your bills. Right. And they're using the regular charge language to claim that they're able to do that. But, in fairness, there also is a case, a Supreme Court case, that said the employer can pay what is reasonable. And they look to the language that says the employer is liable for all reasonable medical services, and with that case they're saying that means we can determine what is fair and reasonable. Right. Now the difficulty with that case is that was decided after the bill that established the court's authority to have fee schedules, and that case ignored that bill and ignored the legislative history which I think shows an intent that the schedule was to be mandatory. So it's a very complex issue, but that's--thank you, Senator Carlson. That's

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what else I wanted to say. [LB153]

SENATOR CARLSON: Okay. Thank you. [LB153]

SENATOR COOK: Are there other questions from the committee for Mr. Morton? Thank you very much, sir. [LB153]

GLENN MORTON: Thank you. [LB153]

SENATOR COOK: Next testifier in support of LB153. [LB153]

LAUREEN VAN NORMAN: Good afternoon, committee members. My name is Laureen Van Norman and I am currently the presiding judge of the Nebraska Workers' Compensation Court. My first name is L-a-u-r-e-e-n and my last name is Van Norman, just like it sounds. I am here today in support of LB153, which Senator Lathrop kindly introduced at the request of the court. Mr. Morton has described the administrative issues and conflicts which arise as a result of the problems that LB153 is designed to address. And I want to comment just very briefly on the problems which might occur for an employer or an injured worker who might be caught in the middle of such a dispute, what happens when a third-party payer unilaterally decides to pay medical bills at a rate other than the actual bill or pursuant to the medical fee schedule. Section 48-120 currently protects employees from collection as long as payments are made according to the fee schedules or under a contract as set out in (d). When payments are made otherwise, as the court is attempting to remedy with this legislation, the plaintiff is opened up to collection proceedings. On occasion, in the course of a litigated Workers' Compensation Court case, I spoke with some of my fellow judges and we all agree that we do, we often see plaintiffs who have been sued for the collection of the balance or the difference between the...because the hospital or other medical provider does not view itself as having been paid in full. The plaintiff is protected from lawsuits as long as the medical bills are paid in full or paid pursuant to the fee schedule. If a lesser amount is paid, then the medical provider may sue the plaintiff in collection. While the Workers' Compensation Court is limited in the remedies that we can provide to that plaintiff, while we can order the insurer or the employer to pay the bill, we can't have the parties or the plaintiff reimbursed for any cost they may have incurred in the litigation in collection, in other words, any interest or attorneys fees or any of that kind of thing that they might have incurred to defend themselves in the county court or wherever the collection suit is brought. So they're faced with the trauma of a collection suit and damage to his or her credit rating in addition to whatever sort of thing that they may be going through due to their work-related injury. One of the purposes of the fee schedule is to provide certainty to the doctors and hospitals who serve injured workers. It's somewhat of a balancing act that the court goes through on a biannual basis to ensure that providers feel fairly compensated while insurers and other payers feels that they are fairly treated as well. The end purpose, of course, is that we ensure that providers are not reluctant to treat

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Workers' Compensation Court patients--and you may all have anecdotal information on why that's a problem sometimes. But...and I see I have a red light. That was fast. [LB153]

SENATOR COOK: All right. Thank you very much. [LB153]

LAUREEN VAN NORMAN: Okay. [LB153]

SENATOR COOK: Are there questions from the members of the committee? Seeing none, thank you very much. [LB153]

LAUREEN VAN NORMAN: Thank you. [LB153]

SENATOR COOK: Next testifier in support of LB153. [LB153]

STEVE HOWARD: I'm Steve Howard, H-o-w-a-r-d, on behalf of the state AFL-CIO. And I want to just pick up on what Presiding Judge Van Norman was talking about, and that is if your workers' compensation claim is denied, then the worker gets sued, and there are these costs and there are these balances that have to be accounted for. Probably defending, right now, eight or ten collection cases on behalf of people, and we're saying these bills are for work-related injuries, and the providers, through the collection agencies, are saying, well, you know, until a judge orders that, we don't care, so. We support LB153 if it will clarify and harmonize the statutes and make it simpler and decrease the litigation, and that's good for everyone. And again, the AFL-CIO State of Nebraska just wants to emphasize our concern for access to services for our members and for all injured workers in the state, so we support LB153. Nothing more from me. [LB153]

SENATOR COOK: Thank you very much, Mr. Howard. Are there questions from committee members? [LB153]

STEVE HOWARD: Thank you. [LB153]

SENATOR COOK: Seeing none, thank you very much. Next testifier in support of LB153. [LB153]

LEE LOUDON: Good afternoon, Madam Chairwoman and other senators of the committee. My name is Lee Loudon. It's L-o-u-d-o-n. I am appearing on behalf of the Nebraska Association of Trial Attorneys in support of LB153, and I would echo the comments of Judge Van Norman and Mr. Howard and Mr. Morton as well. If there are no questions, I have nothing more to add. [LB153]

SENATOR COOK: Okay. Are there questions for Mr. Loudon from the committee?

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Seeing none, thank you very much. [LB153]

LEE LOUDON: Thank you. [LB153]

SENATOR COOK: Next testifier in support of LB153. Seeing none, testimony in opposition to LB153. [LB153]

ROBERT HALLSTROM: (Exhibit 10) Senator Cook, members of the committee, my name is Robert J. Hallstrom. I appear before you today on behalf of the Nebraskans for Workers' Compensation Equity and Fairness, the National Federation of Independent Business. I've also been authorized to appear on behalf of the Nebraska Cattlemen's Association and the Nebraska Chamber of Commerce and Industry in opposition to LB153. Basically I think the crux of the issue here is that there's a system that is far from perfect. We have visited, as Senator Lathrop suggested, with him and indicated our interest in trying to improve on the current system. But essentially what we've got is a system that has been in place for a long time with regard to the medical fee schedule and the issue of regular charge made for services in similar cases. To go back to the 2007 reform legislation, as I recall, as I indicated in my testimony on the last bill, the business community was interested in having all hospital charges subject to the DRG system. When that failed, we ended up with a situation where many of the fees were going to be covered under the Workers' Compensation Court medical fee schedule. Early in that process, the regular charge language was slated to be repealed, but when we were unable to get all hospital charges covered by the DRG system at the request of our organization, NWCEF, the regular charge language was reinserted into the particular bill. I think the problem that we face is--and Judge Van Norman talked about--the unilateral decision on behalf of the employer or the payer. I would suggest it's not necessarily a unilateral decision. It's one that has to be based on a comparison of similar charges by other hospitals in the area, for example, although ultimately that payer does make the decision in recommending what should be suggested for the reimbursement level. What we're concerned about is the unilateral aspect that applies clearly on the other side. The current medical fee schedule established by the Workers' Compensation is billed charges less a percentage discount. In essence, they can charge whatever they darn well please less a specified percentage. And without the buffer on the other end of regular charges, we think that would be a system fraught with problems for the employers. And in fact, as I testified earlier, the data from 2007 was showing that hospitals were routinely charging two and three times for the same service or procedure for work comp cases as they were for healthcare-related claims. That is a situation that could run rampant under this. Attached to my testimony, in closing up, is a copy of the Kothe decision, which I think became kind of the poster child for the need for healthcare reform with regard to hospital reimbursement levels. Very briefly, that case involved a hospital that had submitted billed charges of \$117,000 for surgical implants. The Workers' Compensation Court, in 2004, when the workers' compensation medical fee schedule and the regular charges clearly both applied, as we suggest they do today,

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ruled that instead of getting \$117,000 less a percentage discount, that instead they were entitled to the cost, which was less than \$40,000 plus a 20 percent markup for \$46,000. In that one case alone, if regular charges had not been interpreted by the court to apply, the employer would have paid between \$60,000 and \$70,000 extra because the unilateral decision of the hospital, in that case, was billed charges of \$117,000. With that, I'd be happy to address any questions of the committee. [LB153]

SENATOR COOK: Thank you, Mr. Hallstrom. Questions from committee members for Mr. Hallstrom? [LB153]

ROBERT HALLSTROM: Thank you. [LB153]

SENATOR COOK: Thank you, sir. Next testifier in opposition to LB153. [LB153]

DALLAS JONES: (Exhibit 11) Senator Cook, members of the committee, Dallas Jones in opposition to LB153. I have a handout that I'll pass out that I'll comment on here in a moment. I'm testifying today on behalf of Nebraskans for Workers' Compensation Fairness and Equity, as well as the Omaha Chamber of Commerce and the Lincoln Chamber of Commerce. I want to provide you with an example of a real case where there was unilateral decision-making on behalf of the hospital, which also resulted in inequities which demonstrates from my client's perspective why you must have this protective cap in place for those charges that fall outside of the DRG. In a fairly routine case in an ambulatory surgical center, which is the outpatient, which means we're not talking DRG, the provider charged \$23,000 for this procedure. In this particular case, all of the surrounding hospitals in basically the area--the terminology is the Census Bureau statistical area--but that means basically the surrounding hospitals that provide the same service, on average, charged \$5,000 for the identical procedure based upon the codes that the hospital charging \$22,000 used. In that instance, obviously the difference is a significant amount. The employer in that case objected and said, wait a second, the statute says you shall not exceed the regular charge for this service in similar cases, plain and simple. We've looked at the data. It's undisputed. Everybody around you charges \$5,000; why are you charging \$22,000? We want to pay you \$5,000. That's a classic example of a unilateral decision made on behalf of the healthcare provider that also causes problems. I'm not here to tell you this is a perfect system. There isn't anybody in the room who believes that. Certainly any one of us can point to problems on both sides of the table of the opponent when it comes to this system. But what I am here to tell you is it is not one-sided and it is a routine circumstance where the healthcare providers are charging amounts that are highly variable. I like to call it a bill-what-you-will type of system where the employer is in a position and it has to do something about it. If we don't have it, we're left to deal with a fee schedule which is not really a fee schedule. It is a bill-what-you-will and then we're going to discount what you get by a certain percentage based upon who you are and where you are as a hospital. So there is a better way, but this isn't it. I'd be happy to take questions. [LB153]

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SENATOR COOK: Thank you, Mr. Jones. Questions from committee members. Seeing none, thank you for your time. [LB153]

DALLAS JONES: Thank you. [LB153]

SENATOR COOK: Next testifier in opposition to LB153. [LB153]

KORBY GILBERTSON: Good afternoon, Vice Chairwoman Cook, members of the committee. For the record, my name is Korby Gilbertson. It's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n, appearing today as a registered lobbyist on behalf of the Property Casualty Insurers Association of America in opposition to LB153. I think that Mr. Jones pretty well covered everything that I was going to say, so I will simply open myself up for questions if there are any. [LB153]

SENATOR COOK: All right. Thank you, Ms. Gilbertson. Are there questions? Thank you, Senator Wallman. [LB153]

SENATOR WALLMAN: Thank you, Senator Cook. Welcome here this afternoon. [LB153]

KORBY GILBERTSON: Thank you. [LB153]

SENATOR WALLMAN: You know, this always is dissension, you know, and about hospitals, insurance companies. Is there any that you work together and establish some kind of a fee schedule or...? [LB153]

KORBY GILBERTSON: (Laugh) Wouldn't that be nice. I think that, back when we were working on the hospital inpatient fee schedule, there was a great deal of work that went on, on both sides. And I think that...I don't know if either side really was overjoyed with what came out of it, but...so I don't know, to answer you question quite frankly. I don't know if there is a way we could manage to agree to something. But we're certainly open to it and we did it before on the fee schedule, so. [LB153]

SENATOR WALLMAN: But are we in line with neighboring states as far as our cost, you know? [LB153]

KORBY GILBERTSON: I can...I would be happy to bring you...I have data from NCCI that can show you where Nebraska ranks with other states. We are on the high end of medical costs and other related costs for workers' compensation, so. [LB153]

SENATOR COOK: Thank you. Other questions for Ms. Gilbertson? Seeing none, thank you very much. [LB153]

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KORBY GILBERTSON: Okay, thank you. [LB153]

SENATOR COOK: Next testifier in opposition to LB153. [LB153]

MIKE FITZGERALD: Mike Fitzgerald, 4260 Garryowen Road, P38, Fort Calhoun, 68023. I don't know whether or not I'm for it or against it, but here's the way I look at this statute. All you want to do is take the existing 48-120 and strike from Section 48-120(1)(a), "not to exceed the regular charges made for such service in similar cases." That's all the change we're making. All I ask you to do is take it and leave (1)(a) alone, except strike out those words, rather than now we have a new (1)(a) and we have an (i) and an (ii) and an (iii). Now when you tinker with these statutes, the first thing you do is you give somebody the opportunity to come in and argue about them and then I get a headache. I know what (1)(a) is. I know it by heart. I can work with that. But one of the things you do is there's a term called "as and when needed." Well, that's no longer in (1)(a). It's over in (1)(a)(iii)--stuff like that. Please, if...I don't care if you take out "not to exceed the regular charges made for such service in similar cases." I don't care. But just scratch that out and leave the whole thing alone, because I'll guarantee you that I'm going to have an argument from somebody that they made a change in 2011 and now the whole thing is all changed and decided again. I will tell you, once in 1999 you made a change in 48-125, and the next thing you know, eight years later, we get a case called Lagemann, which changed the whole deal, because now we have (1)'s and (1)(a)'s and (ii)'s and all this other stuff, and it changes the whole thing of the way we interpreted the statute for a long time. So please, if you make the change, just scratch that off and forget this (1)(a), (ii)'s, and all that. That's all I ask you. And I don't know if I'm against it or for it or what, (laughter) but don't change what I'm living with because you're not changing it. That's not the purpose of this hearing. Thank you. [LB153]

SENATOR COOK: All right. Are there questions for Judge Fitzgerald before he departs? None? All right. [LB153]

MIKE FITZGERALD: Thank you. [LB153]

SENATOR COOK: (Exhibits 12, 13, 14) Thank you. Next testifier in opposition, or whatever, to LB153, however one might define it. How about testimony in a neutral capacity related to LB153? I don't see anybody getting up. And I'll take that opportunity to read, while Senator Lathrop walks back to close, some letters into the testimony. We have a letter of support for LB153 from the Nebraska Hospital Association. We also have some letters for...in support of LB238 and LB346. These letters are from the Nebraska Association of Public Employees. Thank you--letters in support. Senator Lathrop. [LB153]

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SENATOR LATHROP: Great. Thanks. Good hearing. I don't want to throw my legal counsel under the bus, but I think she did the (1)(iii) thing, Judge Fitzgerald. (Laughter) That's Molly Burton. (Laughter) If she ever gets out into private practice, just remember that. No, Molly does a fabulous job for this committee on most occasions. Let me talk to you a little bit about this bill now that we've had it. You know, it's interesting, because LB588 was really where I went to school on how hospitals operate and the cost shifting that goes on. And if you take a hospital like--and I'll just make up a hypothetical Creighton University Hospital--if it costs Creighton \$100 million to run the place, to have the nurses there, to pay the lights, to pay the insurance bill, the doctors, all the people that work there, if it costs \$100 million, then if Medicaid...if we cut the provider rates, right, that's going to happen? If we cut the provider rates, they've got to go make that up somewhere, right? When we have uninsured people that can't pay their bills, they've got to make that up somewhere. So when we took up LB588, we had a good discussion about the cost shifting that goes on. Where should work comp be in relationship to, at the bottom there are the people that walk out on their bills, right--the people that don't pay anything; then right above them are the people that pay a little bit and then probably go through bankruptcy; then you have Medicaid, which takes the biggest chunk, and you can bill \$10,000 for a procedure and they might, down at Creighton or any hospital, they might get \$4,000 from Medicaid; and Medicare might pay them a little bit better; and then there's health insurance and work comp. So when we do these things, it sounds great to say, hey, let us have the reasonable not to exceed the regular charge, and the chamber comes in and says this is a great idea. The problem is, we've got to make it up somewhere. Creighton or UNMC, they're going to make it up somewhere. So the question is whether or not we stick with the fee schedule and take this out of there and the court is going to dictate what they should be reimbursed, or whether we say, no, you can use this regular charge language to further reduce the bills, but it's going to show up on your health insurance premium. Because those hospitals have to make it up somewhere. It doesn't magically go away. And that really is what I learned when we took up LB588 and why we tried to resolve this issue. So to illustrate the point--and I have practiced in the area of work comp so I'm familiar with what's going on. And, frankly, how much the hospital gets makes me no difference when I'm representing a plaintiff. That really isn't the issue, other than if...work comp--most of work comp is paying the bills, right? There's two features to it. Some of it is benefits that go to somebody who is disabled because of their work-related injury. A lot of people never even get disabled. They...you know, they go in the ER and that bill gets sent to work comp and paid, and the person is back to work. So the biggest piece of this is the medical expenses. And what makes work comp unique, at least compared to health insurance, is they pay 100 percent, no deductible, no copay. That's the biggest benefit to an injured worker in having been covered by work comp. But if it's paid according to the fee schedule, they can't be sued. So if the bill comes out from--and I'll say Creighton again--if they send a bill for \$2,000 to the worker, and the fee schedule says you're supposed to get \$1,800, if they take \$1,800 they can't sue them, right? But if these people that work on these plans come in, in the meantime, and say, no, we think the

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reasonable charge is \$1,500, that doesn't get them exempt from the lawsuit for the \$300 difference, okay? So there are I'll just say a lot of policy considerations at play. It's not just as simple as saying, wait a minute, I like what Hallstrom said, the chamber is with him; we'll lower premiums. No, because we've got some cost shifting that will happen when that's done. We have businesses that won't tell us how they're calculating what the fair and reasonable or the regular charge is. That should cause us some pause. Maybe we go ahead in this thing or maybe we don't, but it ought to cause us to pause and say, well, what are they doing? How do they come up with a regular charge? Are they looking at the Medicaid amount? Or did they calculate that by taking a survey of people, what they thought should be paid? Well, if we don't know how they come up with what they believe to be the regular charge is and they won't tell the court and all they'll say is, well, that's proprietary, maybe we need to clarify it by saying you'll pay what the work comp fee schedule is, and when that's being set you can come in front of the Work Comp Court, which they have a right to do, and say here's what we think it ought to be, and the Work Comp Court will exercise its judgment and set the fee schedule. All I'm saying is it's not as simple as saying, well, let's leave regular and reasonable in there and they'll nick the hospitals and no one will be worse off for it because somebody is going to keep...somebody is going to pay to keep the lights on at Creighton or at UNMC. So that's the policy considerations. And I always appreciate the thoughts of Bob Hallstrom and Dallas Jones. Dallas does a lot of this work, and his opinion is usually thoughtful and well thought through. But I think the committee needs to sit down, or I'll sit down with these folks and try to come up with some solution if we can. That's all I've got, unless you've got questions. [LB153]

SENATOR COOK: Thank you, Senator Lathrop. Senator Carlson has a question for you, sir. [LB153]

SENATOR LATHROP: Sure. [LB153]

SENATOR CARLSON: Thank you, Senator Cook. This doesn't really relate to exactly what you said, but one of the things that comes through my mind, I'm kind of looking at this...I'm listening to testimony and I'm looking at what is stricken--and that's hard to read through that stuff sometimes because it's stricken and it's hard to comprehend. So Judge Fitzgerald brought up kind of what I wanted to ask. In layman's terms that Tom Carlson can understand, what's the difference between what was stricken and what you put in? [LB153]

SENATOR LATHROP: Nothing. I'm reading the lips of my committee counsel who wrote it. That's Molly Burton, B-u-r-t-o-n. (Laughter) Really, I think the point is, it's...really this is about whether we're going to limit...whether the measure for what gets paid in a work comp claim is set by the court or is that subject to a...the language that is "not to exceed the regular charge," which just allows another way of...it really makes the thing, the work comp schedule, meaningless. If the work comp schedule for a back surgery is \$20,000

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and they come in with their process and say, nope, it's \$15,000, well, we might as well not even have a...we might as well not even have a schedule. We'll just make it not to exceed the regular charge--and that's not really what we tried to do in LB588. [LB153]

SENATOR CARLSON: Well, again I'm making a statement here for the record. Because some of the things that you brought up about how are charges arrived at and nobody knows; how do we get that information and they won't give it? How in the world are payments arrived at for Medicaid? How in the world are payments arrived at for Medicare? We don't know. But it's not something that those in the medical profession can live on, and it's... [LB153]

SENATOR LATHROP: No. I think if you talk to any provider, Senator Carlson--and where I learned of this mostly was in LB588 in the hearings and the people we spoke to--they will tell you that no one can keep their doors open on what Medicaid pays. You can't. [LB153]

SENATOR CARLSON: I know. They've got to make it up somewhere. [LB153]

SENATOR LATHROP: And we're about to nick them, I think, for another 5 percent. And we can do that... [LB153]

SENATOR CARLSON: In fact, it's so... [LB153]

SENATOR LATHROP: ...but we're kidding ourselves if we think that the hospitals can absorb it, because they can't--and the doctors. [LB153]

SENATOR CARLSON: And having a son in the medical profession, it's so serious that there are going to be some doors closed if this continues to go that way. And we think of doctors as people that make so much money that we don't even need to worry about them. It's not really true. And how does that relate to what we're talking about? Well, we're talking about setting fees in one area and fees are set in another, and it's a complex issue. [LB153]

SENATOR LATHROP: Well, it is. And the other thing I neglected to mention, which was excess. If we...if the reimbursement rate for work comp gets too low, then what you do is you have doctors and hospitals that say, no, no, we're not...we don't do work comp here. You know, imagine if Nebraska Spine, who does a lot of back surgeries, says we're not going to do it because the work comp fee schedule is too...or this process of not to exceed the regular charge is too low for us; can't keep our doors open. [LB153]

SENATOR CARLSON: Thank you. [LB153]

SENATOR LATHROP: So that's the policy considerations. [LB153]

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SENATOR COOK: Other questions for Senator Lathrop? Seeing none, we will close the hearing on LB153 and hearings for the day. Thank you all for coming. [LB153]