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Business and Labor Committee
March 14, 2011

[LB141 LB272 LB291 LB348 LB585 LB586]

The Committee on Business and Labor met at 1:30 p.m. on Monday, March 14, 2011, in Room 2102 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on gubernatorial appointments, LB141, LB348, LB272, LB291, LB585, and LB586. Senators present: Steve Lathrop, Chairperson; Tanya Cook, Vice Chairperson; Brad Ashford; Tom Carlson; Burke Harr; Jim Smith; and Norm Wallman. Senators absent: Senator Ashford and Senator Carlson.

SENATOR LATHROP: My name is Steve Lathrop. I'm the state senator from District 12 and the Chair of the committee. We have a fairly full agenda, as you might have seen. I think we're a two-day committee trying to cram it all into one day, but that's another...an argument for another day. I don't know that I've done this before. I usually just kind of roll right into what we're going to do. But we have three confirmations today and a good number of bills and we'll take them up in the order that you've seen them posted on the agenda. That's my hope. I want to introduce my committee because we do have some people here today who are not regulars and just so that you know who's up here asking the questions. To my left is Jim Smith from Papillion, Jim's first year on the committee; Norm Wallman, who's been on the committee for...this will be his fifth year; Senator Tanya Cook; my administrative assistant and committee clerk, Kate Wolfe; Molly Burton, who many of you know who are regulars, she's our committee counsel and does a great job for us; and Burke Harr is from Omaha. We have two pages and I have yet to recognize them this year and I've been told I needed to do that today and I shouldn't even need to be told, they do a terrific job, Kate and Leslie. If you have attachments or things that you want us to see, hand them to one of these fine pages and they'll share them with us. The process today, as it is always if you are going to speak, we'll have the bill introducer first, then we will have proponents, opponents, and those testifying in a neutral capacity. If you are going to testify, you need to know a couple of things. One is you need to fill a sheet out so that Kate here can make sure that we make a good record and we got everybody's name spelled correctly and the record reflects people who are opposed, in support of, or in a neutral capacity. We also have the light system and it's particularly important on days when we have so many things to take up. The light system is here. When you sit down to testify you'll get a green light, which will be on for two minutes. That will be followed by a yellow light for one minute. So if you're doing the math in your head, you have three minutes. And when that red light comes on we'll ask you to wrap it up so that we can keep things moving. Please stay in the chair to see...long enough to see if anybody here on the committee has any questions. Sometimes people just talk and then they turn around and get up like they're done. And cell phones, please turn them off or in the vibrating position. I don't know which of my committee members did that but I suspect I do. (Laugh) Anyway, we won't make a record of that. We're going to take up three gubernatorial appointments and I always like doing this because these are people that have agreed to volunteer their time and work on these boards, which is a nice form of service for the state of Nebraska. They relate to

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

the Boiler Safety Advisory Board and our first candidate is Robert Kirkpatrick, so we'll ask Mr. Kirkpatrick to come forward.

ROBERT KIRKPATRICK: Good afternoon, Committee. [CONFIRMATION]

SENATOR LATHROP: Good afternoon. [CONFIRMATION]

ROBERT KIRKPATRICK: This would be my second go-round. I feel that I'm very capable of being on this board and it's an honor to be on this board. [CONFIRMATION]

SENATOR LATHROP: Mr. Kirkpatrick, my fault, I should have told everyone, if you're going to testify start out with your name and spell your last name. [CONFIRMATION]

ROBERT KIRKPATRICK: Oh, I'm sorry. Robert Kirkpatrick, K-i-r-k-p-a-t-r-i-c-k. [CONFIRMATION]

SENATOR LATHROP: Okay. [CONFIRMATION]

ROBERT KIRKPATRICK: Sorry. [CONFIRMATION]

SENATOR LATHROP: And it's your second time. [CONFIRMATION]

ROBERT KIRKPATRICK: Yes, sir. [CONFIRMATION]

SENATOR LATHROP: All right. Go ahead. [CONFIRMATION]

ROBERT KIRKPATRICK: I've got roughly 40 years' experience in the boiler business, from 15 years of manufacturing, 4-year apprenticeship, 20-some years as quality manager. I've sat on the traction engine board for national board so I'm enthused to help out the state for the safety and keep the people from getting harmed for misusing the units, whether it's commercial or residential. I'm very highly on the safety part of the units, of building them and manufacturing them. [CONFIRMATION]

SENATOR LATHROP: Very good. Well, it's great to have you re-up too. Have you enjoyed your experience? [CONFIRMATION]

ROBERT KIRKPATRICK: I appreciate it because really it's an honor to do this. [CONFIRMATION]

SENATOR LATHROP: Okay. We'll see if anybody has any questions for you. I don't see any. Sometimes when people come in here for their confirmation on the appointment I like to ask them questions about what they do and we do have a lot going on this afternoon so I'll keep it kind of brief, but can you tell us what you...just your judgment

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

about how often these boilers need to be inspected because that becomes an issue here about every other year. [CONFIRMATION]

ROBERT KIRKPATRICK: Basically, in the manufacture part of that, I would say yearly unless there's any cause of concern of the safety valves leaking or any concern of any gas leaks or anything that would be detrimental to the area and cause a big problem of malfunction of the unit and possibly hurting somebody. [CONFIRMATION]

SENATOR LATHROP: And when you say possibly hurting somebody, is the risk the carbon monoxide or are there other risks? [CONFIRMATION]

ROBERT KIRKPATRICK: Carbon monoxide and also the fumes building up inside what we call the furnace area and having a furnace explosion, whether it be fire tube, water tube, flex tube, residential little units. So I mean I think if somebody sees a part where they have water leaks, they have a thing, they need to make sure that they draw that to people's attention and not just let it go because you can run them out of water. [CONFIRMATION]

SENATOR LATHROP: Oh, can you? Are these boilers, in a commercial setting, are they typically inspected by an insurance company, so if I have a building, if I have a building, an office building or a school building or something with a boiler in it will the insurance company, the liability company for the property owner, typically inspect it? [CONFIRMATION]

ROBERT KIRKPATRICK: Yes. Go ahead. [CONFIRMATION]

SENATOR LATHROP: And do you think we're duplicating that effort or can we rely on the insurance company inspection? [CONFIRMATION]

ROBERT KIRKPATRICK: When you mean duplicate, from like the state doing it or...? [CONFIRMATION]

SENATOR LATHROP: Yes, the state doing inspections. [CONFIRMATION]

ROBERT KIRKPATRICK: I don't think you're duplicating. I think it's a part that has to be done whether the state does it with the commission people they have or the insurance company. To my point, I think it needs to be done for everybody. [CONFIRMATION]

SENATOR LATHROP: If the insurance company sends somebody out to the church or the school or the office building where the boiler is and they do an inspection to satisfy themselves that it's a safe boiler and they're not insuring a bad risk and they turn that in to the state, is that sufficient, in your judgment? [CONFIRMATION]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

ROBERT KIRKPATRICK: As long as the documentation is presented properly to the state to where they may say, okay, you need to fix this within 30 days or 10 days and making sure that is followed up and taken care of, I think it's sufficient enough as long as it's followed up that these certificates are posted and current and they have been looked at. [CONFIRMATION]

SENATOR LATHROP: Very good. Okay. Thanks, Mr. Kirkpatrick. Does anybody else have any question about boilers? We got the guy here. All right. Thank you very much for your service to the state too. [CONFIRMATION]

ROBERT KIRKPATRICK: Thank you. Appreciate it. [CONFIRMATION]

SENATOR LATHROP: Next is going to be Mr. Bley. Am I pronouncing that right? Bley. Okay. Come on forward. If you can start with your name and spell your last name. [CONFIRMATION]

STEVEN BLEY: Good afternoon. Steven Bley, B-l-e-y. I look forward to the opportunity to serve on the State Boiler Safety Code Advisory Board. I feel I am qualified for this board as I have nine years' experience with operations and maintenance of utility-scale boilers with the Omaha Public Power District. I'm familiar with all relevant codes and am a registered professional engineer in the state of Nebraska. [CONFIRMATION]

SENATOR LATHROP: Sounds like pretty good qualifications to me. This is you first time around? [CONFIRMATION]

STEVEN BLEY: It is. [CONFIRMATION]

SENATOR LATHROP: Good. Good. Well, thanks for your willingness to serve. Does anybody have any questions? Senator Cook. [CONFIRMATION]

SENATOR COOK: Thank you, Mr. Chair. Are young people going into this kind of work and what kinds of preparation do they need in high school or college to do the job that you do or do the job that Mr. Kirkpatrick does on a day-to-day basis? [CONFIRMATION]

STEVEN BLEY: There are still people entering this field. In my capacity, I'm an engineer and I work in inspecting and operating boilers. As far as getting people out of high school interested, it's a matter of technical interest, mathematics and science. It kind of steers people in that direction. [CONFIRMATION]

SENATOR COOK: Thank you. [CONFIRMATION]

SENATOR LATHROP: Thanks. Senator Harr. [CONFIRMATION]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR HARR: Did you work with Senator Smith? [CONFIRMATION]

STEVEN BLEY: I did not. [CONFIRMATION]

SENATOR HARR: Oh, okay. [CONFIRMATION.]

SENATOR SMITH: Didn't have the privilege. (Laughter) [CONFIRMATION]

SENATOR HARR: Just trying to find out if your reputation was better there.
[CONFIRMATION]

SENATOR LATHROP: And Senator Wallman. [CONFIRMATION]

SENATOR WALLMAN: Thank you, Chairman Lathrop. Yes, and I appreciate what you do. So do you inspect the steam engines and that at these antique tractor shows?
[CONFIRMATION]

STEVEN BLEY: I do not do that. My experience is with utility-scale boilers, power boilers for generation of electricity. [CONFIRMATION]

SENATOR WALLMAN: Thank you. [CONFIRMATION]

SENATOR LATHROP: I think that's all the questions. Thank you again for your service and your willingness to help out. [CONFIRMATION]

STEVEN BLEY: Yes, thank you. [CONFIRMATION]

SENATOR LATHROP: And our third person is Thomas Phipps. Mr. Phipps, come on up, if you wouldn't mind. [CONFIRMATION]

THOMAS PHIPPS: Thomas Phipps, P-h-i-p-p-s. I look forward to serving on the board because of my experience that I have as an inspector, as an installer, and as a repairer and an operator of boilers for the last 37 years. And I look forward to providing this service to the state. [CONFIRMATION]

SENATOR LATHROP: Thirty-seven years? [CONFIRMATION]

THOMAS PHIPPS: Yes, sir. I've been around the boiler business since I was 18 years old in 1973. [CONFIRMATION]

SENATOR LATHROP: And are you from Omaha? [CONFIRMATION]

THOMAS PHIPPS: Yes, sir, I am. [CONFIRMATION]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR LATHROP: Good. [CONFIRMATION]

THOMAS PHIPPS: I am currently the chief boiler inspector for the city of Omaha. [CONFIRMATION]

SENATOR LATHROP: Oh, good. Good. That's good practical experience it sounds like. Thirty-seven years is certainly a good background. Are there any questions for Mr. Phipps? I see none. And again, like the others, I appreciate your willingness to serve and you'll hear from us soon I guess. (Laughter) It kind of feels like a job interview, doesn't it? [CONFIRMATION]

THOMAS PHIPPS: Yes, sir, it does. [CONFIRMATION]

SENATOR LATHROP: Yeah, well, the hardest part I think is getting the gubernatorial appointment. [CONFIRMATION]

THOMAS PHIPPS: Yes, sir. [CONFIRMATION]

SENATOR LATHROP: So thank you very much, Mr. Phipps. [CONFIRMATION]

THOMAS PHIPPS: Thank you, Senator. [CONFIRMATION]

SENATOR LATHROP: And you folks that just had your hearing, you're welcome to stay around if you like, but if you would prefer to skip the work comp day we have, okay. That will close our hearings on the gubernatorial appointments for those fine people and we'll move on then to LB141, and that brings us to Senator Lautenbaugh or his stand-in. [CONFIRMATION]

BRENT SMOYER: Senator Lautenbaugh apologizes he couldn't be here. He was called away to court down the street. So he's going to be here later though, so rest assured you don't have to deal with the B team for long. For the record, my name is Brent Smoyer, B-r-e-n-t S-m-o-y-e-r, and I am legal counsel to the Rules Committee and Senator Scott Lautenbaugh. LB141 is a fairly simple change to existing public records laws, just adding two new exemptions to the records that could be withheld, including initial police reports of accidents and initial reports of workers' comp injury. Now it should be known that there is a similar measure that has been introduced in the Government Committee. I would expound further on this but Senator Lautenbaugh was actually kind of open to let that measure get its course before having to come before the Business and Labor Committee and ask you guys to work on it. So he did request that the committee just hold it right now and not necessarily take any action immediately, depending on what happens with the Government Committee bill. [LB141]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR LATHROP: Hold...he wants to have this committee hold LB141. [LB141]

BRENT SMOYER: LB141, yes, preferably just kind of delay any action. There's no real hurry I guess is how he put it. [LB141]

SENATOR LATHROP: Okay. [LB141]

BRENT SMOYER: Otherwise, that pretty much finishes the opening for him. [LB141]

SENATOR LATHROP: Very good. Thanks, Mr. Smoyer. [LB141]

BRENT SMOYER: Thank you, Senator. [LB141]

SENATOR LATHROP: Are there people here to testify in favor of LB141? [LB141]

ROBERT HALLSTROM: Chairman Lathrop, members of the committee, my name is Robert J. Hallstrom. I appear before you today as a registered lobbyist for the Nebraskans for Workers' Compensation Equity and Fairness, also on behalf of the National Federation of Independent Business and have been authorized to state on the record the support for the Nebraska Chamber of Commerce and Industry. In recognition of Senator Lautenbaugh's request that the bill be held, I will express our support for the bill but say nothing further. Thank you. [LB141]

SENATOR LATHROP: Terrific. Thanks, Bob. Any questions? (Laughter) I meant that in a thank you for not putting us through the full thing if it's just going to be held. [LB141]

ROBERT HALLSTROM: You'll get another shot. [LB141]

SENATOR LATHROP: All right. Yeah. Thanks. Thanks, Bob. [LB141]

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. I'm appearing today as a registered lobbyist on behalf of the Property Casualty Insurers Association of America and Lincoln Public Schools. As with Mr. Hallstrom, I'll save you my long testimony since we've heard this bill I think...I don't know how many times now over the last five years, but we still support it for obvious reasons. And if you have any questions, I'd be happy to answer them. [LB141]

SENATOR LATHROP: Thanks, Korby. Any questions for Ms. Gilbertson? I see none. Thanks. [LB141]

KORBY GILBERTSON: Okay. Thanks. [LB141]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR LATHROP: Other proponents? Anyone here in opposition to LB141? Good afternoon. [LB141]

JON REHM: Good afternoon. My name is Jon Rehm and I'm appearing on behalf of the Nebraska Association of Trial Attorneys here in opposition to LB141. [LB141]

SENATOR LATHROP: That's R-e-h-m? [LB141]

JON REHM: R-e-h-m, that is correct. [LB141]

SENATOR LATHROP: Okay. [LB141]

JON REHM: And, Senator, in light of the proponents of this bill just simply stating...being as this bill is going to be held, I'd just like to reserve any, you know, reserve any testimony and just state that I state that I oppose this bill, so... [LB141]

SENATOR LATHROP: Okay. Very good. Hang on a minute. Senator Wallman has a question for you. (Laughter) [LB141]

SENATOR WALLMAN: Thank you, Chairman Lathrop. I just had supper with your grandfather the other day. [LB141]

JON REHM: Good. [LB141]

SENATOR WALLMAN: Thanks. [LB141]

JON REHM: Thanks. [LB141]

SENATOR LATHROP: There we go. [LB141]

JON REHM: Anybody else? [LB141]

SENATOR LATHROP: Okay. Anyone else here in opposition? [LB141]

STEVE HOWARD: Steve Howard, H-o-w-a-r-d, on behalf of the Nebraska State AFL-CIO, in opposition to the bill. The only thing that we would say is we don't really get complaints from our clients about their first reports being out there but in light of the procedural events today I don't have anything else to add. We oppose it. [LB141]

SENATOR LATHROP: Okay. Thanks, Steve. [LB141]

STEVE HOWARD: Thank you. [LB141]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR LATHROP: Anyone else here in opposition to LB141? Anyone in a neutral capacity? And Mr. Smoyer to close. [LB141]

BRENT SMOYER: I believe I would waive closing, Senator. [LB141]

SENATOR LATHROP: And he'll waive closing, which brings us...oh, pardon me. Before I close the hearing though I do have a letter from Cline Williams and, in particular, Shawn Renner, who routinely appears on behalf of the Media of Nebraska, Inc., and they've sent a letter in opposition to LB141. (Exhibit 1) That will be made a part of the record. And with that, we will close the hearing on LB141 and move then to LB348 and, again, Senator Lautenbaugh. Whoops. I thought you were just holding the door for Sally. [LB141]

BRENT SMOYER: Well, that and the senator was actually hoping to introduce this himself but...pardon me?

SENATOR COOK: Is he coming?

BRENT SMOYER: He is on his way.

SENATOR COOK: Oh, I thought he was coming in the door.

SENATOR LATHROP: Let's see what else we have here.

BRENT SMOYER: I thought we were at the tail end here.

SENATOR LATHROP: Brent, is he in a...Brent, is he in a hearing?

BRENT SMOYER: He's actually in a brief hearing across the street. I will (inaudible).

SENATOR LATHROP: Okay. Well, I'm just wondering, we could...why don't you see if you can get a hold of him. We can see if we can take up something else, like Fulton's bill or something.

BRENT SMOYER: I appreciate it. Thank you, sir.

SENATOR LATHROP: Or Nelson's. Nelson has a bill as well.

BREAK

SENATOR LATHROP: Good grief! Now you're going to have Fulton and Nelson breathing down your back in just a second. Catch your breath, Senator. We're I guess going to proceed directly to LB348, as Senator Lautenbaugh has arrived. And when

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

you're ready, you may proceed. [LB348]

SENATOR LAUTENBAUGH: I have a feeling I'll have a better closing than I do an opening. (Laughter) And I applaud your efficiency today. LB348 would make a change in workers' compensation law where you would have to be...an injury would have to be the prevailing factor, work-related injury would have to be prevailing as the cause of the work-related disability instead of just a factor. There are witnesses coming behind me to discuss this. Like I said, I'll have a much better close, hopefully coming pretty quick here, and (laughter)... [LB348]

SENATOR LATHROP: Well, don't feel compelled to make it any longer than your opening. [LB348]

SENATOR LAUTENBAUGH: That's fair. I would... [LB348]

SENATOR LATHROP: Go ahead. [LB348]

SENATOR LAUTENBAUGH: I would be happy to take any questions at that point, would be my preference, but... [LB348]

SENATOR LATHROP: All right. We'll let you catch your breath and bring up the proponents of LB348. Good afternoon. [LB348]

TIMOTHY CLARKE: Chairman Lathrop, members of the committee, my name is Timothy Clarke, last name is C-l-a-r-k-e. I'm an attorney with Baylor Evnen law firm in Lincoln and I'm appearing as a proponent of LB348 on behalf of the Nebraskans for Workers' Compensation Equity and Fairness. As Senator Lautenbaugh pointed out, this particular bill, LB348, changes the causation standard for proving that an injury is work-related, basically moving to a precipitating or primary precipitating cause. The current standard for proving that a work-related injury is caused by an accident in the Nebraska Workers' Compensation Act is essentially proving any degree of aggravation or acceleration of a preexisting condition, so in situations where an individual may have a significant preexisting condition--a degenerative knee condition, a degenerative hip condition, a degenerative back condition--if the work accident aggravates even only a modest amount, the employer currently is on the hook for everything, including medical and disability and including the preexisting condition. As I mentioned, this most often comes up in the cases of degenerative knees, hips, and backs, and under the current standard the employer is ultimately going to be on the hook for the entire preexisting condition. Just as an example, in private practice we often run into a situation where an individual has a degenerative knee condition and in some cases both knees are degenerative. I have a situation that I personally was involved in where the doctor had recommended that one of the knees be replaced several years prior to the work accident. About six months prior to the work accident the doctor recommended that the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

other knee be replaced. The individual was subsequently involved in a relatively minor work-related incident involving the knee where the doctor had previously recommended a knee replacement surgery. No question that there was a minor aggravation to the knee condition but without the preexisting condition it wouldn't have amounted to much. According to the standards...the current causation standard, the employer could potentially be on the hook for not only the degree of aggravation, which was very minor, but the entire preexisting condition, including both medical and indemnity. So we're in support of the change to the statute. [LB348]

SENATOR LATHROP: Very good. Thank you, Mr. Clarke. Are there any questions for this witness? I see none. Oh, I'm sorry. [LB348]

SENATOR SMITH: Yes, sir. [LB348]

SENATOR LATHROP: Senator Smith. [LB348]

SENATOR SMITH: Mr. Clarke, can you maybe expand a little bit farther? I know you kind of were coming to the end of your testimony there and you're talking about a scenario, but can you maybe expand on that a little bit more of scenarios of the current and the proposed law for happy outcomes? [LB348]

TIMOTHY CLARKE: Sure. Again, as I mentioned, and I may be out of time so with the committee's approval, if I could answer the Senator's question. [LB348]

SENATOR LATHROP: Oh yeah, absolutely, that's the whole point. Yeah. [LB348]

TIMOTHY CLARKE: Thank you. It most often comes up in the cases of degenerative conditions, conditions that may be related to maybe just age related, could be due to degeneration over time, not necessarily related to a particular work activity. And under the current standard, if you have a preexisting condition, let's say that comprises 99 percent of the overall condition, including the disability, but there's a small amount of aggravation, then the employer could potentially be on the hook for not only the extent of the aggravation but also the preexisting condition. So in the case that I cited earlier, if you have someone who the doctor has recommended a knee replacement surgery before the work accident, and with regard to the work accident there's only a small amount of aggravation, the individual may have needed the knee replacement anyway, in this case did need the knee replacement, the workers' compensation carrier and the employer would be on the hook for a surgery that had been recommended prior to the work accident, as well as all of the disability that would result from that. [LB348]

SENATOR SMITH: Okay. Thank you. [LB348]

SENATOR LATHROP: Okay. I think that's it. Thanks, Mr. Clarke. [LB348]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

TIMOTHY CLARKE: Thank you. [LB348]

SENATOR LATHROP: And for those of you who are first-timers here, you'll see that senators kind of come and go in this process (laughter), terribly disrespectful (laughter). No, they're...no, actually, they have bills to introduce in other committees and in Senator Harr's case, he's got a briefing on some insurance matter. So they're not being disrespectful at all with their absence. Mr. Hallstrom, welcome back. [LB348]

ROBERT HALLSTROM: (Exhibit 2) Chairman Lathrop, members of the committee, my name is Robert J. Hallstrom, H-a-l-l-s-t-r-o-m. I again appear on behalf of the Nebraskans for Workers' Compensation Equity as well as the National Federation of Independent Business and have been authorized to express support for LB348 on behalf of the Nebraska Chamber of Commerce and Industry. I have circulated my written testimony. To be relatively brief, this legislation is patterned in large part after legislation that was adopted in Missouri in 2005. I have cited a number of cases that perhaps will provide the committee with a little bit better background on the types of injuries and the facts and circumstances that were existent in cases that were tried and determined in Missouri subsequent to their adoption of the prevailing factor law in 2005 which reflect the situations that Mr. Clarke had alluded to, specifically in connection with those types of preexisting injuries, minor or insignificant aggravations thereof that resulted in no compensation being payable under the three cases that are cited on pages 2 and 3 of my testimony. With that, I'd be happy to address any questions that the committee may have. [LB348]

SENATOR LATHROP: Bob, I do. You mentioned that Missouri adopted the prevailing factor test in 2005. Are there other states that have the prevailing factor test or does Missouri stand alone? [LB348]

ROBERT HALLSTROM: I had done some preliminary research, Senator. I think there's maybe a half a dozen states that either have a prevailing factor or some refer to it as a major contributing cause, different terminology but I think they all get to about the same end point in terms of effectuating the standard that applies to these types of situations. [LB348]

SENATOR LATHROP: Okay. Thank you. Appreciate your testimony, as always. [LB348]

ROBERT HALLSTROM: Thank you. [LB348]

SENATOR LATHROP: Other proponents? [LB348]

KORBY GILBERTSON: Good afternoon, Chairman Lathrop, members of the committee.

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

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 support of LB348. PCI very much supports the concept of adopting a prevailing factor concept in workers' compensation, and Mr. Hallstrom and the previous testifier did a fairly good job of explaining so I'd be happy to answer any questions. [LB348]

SENATOR LATHROP: Any questions for Korby? I see none. Thanks, Korby. [LB348]

KORBY GILBERTSON: Thank you. [LB348]

SENATOR LATHROP: Other proponents? Anyone here in opposition to LB348? [LB348]

STEVE HOWARD: Steve Howard, H-o-w-a-r-d, on behalf of the State AFL-CIO. If the bill passes, we would maintain that the first thing that's going to happen is there's going to be a whole lot of litigation because there will be claims that are denied and insurers and employers will want to test this law and want to push this and get some guidance from the appellate courts and from the Work Comp Court as to just what it means. It will drive work to lawyers and there will be claims that are denied, and the State AFL-CIO certainly isn't in favor of work-related claims being denied and unnecessary litigation. The other result that I think the committee ought to take into mind...into consideration respectfully is that when it stops being a workers' comp claim then the exclusive remedy provision of the Work Comp Act goes away and that would throw it into general, common law liability. In other words, employers may find themselves being sued in the district court on claims of negligence or claims of putting a person on a machine that should have been tested and having a person do work that's prone to lead to injury, so as comp claims go down, claims in the district court may go up. The other thing that will go up, Medicaid and Medicare and claims under health insurance, Blue Cross and Blue Shield and the health insurance companies that insure folks in the state, because these bills for these services are not going to go unpaid for. People are going to get healthcare and the cost is going to be borne by someone else somewhere else. So I believe that we heard earlier this year in committee hearings that rates in Nebraska are in fact, fortunately, going down historically over the past few years and so there is not an urgent need for this. But I guess I would just close by commenting that I've not had that experience of a 99 to 1 ratio between preexisting versus the 1 percent that results in an injury and been successful on those cases. Maybe I'm not doing a good job on those but the court all the time takes into account natural progression of a preexisting condition as opposed to one event that causes it. So for those reasons, because it's going to shift costs elsewhere, because it's going to drive up litigation in other areas and drive up litigation in the workers' comp arena, we oppose this bill. [LB348]

SENATOR LATHROP: Very good. Thanks, Steve. Are there any questions for Mr.

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Transcriber's Office

Business and Labor Committee
March 14, 2011

Howard? I see none. [LB348]

STEVE HOWARD: Thanks. [LB348]

SENATOR LATHROP: Thanks, Steve. Other opponents? [LB348]

TODD BENNETT: Todd Bennett on behalf of Nebraska Association for Trial Attorneys, and that's B-e-n-n-e-t-t. One of the first things I'd like to point out in opposition of this bill is this certainly is going to discriminate against anybody that is an older worker, anybody who's had a previous injury, anybody who has what they call asymptomatic, no pain and symptoms, injury or condition that is, as they want to put it, to propose this bill, a minor injury. What this also does is ironically put an accident for a physical injury in question with occupational disease. Nebraska has already stated, in Miller v. Goodyear, that a worker does not have a heightened burden because he's got a preexisting condition. Ironically, what this does is going to put the burden for workers' compensation cases much higher than what it is in a regular negligence third-party case. Ironically, in David v. DeLeon, which is one of the cases that they set out in the jury instructions, specifically says that a worker who has a negligent or an aggravation of a preexisting disease is entitled to full compensation until it is proven that there's a preexisting condition that produced any other disability prior to that accident. Otherwise, even that third party is liable for full compensation. Ironically, the Nebraska...in the work comp arena, in the case of Benson, the Supreme Court clearly says some money is entitled to the...if they're injured, for permanent problems, to full compensation. Then there's, ironically, 100 years of law dating back to 1922 which is the case of Gilcrest Lumber v. Rengler. Ironically, in that case, once you have an accident that produces an injury, combines with a preexisting condition, you're entitled to compensation. That's the law as is in the third-party case, that's the law in Nebraska. And again, in an occupational disease case, I will tell you this bill actually contradicts statute 48-151, which in the terms of the compact an occupational disease can be aggravated. This bill is in direct contradiction to that. There's no explanation of how they're going to go from the cause to the an aggravation. The terms in that section clearly conflicts with this statute...or this bill, as proposed. What it also does is not define cause, does not define prevailing, does not define factor. And Mr. Howard's comments of increased litigation, it's going to be a matter of a technical interpretation of how to litigate these claims and interpret this. We're going to start all over and we're not here to resurrect the wheel. Everybody knows the standard is, more likely than not, to a reasonable degree of medical certainty. The people that testified as a proponent for this bill clearly know the standard. This is going to change the standard and it certainly violates the equal protection of injured workers who have been hurt before, who had no problems through their preexisting condition. This is resurrected. We're not here to redo the wheel. Thank you. [LB348]

SENATOR LATHROP: Good. Todd, for those people in the room that don't do this work, a preexisting condition, a classic example is degenerative disk disease, right? [LB348]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

TODD BENNETT: Correct. [LB348]

SENATOR LATHROP: And degenerative disk disease is just the natural aging process. So when we talk about preexisting degenerative changes, we're just talking about guys who have MRI scans like mine might be, (laugh)... [LB348]

TODD BENNETT: Correct. [LB348]

SENATOR LATHROP: ...full of disks that are beginning to collapse and some changes that are age related. [LB348]

TODD BENNETT: Correct. Correct. [LB348]

SENATOR LATHROP: And they may or may not be symptomatic. [LB348]

TODD BENNETT: And they may or may not be symptomatic. Ironically, I guess one thing I'd like to add is when we're talking an unfair result if someone had a preexisting problem, there is the law that says if there was and they were compensated for it, you can't get compensated twice. That's still...there's credits and offsets. If they worked for the same employer, had the same body part and had a preexisting problem that was compensated, the employer gets credit for that. So we're not, again, we're not here to resurrect the wheel. [LB348]

SENATOR LATHROP: Okay. Senator Smith. [LB348]

SENATOR SMITH: Thank you, Senator Lathrop. You mentioned that this might be...end up being somewhat resulting in discrimination against the older workers. [LB348]

TODD BENNETT: Correct. [LB348]

SENATOR SMITH: But couldn't the same be said if employers do not feel they have some type of protection there could be a tendency to seek out younger employees and not to hire older employees? And, you know, we do have an aging work force that, you know, with retirement things going the way they are, they're going to want to remain in the work force, so it could go either way really on that particular argument. [LB348]

TODD BENNETT: It could. It could very well, but I tell you what, the goal is who's going to bear the risk of that economic loss. It's the industry, not a particular employer. And ironically, this is another reason why many were against getting rid of the Second Injury Fund a few years ago. The employer had that protection. They no longer have that protection. [LB348]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR SMITH: Okay. Thank you. [LB348]

TODD BENNETT: You bet. [LB348]

SENATOR LATHROP: I see no other questions. Thanks for your testimony. Anyone else here in opposition to LB348? Anyone here in a neutral capacity on LB348? Senator Lautenbaugh to close. And if you're Senator Fulton or Nelson, you can start showing up. (Laughter) [LB348]

SENATOR LAUTENBAUGH: It's almost like you think they're watching across the hall there but... [LB348]

SENATOR LATHROP: Well, I'm hoping so. [LB348]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman and members of the committee, for your attention to this today. I feel a little more composed than when I last saw you moments ago, which is good. This is just simply a policy choice and the horrors that have been predicted if something like this passed have not come to pass in Missouri yet. There's no evidence of that. I heard equal protection mentioned at one point even and this just doesn't seem to get there. But I do know something of this area and I do know that I've had cases where a gentleman with a profound hearing loss starts a job and ultimately, as time goes by, he works in a noisy place and his hearing loss has increased. Well, it's not very difficult to get that tied to the job and all of a sudden he's a "perm total." Even though when he was hired people had to write notes to communicate with him, he was so profoundly deaf then, he was more so. And it was found he was just unemployable because of other conditions that weren't work related but the hearing loss, which they were able to demonstrate a slight increase, that was what put him as a "perm total." This does happen. And it is correct, too, as was said, we're deciding here who's going to bear the burden. Is it going to be the employers paying the comp rates? Sometimes there is a wrong without a remedy and sometimes there's a right without a remedy, but sometimes someone will have an injury, a degenerative condition, a condition of life that is not simply work related. And this is designed to address the circumstance where, for whatever reason, efforts are made to make an injury, that wouldn't otherwise be work related, work related. Instead of the employer being on the hook for just what happened during the employment, we're tying in the rest of it. This bill is meant to address that circumstance. [LB348]

SENATOR LATHROP: Scott, can I ask a question, just in terms of your intent? And probably the most classic example is...and I'm going to make up a hypothetical person, obviously, but say a 50-year-old, 55-year-old pipe fitter never had a symptom in his life, picks up a pipe one day and, wham, feels something go in his back, shoots down his leg, and he's got a herniated disk. Most of the time in that scenario, and we've both seen those on either side of it, most of the time you're going to do an MRI on a

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

50-year-old and you're going to see degenerative change was there to start with, right? [LB348]

SENATOR LAUTENBAUGH: Uh-huh. [LB348]

SENATOR LATHROP: And that's, in my example, the guy is asymptomatic, doesn't have a symptom, never treated with anybody for the back problem, but as he arrived at age 50 has degenerative changes in his back. Under this bill, would that change? The outcome clearly would...the holdings in our system, in our court, they have said that would be a compensable injury. Would that change here, in your judgment? [LB348]

SENATOR LAUTENBAUGH: I don't believe so, no. There's actually an incident there you're pointing to. [LB348]

SENATOR LATHROP: Pardon me? [LB348]

SENATOR LAUTENBAUGH: There's actually an incident there you're pointing to that could...I mean life is a degenerative condition. I mean let's be honest, we're all falling apart at varying rates of speed, so (laughter)... [LB348]

SENATOR LATHROP: No, but that's...that really is what this discussion is about. [LB348]

SENATOR LAUTENBAUGH: It is. It is indeed. [LB348]

SENATOR LATHROP: We are falling apart at varying... [LB348]

SENATOR LAUTENBAUGH: It is indeed. [LB348]

SENATOR LATHROP: And so where...when does it become a prevailing factor because is that just the guy that had the recommendation for knee surgery before he picks up the pipe and aggravates his knee? [LB348]

SENATOR LAUTENBAUGH: That would be the clearest case or even at least treatment or some sort of a condition there that was identifiable beforehand. If you got into a circumstance where...your hypothetical where the gentleman picked up the pipe and one doctor said he had degenerative, you know, disease ahead of time, there would surely be someone else saying, well, yes, but it was asymptomatic; this is the event that did it. And that would be different than what we're talking about in this bill. [LB348]

SENATOR LATHROP: But couldn't the prevailing factor get us back to trying to decide whether somebody who didn't have the degenerative process would have had the injury? In other words, aren't we going to create an expert witness, if it's possible, well,

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

they'll clearly (laugh)...they'll materialize, the doctor who would say, it's my professional judgment this person wouldn't have had the injury lifting the pipe but for the degenerative changes? Is that where this is going? [LB348]

SENATOR LAUTENBAUGH: That's not what the bill is meant to get at specifically, certainly. [LB348]

SENATOR LATHROP: And that might be...you heard one of the criticisms... [LB348]

SENATOR LAUTENBAUGH: Yes. [LB348]

SENATOR LATHROP: ...which was we haven't defined what a prevailing factor is. [LB348]

SENATOR LAUTENBAUGH: Right. And I also heard, to expand on that a little, discussion that this would create more district court litigation. I don't see that as a realistic concern because there are comp injuries now that are found to be non-work-related and noncompensable. That doesn't lead lockstep to, well, then we'll start it out in district court. That means you haven't proven you had a workers' compensation injury. You still have to have some other kind of injury if you'd have a district court action. [LB348]

SENATOR LATHROP: But we run into this every time, every year in Business and Labor when we see attempts to change what's compensable from what isn't, and the argument is, well, if you're going to make that a noncompensable injury then work comp isn't the exclusive remedy and you can, assuming there's some negligence on a coworker, bring the suit in the district court, and I think that was the point is all. [LB348]

SENATOR LAUTENBAUGH: Right, and that, again, is not how I'm conceptualizing what we're talking about here. [LB348]

SENATOR LATHROP: I'm pretty sure that's true. (Laugh) [LB348]

SENATOR LAUTENBAUGH: Yeah. (Laugh) [LB348]

SENATOR LATHROP: All right. Well, thanks, Scott. We appreciate your answering the questions and your close. I have, before we close the record, I have a letter from Nebraska Insurance Information Services signed by Jim Dobler, dated today, in support of LB348; and Carlos Castillo, I'm sure there's people that know his name better than I do,... [LB348]

SENATOR COOK: Castillo. [LB348]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR LATHROP: ...Castillo, director of Administrative Services, in support of LB348. (Exhibits 3 and 4) They will be made a part of the record. And that will close our hearing on LB348 and bring us to LB272 and Senator Tony Fulton. Welcome, Senator Fulton. [LB348]

SENATOR FULTON: Thank you, Mr. Chairman, members of the committee. For the record, my name is Tony Fulton, T-o-n-y F-u-l-t-o-n, and I represent District 29 here at the Legislature. I bring to you LB272. The bill provides that reports filed with Nebraska Workers' Compensation Court, pursuant to Section 48-144.01, are to be confidential and not open to public inspection or copying, subject to specific exceptions. Such reports would not be open to public inspection or copying except as necessary for the compensation court to administer and enforce other provisions of the Nebraska Workers' Compensation Act unless: (A) the requester is the employee who is the subject of the report or an attorney or authorized agent of the employee; (B) the requester is the employer, workers' compensation insurer, risk management pool, or third-party administrator that is a party to the report or an attorney or authorized agent of such party; (C) the requester is an authorized agent, authorized representative, attorney, investigator, consultant, or adjuster of an insurance carrier for a third-party administrator who's involved in administering any claim for insurance benefits related to any injury of the employee whose report is filed with the compensation court; (D) the report is used for the purpose of state or federal investigation or examinations or for the state or federal government to compile statistical information; (E) the report requested is sought for the purpose of identifying the number and nature of any injuries to employees of an employer identified in the request without revealing the identity of any employee; or (F) ordered by a court of competent jurisdiction. The bill is designed to curb the avalanche of communications which injured employees receive once the report of first injury is filed with the Workers' Compensation Court. Protecting injured workers from this invasion of privacy should cause no harm to employees in need of legal representation. There can be little doubt that injured employees have adequate access to information regarding potential legal representation for their claims, as many lawyers advertise on television and radio and a host of lawyers are listed in the yellow pages of the local phone book. Employees' rights and access to information are further protected by the fact that the Workers' Compensation Court has an 800 number which employees may call to obtain information regarding court procedures and their rights under the workers' compensation system. Moreover, the Workers' Compensation Court publishes a pamphlet which explains the rights and obligations of both employers and employees. It appears that the vast majority of work-related injuries are handled between the injured employee and their employer or insurance carrier without the need for litigation or legal intervention. The communications by lawyers pursuant to information contained within the first injury reports produce unnecessary conflicts and needless litigation, thereby increasing the costs of the workers' compensation system and, therefore, reducing the net benefits received by an injured employee. The first reports of injury often contain sensitive medical information related to an injured employee. While workers'

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

compensation is exempted from the provisions of HIPAA, it is safe to assume that most individuals have a greater expectation of privacy with regard to records relating to their medical condition. Restricting access to workers' compensation first reports of injury does not appear to be unique or unprecedented. Approximately 40 states have some form of restriction on access to Workers' Compensation Court records. In addition, state law provides similar confidentiality protections to unemployment insurance records as those proposed for workers' compensation first reports of injury under this bill. I respectfully request the committee's consideration and advancement of LB272. [LB272]

SENATOR LATHROP: Thank you, Senator Fulton. Any questions for Tony? I see none. Are you going to stick around for close? Okay. [LB272]

SENATOR FULTON: No. Thank you. [LB272]

SENATOR LATHROP: Appreciate your introduction of this bill. And proponents include Mr. Hallstrom. [LB272]

ROBERT HALLSTROM: Chairman Lathrop, members of the committee, my name is Robert J. Hallstrom, H-a-l-l-s-t-r-o-m. I appear before you today as a registered lobbyist for Nebraskans for Workers' Compensation Equity and Fairness, and also the National Federation of Independent Business in support of LB272. I've also been authorized to express support on behalf of the Nebraska Chamber of Commerce and Industry for this legislation. Senator Fulton has done a nice job of incorporating most of my testimony into his opening remarks so I will be brief. I do want to note for the committee that the provisions of 48-612 and 48-612.01 are those that reflect almost identical confidentiality protections under the unemployment insurance law in the state of Nebraska as to those that are proposed under LB272. I do want the committee to know that late last week Mr. Glenn Morton, who is the administrator of the Workers' Compensation Court, had expressed some interest in some amendments to LB272. I have not had an opportunity to fully digest those but I have talked with him and we certainly do not appear to have any objections. We just don't have anything drafted for the committee consideration today. Be happy to address any questions. [LB272]

SENATOR LATHROP: Okay. Thanks, Bob. Any questions? I see none. [LB272]

ROBERT HALLSTROM: Thank you. [LB272]

SENATOR LATHROP: Other proponents? [LB272]

KORBY GILBERTSON: Good afternoon again. [LB272]

SENATOR LATHROP: Good afternoon. [LB272]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

KORBY GILBERTSON: Chairman Lathrop, members of the committee, for the record my name is Korby Gilbertson, 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 and Lincoln Public Schools. This bill is fairly similar to one that we've already heard today and ones that we've heard in the past. One note I wanted to make in addition, based on some testimony in the opposition to the earlier bill, was that they don't get very many complaints from members regarding the solicitations they get. That was the number one message I got from Lincoln Public Schools, that they get blamed all the time for reducing their information to people and that the employees actually assume that it was LPS that released information for the solicitations. So they do get a number of complaints about that, so it is not something to just pass up. [LB272]

SENATOR LATHROP: Thanks, Korby. [LB272]

KORBY GILBERTSON: Thank you. [LB272]

SENATOR LATHROP: Any questions? I see none. [LB272]

KORBY GILBERTSON: Thank you. [LB272]

SENATOR LATHROP: Thank you. Other supporters of LB272? Anyone here in opposition to LB272? [LB272]

STEVE HOWARD: Steve Howard, H-o-w-a-r-d, for the State AFL-CIO, and I guess I was the one that said that we don't get a lot of complaints. Maybe it's just a different experience. I'll tell you, we turn away...not turn away but we decline representation of a huge number of folks that come in and want to talk about their work comp rights. You know, I'll talk to anybody about their work comp claim, you know, with no charge and the majority of the time, at the end of the conversation, I'll say, well, it looks like they're paying what they should be paying or, you know, maybe you've got some mileage due they didn't know about, but access to lawyers, it's important. We don't do these direct solicitations but I suggest to you that there is most likely a certain percentage of the working population that it may not occur to that they have some work comp rights. You know, a lot of times a person gets hurt and they think it's their own fault. If the delivery driver gets in a wreck and they feel badly about it and they're hurt, the first thought isn't to sue the company. And so to restrict access to attorneys I think would be the outcome of this legislation. I know the testimony often turns into little stories about cases, but access to first reports of injury helped us earlier this year and I'll just tell a short story. Had a claimant that was not given his Form 50 by his employer. Gets hurt, employer is supposed to give him a Form 50, write down the name of your family doctor here on the form, and the employer didn't do that. And there really isn't much of a penalty for that, no real consequence, so I sat the employer down and said, well, gosh, you know, all this medical care, long before I got involved, started with the company doctor, not with

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

our doctor. And the owner of the company said I've never had a claim before, I'm not familiar with this, I just thought we'd send him to our doctor. And we were able to prove, through other names of other workers, that there were at least two prior injuries and it sort of rebutted the notion that this fellow didn't know about workers' comp and I think it will do us some good down the road. So you know, like I said, I just don't hear this outcry but I can't speak for everyone that gets one of these letters. But we would oppose LB272 for those reasons, and I'm happy to take any questions. [LB272]

SENATOR LATHROP: Do you have...was that a question? [LB272]

SENATOR SMITH: Yes. [LB272]

SENATOR LATHROP: Yes, Senator Smith. [LB272]

SENATOR SMITH: Thank you, Senator Lathrop. You said you think this would serve to deny access to attorneys. Where do you see that? [LB272]

STEVE HOWARD: Well, people get a letter in the mail and they see here's your first report and then they may go talk to that lawyer. You're right, it's not in the bill, but that's what's happening now, as I understand it. First reports of injuries, you can get them from the court and there are a small batch of attorneys that will send a letter to the worker and that may be a person that doesn't know what their rights are and it doesn't occur to them to pursue workers' comp as opposed to their health insurance. So that's the way that we would worry about it maybe decreasing access. [LB272]

SENATOR SMITH: But it would not deny their attorneys access to the information that's necessary. [LB272]

STEVE HOWARD: As I read it, after being hired they would certainly have access if they fill out the form so, yeah. [LB272]

SENATOR LATHROP: Okay. Thanks, Steve. [LB272]

STEVE HOWARD: Thank you. [LB272]

SENATOR LATHROP: Anyone else here to testify in opposition? [LB272]

LEE LOUDON: Thank you, Senator Lathrop and members of the committee. My name is Lee Loudon, L-e-e L-o-u-d-o-n. I'm here on behalf of the Nebraska Association of Trial Attorneys in opposition to LB272. I would echo what the previous witness, Mr. Howard, said. I, too, represent workers' compensation claimants and I have had situations where employers have denied the meritoriousness of a claim. For example, an employer claimed that they had never had this type of injury before, and through

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

access to the first reports of injury, not just for my client but for other persons who had been injured at this employer, I was able to locate witnesses who were able to say that what the employer was telling me was not true, that this was a continuous problem with this particular type of machine and that other individuals were getting hurt. I think the access to the first reports of injury are important because it allows attorneys to do additional discovery and verify what we're being told, both by our clients and by the employers. For that reason, I oppose LB272. [LB272]

SENATOR LATHROP: And your point is...and I think Mr. Howard just made it, and that is people get hurt and the law requires, just for those that don't understand it, what the rule is. The rule is if somebody gets hurt in your workplace and you work in the state of Nebraska, you're required to file a first report of occupational injury. Those are now down in the Work Comp Court clerk's office or administrator's office and there are some lawyers that go through those and mine them for potential clients and send letters out. Right? [LB272]

LEE LOUDON: Yes. Yes. [LB272]

SENATOR LATHROP: This would...this bill would have the effect of stopping that practice, but it would also prevent a lawyer who's trying to prove a repetitive trauma kind of an injury, that that happens at the packing plant, the guy that does this all day long on the side of a beef, that that's a common type of an injury for a particular position. [LB272]

LEE LOUDON: Exactly. That's the very situation that I had. I represented an individual who worked at a packing plant in Grand Island and he had torn his rotator cuff and the employer said, well, this is the first time we've seen an injury like that. And if LB272 were passed, I wouldn't be able to do the research necessary to get the first reports of injury concerning this employer of other individuals who had had this similar kind of injury at this employer. And through my research on that case several years ago, I was able to prove that there were other individuals having this identical kind of injury and I was able to prove the case to the satisfaction of the judge and get my client the surgery that he needed to fix his shoulder. [LB272]

SENATOR LATHROP: Good. [LB272]

LEE LOUDON: So I just think it's overkill, that it's designed, I guess, to screen out the attorneys who send these solicitation letters, but also would block those other attorneys who just use it to do discovery, to do research to try to help individuals. It would impede that. [LB272]

SENATOR LATHROP: Okay. Any questions for Mr. Loudon? Senator Smith. [LB272]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR SMITH: Thank you, Senator Lathrop. So it doesn't sound like you have any problem with this bill as it relates to solicitation, only to research. [LB272]

LEE LOUDON: Well, I'm not sure how you could change the bill so it would allow other individuals like me to do the research. See, I looked at the...sorry to... [LB272]

SENATOR SMITH: And that being the...yeah, that being the issue--how you would separate that out. [LB272]

LEE LOUDON: Yeah. Right. [LB272]

SENATOR SMITH: But that's your main argument. [LB272]

LEE LOUDON: Right. Subparagraph (e) I don't...would still not allow us to get the names of the individuals and that's what you need. It said you could find out the number and nature of the injuries but still you've got to be able to talk to witnesses, you got to have names so you can ask them, you know, like in my case, have...did you injure your shoulder out at the meat packing plant as well and would you be willing to be a witness? And in my case, the guy said, yes, I'm glad to help. [LB272]

SENATOR SMITH: Fine. Thank you. [LB272]

LEE LOUDON: Thank you. [LB272]

SENATOR LATHROP: Thanks, Mr. Loudon. Anyone else here in opposition to LB272? Anyone here in a neutral capacity? Okay. That will do it for our testimony but I need to make a point or make a note, which is we have another letter from Cline Williams law firm, signed by Shawn Renner again, opposed to LB272 on behalf of Media of Nebraska, Inc., and that letter and his opposition will be made a part of the record. (Exhibit 5) That will close our hearing on LB272 and bring us to LB291 and Senator Nelson. Welcome to the Business and Labor Committee. [LB272]

SENATOR NELSON: Thank you, Chairman Lathrop and members of the Business and Labor Committee. For the record, my name is John Nelson, spelled J-o-h-n N-e-l-s-o-n. I represent District 6 in downtown Omaha, midtown Omaha rather and almost downtown. I am here today to introduce LB291. LB291 is designated in part to address a recent Court of Appeals decision in which the court confirmed that the modification of a workers' compensation award may not be applied retroactively. This legislation provides that a modification of a workers' compensation award, in a case where the parties cannot agree on the ground of increase or decrease in disability, is effective as of the date that the increase or decrease actually occurred. LB291 would provide greater flexibility and fairness for both employees and employers in cases where an increase or decrease in compensation is warranted but the filing on the application for

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

modification is delayed. With respect to the manner in which overpayments or underpayments would be made in cases in which a retroactive modification was ordered, LB291 would grant the Workers' Compensation Court discretion to require repayment of an overpayment received by an employee when no further benefits are payable but would require the court to mandate reimbursement of any overpayment received by the employee in cases where future income benefits are due. In cases in which an employee has an award modified to increase benefits, an employer would be required to reimburse the employee for underpayments resulting from the retroactive application of the modification, irrespective of whether future benefits are due. LB291 would also eliminate the requirement that an application for modification in cases in which the parties cannot agree may only be filed after six months from the date of the original agreement or award of benefits. There will be testifiers following me who are experts in the area of workers' comp and who will be better able than I to answer detailed questions. I thank the members of this committee and request that you vote LB291 to General File, and I will be pleased to answer any questions that you might have. [LB291]

SENATOR LATHROP: Thanks, John. Any questions for Senator Nelson? I see none. Are you going to stay around or you got to get back? [LB291]

SENATOR NELSON: I will. I will stay, yes. [LB291]

SENATOR LATHROP: Okay, good. Thanks, John. [LB291]

SENATOR NELSON: Thank you, Senator. [LB291]

SENATOR LATHROP: The first proponent of LB291, if any. Come on up, Mr. Clarke. And even though you've been here before, we're going to have you do your name again, all right? [LB291]

TIMOTHY CLARKE: I'm happy to do that. [LB291]

SENATOR LATHROP: All right. Good. [LB291]

TIMOTHY CLARKE: Chairman Lathrop, members of the committee, Timothy Clarke, appearing as a proponent of LB291 on behalf of Nebraskans for Workers' Compensation Equity and Fairness. As was pointed out, LB291 changes the modification procedure currently codified in 48-141. Under the current statute, if the parties cannot agree when to modify a previous award from the Workers' Compensation Court, the party who wishes to modify the award, whether it be the employee or the employer, has to wait six months and then can file the petition for modification. The appellate courts have indicated that once a petition to modify has been filed, benefits cannot be changed retroactive prior to the date of the modification. And what I would

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Transcriber's Office

Business and Labor Committee
March 14, 2011

point out is this creates a situation that potentially affects both employees and employers, and in fact there are two cases that discuss this, one in the context of impact against the employer and the other in the context of impact against an employee. The appellate court decision that I think was cited by the senator in opening remarks is the Daugherty v. Douglas County decision. In that case, an individual...an award was entered by the court. The individual, subsequent to the award, reached maximum medical improvement and had returned to work full-time, but a period of time had gone by before the petition to modify was filed. The petition to modify was ultimately filed and the court said, even though the individual had returned to their full duty, full work, earning their full wages, that because of this procedural rule that says you cannot modify prior to the date the petition to modify is filed what ended up happening is the employee received both their full wages during the period of time they had returned to work and their full temporary disability indemnity rate. And the court did indicate that this appears to create a windfall in favor of the employee but, again, because of the procedural rule that was allowed. In the Bronzynski case, which is also a Court of Appeals decision from the state of Nebraska, this procedure worked in the opposite way. In that case an individual had reached maximum medical improvement by the time of trial and was awarded permanent disability, but subsequent to that had to undergo an additional revision surgery and, because of the second surgery which occurred after the time of trial, was arguably entitled to temporary total disability benefits, but they weren't paid those benefits because the original award did not provide for those benefits. The petition to modify was ultimately filed, but the court said even though there really isn't a dispute that this person needed the second surgery and was off of work as a result of the second surgery, because they could not apply benefits retroactive prior to the date of injury the employee was not entitled to temporary disability benefits even though there really wasn't otherwise a dispute as to the fact that this surgery was needed and the employee was off of work. So any questions? [LB291]

SENATOR LATHROP: Very good. Thank you, Mr. Clarke. I see no questions. [LB291]

TIMOTHY CLARKE: Thank you. [LB291]

SENATOR LATHROP: Appreciate your testimony and coming down here today. It's a new face from Baylor Evnen. [LB291]

TIMOTHY CLARKE: Yes. Thank you. [LB291]

ROBERT HALLSTROM: (Exhibit 6) Chairman Lathrop, members of the committee, my name is Robert J. Hallstrom, H-a-l-l-s-t-r-o-m, appear before you today in support of LB291 on behalf of the Nebraskans for Workers' Compensation Equity and Fairness and the National Federation of Independent Business. I've also been authorized, for the record, to express support on behalf of the Nebraska Chamber of Commerce and Industry. Senator Nelson and Mr. Clarke have addressed the majority of the Daugherty

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

case, which gave rise to this. I would note in the opinion, which is attached to my testimony, the court decision that's attached to my testimony, that the court did suggest that there may have been a windfall here; that because the court doesn't have equity jurisdiction, they could not provide the employer with credits for those wages that were paid during the time that they ultimately had to also pay temporary total disability benefits, and they also suggested that it was a matter better left to the Legislature. Thus, we are here today. I would suggest that in looking at this case, the second thing that it does is to remove the six-month waiting period, if you will, for the ability of either the employer or the employee to file an application for modification. We've tried to go back in the legislative history to determine why that six-month period was placed there. It has been in the law for quite some time. But also, until approximately 1988, there was also a provision in the statute that indicated that any award or agreement that was less than six months in duration was not subject to review or appeal. That was ruled unconstitutional by the court in 1988. Whether or not those two parts of the statute were intertwined when they were put together many, many years ago I'm not sure, but it seems to be fair to provide that there not be a six-month waiting period for those applications to be filed in the event that there is an entitlement to either an increase or decrease in benefits. Be happy to address any questions. [LB291]

SENATOR LATHROP: I'm just trying to headnote this while you were talking, Bob, and I'm trying to understand it or make sure that I understand your concern. It says the modification award cannot be applied retroactively beyond the date the application for the modification is filed. That really is kind of a fairness thing, isn't it? I mean an employer could just kind of sit around and overpay somebody and then come in a year afterwards and say, you know what, I think we overpaid you about a year ago. [LB291]

ROBERT HALLSTROM: Senator, I'm not sure employers would knowingly overpay. I think most times they find that they're not able to recoup those overpayments in many of the situations, so I probably wouldn't be that concerned about that particular situation. I think the facts in Daugherty perhaps--admittedly, not had time to go through that--but we had a situation where an employee was injured and had a running award entered, came back to work, was returned to work at full wages, got laid off a second time because of injury, temporary total disability benefits were paid during that time period, came back to work a second time, worked for almost a year during which regular wages were paid, finally got to the point where he could not return to work and the temporary disability benefits were paid again. The employee went back into court to get some medical payments authorized and in the course of getting those medical payments authorized the court said, oh, by the way, even though you were receiving regular wages when you went back to work, no one came in to modify the award and they went to...could have gone back to day one but said this procedural aspect of not being able to retroactively adjust the benefits or modify the benefits prevented them from doing so. [LB291]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR LATHROP: The rule also is you have to wait a certain period of time before you can modify an award. [LB291]

ROBERT HALLSTROM: And that's also... [LB291]

SENATOR LATHROP: Is that part of what you're trying to fix? [LB291]

ROBERT HALLSTROM: Yes, also in the bill is a six-month waiting period, is what I call it. It just says if there's no agreement, you have to wait at least six months before you can file application to modify. Again, I can't conclusively say but in the statute many, many years ago there was a provision that said if you have an award that's less than six months you can't... [LB291]

SENATOR LATHROP: I think that sounds right to me too. [LB291]

ROBERT HALLSTROM: ...can't review it. [LB291]

SENATOR LATHROP: And that's just to keep people from coming back over and over and over. [LB291]

ROBERT HALLSTROM: It could, although that six-month nonreviewable was ruled unconstitutional so... [LB291]

SENATOR LATHROP: Oh, was it? Okay. [LB291]

ROBERT HALLSTROM: Yes. So whether or not the two were tied together, but it seems to make some sense to us. I think we're sensitive of the fact that you may want to not have people coming back and modifying but there has to be a justification that probably is going to precipitate someone filing that. [LB291]

SENATOR LATHROP: Right. [LB291]

ROBERT HALLSTROM: But if it is warranted, why wait six months? [LB291]

SENATOR LATHROP: Okay. I think I get it. Thank you. [LB291]

ROBERT HALLSTROM: Thank you. [LB291]

SENATOR LATHROP: Proponents, other proponents. You have a special interest in this one. (Laughter) [LB291]

BERNARD MONBOUQUETTE: Yes, I do. [LB291]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR LATHROP: You can fill that out afterwards. [LB291]

BERNARD MONBOUQUETTE: Thank you. [LB291]

SENATOR LATHROP: I'll give you permission to go ahead just to keep things moving along, Bernie. [LB291]

BERNARD MONBOUQUETTE: Thank you. Good afternoon, Senators. My name is Bernard Monbouquette. I'm a deputy county attorney from Douglas County. And I was involved in the Daugherty case with Matthew Lathrop, the capable counsel for the employee, and it became obvious that this was something that would be deserving of legislative involvement. The judges of the Workers' Comp Court indicated their inability to prevent a duplication of payment to the employee because they felt that there was no legislative basis for their taking any kind of equity action to prevent unfairness and that the standing of the last case of the Nebraska Supreme Court said we'll only allow a modification to go back to the date that you filed the application rather than going back to the date of the change that precipitated coming in and asking for a modification. So because of the shortfalls in the statute, the employee was paid not only for the time that he worked full-time without restriction but he was paid as if he was totally disabled. And so that...I don't think that's the spirit or the philosophy of Nebraska that somebody be paid twice and it was a long case, a 2002 injury that is involved here. And throughout the dealing, the employer and the employee were able to go back and adjust the employee's status as either been working full-time and therefore receiving a wage or not being able to work and therefore receiving total workers' comp benefits. And after a period of time, when the employee was unable to work due to his own doctor's restriction, he came and asked the employer, I'd like to come back to work. And after checking to see if medically he was able to do that, the employer said yes, but of course we didn't go back to the Workers' Comp Court and get the order changed. So after a year of the employee working, it became obvious that the order had never been modified. So we asked the court to modify the order to reflect the fact that he was no longer disabled and able to work and they said, fine, but we can only go back to the date that you made this request. So there was a duplicate payment of about one year. [LB291]

SENATOR LATHROP: Is that, as a practical matter, is that one of those things that's just sort of an alert to employers, hey, listen, if you bring the guy back or if his situation changes, file an application right away and we avoid this? [LB291]

BERNARD MONBOUQUETTE: I don't disagree with you. [LB291]

SENATOR LATHROP: Okay. [LB291]

BERNARD MONBOUQUETTE: If we had been more diligent and said, no, I'm sorry,

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Transcriber's Office

Business and Labor Committee
March 14, 2011

you can't come back to work until we go to the court and get this order modified, we could have done that and not allowed him to come back to work. But it seemed sort of silly when somebody says we want to come back to work. [LB291]

SENATOR LATHROP: Right. [LB291]

BERNARD MONBOUQUETTE: Say, fine, can you be there Monday? Yes, I will. Okay, we'll stop your comp benefits and... [LB291]

SENATOR LATHROP: But as a practical matter now, from your point of view as being associated with Douglas County, your practice then would be okay, well, we're going to sign a stipulation that you're no longer totally disabled and then you can come back. [LB291]

BERNARD MONBOUQUETTE: Yes. [LB291]

SENATOR LATHROP: Okay. [LB291]

BERNARD MONBOUQUETTE: I think it's the Workers' Comp Court's inability to do equity, I think, that was troublesome and they said, yeah, this looks like an overpayment to us but we can't do anything to prevent the unfairness of it all. [LB291]

SENATOR LATHROP: And just as a practical matter, we can appreciate they're a court of limited jurisdiction and giving them equity powers probably isn't going to happen here. [LB291]

BERNARD MONBOUQUETTE: Okay. [LB291]

SENATOR LATHROP: No, I mean you would agree with that that's not the...I mean we can change some rules around but we can't give them equity powers. You would agree with that? [LB291]

BERNARD MONBOUQUETTE: I would hope that there would be... [LB291]

SENATOR LATHROP: Just philosophically. [LB291]

BERNARD MONBOUQUETTE: Philosophically, well, I don't know where their equity power comes from but for the Legislature. [LB291]

SENATOR LATHROP: Okay. Terrific. [LB291]

BERNARD MONBOUQUETTE: But I think this ability to modify the order, there's no reason not to allow them to go back to the date when the change actually occurred.

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

That makes sense. [LB291]

SENATOR LATHROP: Right. You've explained the bill. Between you and Bob, I think I get it and it's clear to me and I think the members of the committee. So thank you, Bernie. [LB291]

BERNARD MONBOUQUETTE: Thank you. [LB291]

SENATOR LATHROP: Appreciate it and always good to see you. [LB291]

BERNARD MONBOUQUETTE: Thank you, Senators. [LB291]

SENATOR LATHROP: Next person, if any, in support of LB291. Anyone here in...oh, I'm sorry, Tad. [LB291]

TAD FRAIZER: Just very quickly, Senator, members of the committee, my name is Tad Fraizer, that's T-a-d F-r-a-i-z-e-r, local counsel for the American Insurance Association, a national trade association of property and casualty firms, including some that write worker compensation insurance. And just very briefly for the reasons that have been previously cited by the prior witnesses, we'd be in support of the general concept of the bill. And would try to answer any questions you might have. [LB291]

SENATOR LATHROP: Very good. I see no questions. Thanks, Tad. [LB291]

TAD FRAIZER: Thank you, Senators. [LB291]

SENATOR LATHROP: Anyone else here in support of LB291? Anyone here in opposition? [LB291]

TODD BENNETT: Good afternoon. Todd Bennett for the Nebraska Association of Trial Attorneys again. First and foremost, this is a matter of when we have stipulation in agreements, awards in orders. It's not dealing with any other situation. The reason that's important is because the first thing you have to do is file an application in front of the court to modify that order. Ironically, I actually agree with part one of that bill. Let's get rid of the six months because there's...for every bad case you heard from the employer side, there's a bad case on behalf of the injured worker. However, for the rest of the bill it's totally far-fetching, it's overreaching, and frankly the court already has the power to provide offsets, to provide credits. The first thing I want to point out is, in this first section, is it says an application may be filed. That's going to leave a unilateral decision for anybody to say, well, we're going to interpret it this way and we're going to apply it this way and so forth. The reason it should be a requirement and say "shall" have an application filed is because we're dealing with court orders. The reason that is, is once you file that court order a judge can determine from that date when payments are due,

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

when the credit is due and so forth. There's no unilateral discretion in this between a party. It's up to the court to determine when the date of that compensation starts. For the rest of this bill, as far as overpayments, underpayments, overpayments, again, the court has the power to assess offsets and credits. Clearly they can. With respect to underpayments, this actually is rewriting statute 48-119. That statute is when compensation is payable. Clearly, it's from the date of injury and date of disability. There's case law interpreting that, the only difference being in this particular bill they want to start from a date they choose. That's not fair to a plaintiff, it's not fair to an employer. The requirement that the court sets out is you have to file a modification. It's a matter of filing delays and that we should have equity to go back and change it. Frankly, if you're countering, we're all big boys, we live by rules. We live by rules. Everybody knows right now the status of that is once you file the modification, that's the date from when the compensation is due and payable and/or determined, as well as offsets and credits. With respect to the six months, again, for every good case, you just heard there's a bad case. And yet, for example, if somebody gets a court order, has a surgery a week later, they can't come in and rectify that to be paid from the date of surgery. They have to wait six months. So again, for every good case there's a bad case, but to the rest of this bill we already have offset and credits. The court already has the power and we know when compensation is due and payable. [LB291]

SENATOR LATHROP: Very good. Thanks, Todd. Any questions? See none. Thank you. Anyone else here in opposition? [LB291]

STEVE HOWARD: Steve Howard, H-o-w-a-r-d, for the State AFL-CIO in opposition. And I agree with what Mr. Bennett said. You know, this scenario is not going to repeat itself in the future cases that are filed before the court because all employers are now clearly on notice, if they weren't before, that when the person goes back to work you file the application. It isn't the day you go back in front of the judge to have it modified, it's the day you file the application. You can do it on one piece of paper or maybe two pages, fax it to the court, no filing fee. It's simple. In the real world what happens is the parties agree. You get a call from the defense lawyer, hey, we're putting this employee back to work, can we agree to modify the award accordingly, and it's worked out. And so I don't think you're going to...I don't think the court is going to see this scenario happening again. And it really is one case. It's an aberration. But some other things that I might bring up, I would respectfully argue that the language, especially in that second section, there may be some constitutional problems because it talks about the court, in its discretion, ordering the repayment. That discretion doesn't have any guidelines. It would be an unconstitutional delegation from the legislative branch to the judiciary to decide what factors to take into account for that discretion and when is a judge supposed to order it, when should he or she not order it. So that's a concern that we have. But while we're on the subject of this modification of an award, the language as it exists now states that you can only modify if there's an increase or decrease due solely to the original injury, due solely to the injury. We always have this fear when we're trying

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

our cases that the day after you walk out of the courtroom or maybe the day you get the award an employee gets fired or the plant closes or there's some other significant factor out there that has nothing to do with the injury. So if the Legislature were...and this committee were to ever consider a modification, you know, in a broader sense, something maybe like the divorce statutes are, if there's a significant change in material circumstance, because a lot more than the injury that goes into what the person's benefits are. Maybe that's for another day, but to get an increase in your award you have to show your injuries made you worse and that's a pretty steep standard. But, you know, we don't think the bill is necessary. We think the law has been made clear by the Court of Appeals. And with that, I don't have any other comments today. [LB291]

SENATOR LATHROP: Very good. Thanks, Steve. [LB291]

STEVE HOWARD: Thank you. [LB291]

SENATOR LATHROP: Any questions for Mr. Howard? I see none. Anyone else here in opposition to LB291? Anyone here in a neutral capacity? Okay. I'm going to make a part of the record a letter from Jim Dobler with Nebraska Insurance Information Services in support of LB291. (Exhibit 7) And, Senator Nelson, would you care to close? [LB291]

SENATOR NELSON: Thank you very much, Senator Lathrop. I'll be brief. I'm not going to involve myself in the opposing views here but I was taken by your comment that this was a matter of fairness. I think if I were a judge on the comp court, I would appreciate guidelines to the extent that the judge can get them from the Legislature, and I think that's exactly what we have here. If you'll refer to the green copy down at the bottom, if there's an overpayment, this is starting line 24 and 25, the court determines an overpayment of income has been made and no further income benefits are due, the compensation court, in its discretion, may order the employee to pay. Well, I think it's important there, there are going to be instances and we all know that sometimes work comp payments just don't cover everything, and if there are no future benefits due then this gives the court some discretion to say we aren't going to award this, we aren't going to require that of the employee. If, however, there are future benefits due then it says that they shall, over a period of time, with one or two methods prescribed here, go ahead and pay that out. And then it goes on the rest there of subsection (2) just to set out exactly how things will work. And although it's been stated that this case was an aberration, why don't we rectify things now and make sure that other cases coming along that might be just as difficult don't have to have the kind of outcome that we experienced here? And we as a Legislature and you as a committee certainly, if these seem reasonable and fair, we can put these out on the floor. And I would urge you then to advance LB291 to General File. [LB291]

SENATOR LATHROP: Very good. Thanks, John. [LB291]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR NELSON: Thank you, sir. [LB291]

SENATOR LATHROP: Any questions for Senator Nelson? I see none. Thank you and you're free to return to Appropriations. (Laugh) [LB291]

SENATOR NELSON: Thank you. I'm in no hurry. [LB291]

SENATOR LATHROP: Yeah, I imagine. I'd want to be up here too. Thanks, John. We'll give everybody a chance or those that need to leave a chance to leave before we get on to the claims bills, and if you need to stretch, members, feel free to. This is going to take a little while. It takes a little while. [LB291]

BREAK

SENATOR LATHROP: (Recorder malfunction)...bill before. Shannon, who's with the Risk Management,... [LB585]

SHANNON ANDERSON: Risk Manager, uh-huh. [LB585]

SENATOR LATHROP: ...is going to testify. As we go, if you have questions, ask them as we go or feel free to interrupt her as she testifies, because it will be...it will probably be easier for everyone if you ask the questions as we go. Molly will introduce the bill, then Shannon will testify, and she's with the claims office, as I said. We are taking up first the bill with claims. [LB585]

MOLLY BURTON: Yes. [LB585]

SENATOR LATHROP: Is that true? Okay. And then Shannon has brought with her people who can speak to each of these bills that are...or each of these write-offs or claims which are of consequence and they will not be up here to testify unless somebody wants to hear from them. Otherwise, we'll just run right through them. Okay. And with that, Ms. Burton. [LB585]

MOLLY BURTON: (Exhibit 8) Senator Lathrop, members of the committee, my name is Molly Burton, B-u-r-t-o-n, legal counsel for the Business and Labor Committee, here to introduce LB585, which is a Business and Labor Committee bill and it does contain the approved claims against the state of Nebraska. Currently in LB585 you'll see claims pertaining to torts and workers' compensation and then some agency write-offs, writing off uncollected debt. Shannon Anderson is here. She is now the Risk Manager for the state of Nebraska. She'll go through those claims. She's also brought with her, as Senator Lathrop mentioned, agency representatives. There is an amendment. It's attached or it's after the green copy of LB585 in your packet. That does add some new claims. And apparently there's an additional claim that will be added to that amendment

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Transcriber's Office

Business and Labor Committee
March 14, 2011

that just came down today. And there are some...a couple miscellaneous claims, another tort claim, and it also adjusts the funding source amounts to reflect those additional claims. And Ms. Anderson will touch on the amendment as well. [LB585]

SENATOR LATHROP: Very good. Thanks, Molly. Shannon, who has the distinction of being the former counsel to this committee,... [LB585]

SHANNON ANDERSON: That's correct. Thank you, Senator. [LB585]

SENATOR LATHROP: ...and now in the role of...yeah, welcome back. [LB585]

SHANNON ANDERSON: (Laugh) Thank you very much, Senator. For the record, my name is Shannon Anderson, S-h-a-n-n-o-n A-n-d-e-r-s-o-n. And as Senator Lathrop explained, we have in LB585 a series of claims and then we have an AM771. For purposes of making available to the committee the representatives that he's already referenced, I have clustered my testimony so that it would be easier for you to call upon representatives and so it doesn't follow the bill order. So if you follow my testimony, though, you'll know where we are on the claims. So we do have...I just want to, for the agency write-offs, Senator Lathrop had asked arbitrarily for a cutoff of \$25,000 and above those agencies. And I want to point out that we have on hand here representatives from the Energy Office, Game and Parks, Department of Health and Human Services, Department of Insurance, and Department of Roads. And then for the other claims we have representatives from the Attorney General's Office. So with that, we'll begin with tort miscellaneous claims. In total today we'll be discussing 30 claims. This first category will have 12 claims and then they're broken out in clusters as well. So for the first four claims, we have Claim 2008-02654 which is Michael Ellsworth, guardian for Debra L. Bauer. Ms. Bauer was a resident of Beatrice State Developmental Center, suffered two broken legs and sought damages for these injuries and pain and suffering. The case was settled September 3, 2010, for \$190,000, payable to the Debra Lee Bauer trust; attorney's fees in the amount of \$10,000 have already been paid. Claim 2000... [LB585]

SENATOR LATHROP: Can I...I'm going to interrupt you... [LB585]

SHANNON ANDERSON: Okay. [LB585]

SENATOR LATHROP: ...just for a second. Can you, before you go further, tell us what the claims process is just for everybody... [LB585]

SHANNON ANDERSON: Oh, absolutely. Absolutely. [LB585]

SENATOR LATHROP: ...who has never made a claim or been involved in a tort claim, and how we handle those as statutorily. [LB585]

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Transcriber's Office

Business and Labor Committee
March 14, 2011

SHANNON ANDERSON: Sure. Absolutely. Basically, the general entry point is that if anybody wants to sue the state of Nebraska, you will come through the Claims Board now for these, so we handle every week we get any number of claims from any number of sources from dollar values of...we settled a claim in front of the Claims Board two weeks ago for 28 cents and that was from a corrections resident, if you will. We have also claims that will be...we heard one at a Claims Board meeting last Friday for \$15 million. So you get a full gamut. After six months that the claim has rested, if you will, with the Claims Board, the parties can withdraw and then go to the district court in the county in which the incident occurred. And so what you'll see here is a... [LB585]

SENATOR LATHROP: And when you say go to the county, they literally file in the district court. [LB585]

SHANNON ANDERSON: They file a suit and it's not a review, it's not an appeal. It's a new action. They also, if you do go through the board, the State Claims Board, what happens is that it's a very informal process. You're given a two-page application basically where in your own words you write out your claim. You do not have to have an attorney representing you. You come to, if it's under \$5,000, I can adjudicate it. We accept a claim in, we record it, we ask the agency to investigate, and then it comes to me for a decision. I can go back and ask for any other questions or additional information. If it is denied or if it's ruled on in an amount that the claimant is not happy with, they can go directly to the board at the next board meeting. The board, again, the person does not have to have an attorney, comes to the hearing. The claimant and the agency representative, in this case that's the representative of the state of Nebraska, sit together and the three commissioners, which I don't know the history of the board all that well but we have two nonattorneys and one attorney so it's kind of great odds for the common person, if you will, I think, at the board. And you come in and you tell your story and then the agency is given an opportunity to tell their story and the board acts; 98.9 percent of the time, you know, it acts right then and there for a decision. And then that's what we're saying, if you're not happy at that time you file a new action in the district court of the county you're in. Now some of these cases, because of the magnitude and the complexity, the claimant may choose to withdraw that. If the board hasn't acted within six months, the claimant can withdraw the claim and file a new action, and then you'll see those cases have been litigated and reached...either litigated or come to a settlement, and you'll have some of those claims here that you have to approve. Anything over \$50,000, the Legislature has to approve. [LB585]

SENATOR LATHROP: And that was a point I was going to make. [LB585]

SHANNON ANDERSON: All right. [LB585]

SENATOR LATHROP: The State Tort Claims Act basically provides that tort claims filed

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

against the state, even if they're a judgment, in an amount greater than \$50,000 have to come through this committee. [LB585]

SHANNON ANDERSON: Uh-huh, has to come, right. [LB585]

SENATOR LATHROP: And that's why we're here today. [LB585]

SHANNON ANDERSON: That's exactly right. We haven't paid any of these. Now we can pay up to \$50,000 but all of the claimants understand that they will not be paid until the Legislature has ruled and approved the funding for these, and then they have to wait for the next fiscal year to do that. [LB585]

SENATOR LATHROP: Okay. And it might be helpful as you go through these if you can tell us in what manner were they resolved. Is it a judgment, is it an agreement, an award by your office, or did the Attorney General settle a case and that's why we're here? [LB585]

SHANNON ANDERSON: I see. And that would be when I began with the Bauer case, that would have been a case that was settled that had been denied by the Claims Board and then moved on into litigation. [LB585]

SENATOR LATHROP: And was that then turned...was that a settlement entered into by the AG's Office? [LB585]

SHANNON ANDERSON: Correct. [LB585]

SENATOR LATHROP: Okay. Senator Wallman. [LB585]

SENATOR WALLMAN: Thank you, Chairman. Are we going to go each one by one to pay or are we going to lump them all? [LB585]

SENATOR LATHROP: We'll going to go through them and I don't expect that there will be as many questions as we just had on the first one, but we are going to go through one at a time. [LB585]

SENATOR WALLMAN: Thank you. [LB585]

SENATOR LATHROP: Okay? Sure. [LB585]

SHANNON ANDERSON: Similarly, in the Tipton case, 2009-03422, this was a snowplow case where our insured was...had made an improper U-turn. The settlement against the board would have denied this case and it would have gone into litigation and the settlement proceedings, and it came down from the settlement for \$99,166.67.

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Transcriber's Office

Business and Labor Committee
March 14, 2011

Claim 2008-02942, Ramona G. Swearingian, again a car accident here in the city of Lincoln. Our insured ran a red light. This is a case that because it was settled for \$350,000, we have a self-insurance reserve at \$300,000 and the...that we're, the state of Nebraska, is responsible for, if you will, for self-insurance, and so the Legislature, this claim actually is for \$50,000 for the additional appropriation from the Legislature. Claim 2010-04887 is the Christian Kingery case against the Department of Health and Human Services. This is an interesting case because the claimant came to the board with a \$94,000 claim. Our TPA, our third-party administrator, had begun negotiations with them. This is claim number, excuse me, 2010-04887. The board, in their judgment, asked the questions and established the facts of the case and actually accepted an \$85,000 offer from the claimant at the board meeting for their findings and in that case we were able to pay \$50,000 before this and it's \$35,000. So that's a little different one where the board has gone out and acted. Now the next two claims are related to a single incident. These were both settled at the amount of the self-insurance fund that...the self-insurance dollars we're responsible for is \$300,000. Both of these claims have been over a million, one is \$1 million claim and one is \$1.7 million. They are Claim 2011-10823 and Claim 2011-10824, Mr. Maxwell Baker and Mr. William Jones were students at Chadron State College, involved in a rollover incident. Mr. Baker settled for the \$1 million and Mr. Jones settled for \$1.7 million. These cases were both, quite frankly, Mr. Chairman, pretty much valued in the \$6 million, \$7 million range, and through mediation we were able to settle for the \$1 million, \$1.7 million, very serious accidents that occurred. [LB585]

SENATOR LATHROP: And the state's liability is \$300,000 in each case. [LB585]

SHANNON ANDERSON: Is the \$300,000, right. Claim TC04-049-1 is Lucille Kilgore for \$260,000 against the Department of Health and Human Services, payable to the Lucille Kilgore estate. This case turned on whether the plaintiff was an employee or a volunteer. The case settled after the plaintiff, unfortunately, passed away and this claim is in the amendment. This is a...it was in the paper just a couple months ago. It had been litigated and this was the settlement that was reached. [LB585]

SENATOR LATHROP: Yes, this was a very elderly lady and the state insisted that they didn't owe her anything and then, after she died, they settled it. [LB585]

SHANNON ANDERSON: We do have, if you'd like to visit with representatives of the Attorney General's Office with questions on that, I'd be happy to have you ask them that question. (Laugh) [LB585]

SENATOR LATHROP: No. No. No, but you're right, that was well-publicized. [LB585]

SHANNON ANDERSON: Yes. Now the next three cases or, excuse me, the next three claims, and one of which is in the amendment, two are in the bill, are the cases around

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

the Nebraska claims for Wrongful Conviction Imprisonment Act. These are the cases out of Gage County. They're Claim 2010-04095, which is Joseph White for \$475,000; Claim 2010-04096, Kathleen Gonzalez for \$325,000; and Claim 2010-04097, Thomas Winslow for \$180,000. Claimants White and Gonzalez have been paid \$25,000 each already, part of that we can pay up to \$50,000 per incident, but these would be...and again, there are representatives from the AG's Office if you have questions on any of these cases. [LB585]

SENATOR LATHROP: And I think we will have them testify just because of the amount involved and the unique nature. [LB585]

SHANNON ANDERSON: Do you want...that would be fine. Do you want to do it now or do you want to do it at the end? [LB585]

SENATOR LATHROP: We can have them after you're done, Shannon. [LB585]

SHANNON ANDERSON: Okay. Okay, great. [LB585]

SENATOR LATHROP: That's all right. [LB585]

SHANNON ANDERSON: Okay, now next we have two miscellaneous claims. These did not begin as claims. They began...these are expenses that have to be approved by the Legislature and they come through the Claims Board, but they did not originate as a claim to the Claims Board. Claim 2011-11047 is the Nebraska Press Advertising Services in the amount of \$86,026.47 for payments of fees and expenses related to the publication of constitutional amendments in the general and primary elections, and Mr. Beermann from the Nebraska Press Services is here to answer any questions. Claim 2011-11127 is Planned Parenthood Federation of America against the Governor in the amount of \$136,227.96 for attorney's fees. This case was about the constitutionality of LB594, the women's protection act that passed last year. [LB585]

SENATOR LATHROP: Shannon, who was in...is that the result of a court order,... [LB585]

SHANNON ANDERSON: Yes. [LB585]

SENATOR LATHROP: ...that \$136,000? [LB585]

SHANNON ANDERSON: Right. [LB585]

SENATOR LATHROP: And was the AG involved in that? [LB585]

SHANNON ANDERSON: Yes. [LB585]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR LATHROP: Okay. Then we'll...I think we'll also take that up with Mr. Cookson. [LB585]

SHANNON ANDERSON: Okay. Great. The next three cases are workers' comp cases. Settlements which exceed \$50,000 must be approved and monies appropriated by the Legislature. The three settlements before you are \$157,286.77 for Phillip R. Licking, that includes attorney's fees; \$175,000 for Patrick Teitge; and \$50,000 for Patricia Whitt, including attorney's fees. And an assistant attorney general is available today to visit about those cases as well. Now we're to the agency write-offs. These are debts that are determined to be uncollectible by the agencies, and the agencies are to come to the Claims Board. We did this in October in preparation for the budget and we have...we'll just go through those as we have been. We have 14 agency write-offs with 5 requests over \$25,000. The first two are Claim 2010-04378 and Claim 2011-10825. Both are from the Nebraska Supreme Court, one in the amount of \$115.36 and the other in the amount of \$179.89. The Supreme Court has a process in place notifying parties, beginning after 60 days owing, with follow-up letters until a claims write-off request is made. Claim 2011-10559, State Fire Marshal in the amount of \$750. The write-offs are in two categories: statutorily required registration/inspection fees for existing facilities, and inspection fees associated with planned facilities. In both cases, follow-up letters and invoices were sent to the parties requesting payments. Claim 2011-10655 is the Workers' Compensation Court for \$1,597. This total is for four claims, two of which are for consumers, one being for \$2, and the other debts are for two attorneys who have not responded to their collection efforts. Claim 2011-10708 is the Military Department for \$4,171. This claim is for four student soldiers who were afforded state tuition assistance and who dropped or cancelled classes. Letters have been sent to them from 2007 to the present and they have been discharged from the Nebraska National Guard. The five claims over \$25,000, we begin with Claim 2011-10086 in the amount of \$680,325.58 for the Department of Health and Human Services. The department reported that these debts relate to where the agency either made an overpayment or provided a service for which it has not been reimbursed. Prior to submittal of these debts for write-off, the agency pursued recovery through one or more of the following efforts: regular billing statements; recoupment; demand letters signed by the program, by one of the agency's directors and/or by one of the agency's attorneys; telephone calls; referral to a collection agency and use of credit reporting; and litigation. And we have Mr. David McManaman, is an attorney with HHS, is here to answer any questions. Claim 2011-10656 for \$175,035.79 from the Department of Roads, request is for the write-off of 55 uncollectible state property damage claims totaling \$175,000, excuse me. The Department has in place the following procedures. Mr. Monty Fredrickson, director of the Department of Roads, is present to answer your questions. The state property damage coordinator prepares and sends an invoice, then outstanding claims receive a request for payment by coordinator if account remains open at 30 and 60 days. After 90 days a demand letter is sent by the Nebraska Department of Roads' legal counsel.

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

Claim 2011-10661 is from the State Energy Office for \$41,380.14. These are all uncollectible loans from the Dollar and Energy Savings Loans. Director Ginger Willson is here to answer any questions. Claim 2011-10707 is Game and Parks Commission for \$74,461.26. Game and Parks does not write off bad debt for two years to allow for all means possible to collect uncollectible debts. Because they have debts from consumers and vendors, as well as dealing with thefts, Dorothy Porath and Don Manning are on hand to answer any questions you may have regarding this claim. Finally, we have five claims from the Department of Insurance: Claim 2011-10662 for \$1,872; Claim 2011-10664 for \$1,608; Claim 2011-10665 for \$33,755; Claim 2011-10666 for \$3,104; and Claim 2011-10667 for \$44. Four of the five claims the Department of Insurance is requesting to be written off are for agent appointment fees for insurance companies in liquidation and total \$6,628. The fifth claim, totaling \$33,755, is also for a company in litigation (sic--liquidation) and consists of \$1,075 in appointment fees and \$32,680 for an outstanding CHIP assessment. Director of Insurance Bruce Ramge has sent a representative here to answer any questions if you should have them. We do have...we did want to, out in the hallway, add a claim today and it will be from Claim 2009-03186. It involves a case around a foster child, a ward in the foster care program assaulting another child in the family, and that has...and again, the Attorney General's Office can answer questions on that case, and that will be in working with your staff, Senator, get that into the amendment. [LB585]

SENATOR LATHROP: What's the amount of that claim, Shannon? [LB585]

SHANNON ANDERSON: \$50,000. That concludes the 30 claims so I know my light didn't go off. I don't think she set it, did she? (Laugh) [LB585]

SENATOR LATHROP: Shannon, let me just ask you categorically, when an agency...you've just gone through a bunch of agency write-offs. Is it fair to say, and I've sat through five of these now, is it fair to say that with the agency write-offs that they've made every reasonable effort, including regular collection efforts, to collect that money but to no avail? [LB585]

SHANNON ANDERSON: Absolutely. It is not regarded as a badge of honor to come in with an agency write-off. [LB585]

SENATOR LATHROP: Right. And I have to say the first year I was here and we saw all these write-offs, I was appalled. And the longer I'm here... [LB585]

SHANNON ANDERSON: Right, culturally... [LB585]

SENATOR LATHROP: ...yeah, the longer I'm here it looks like that's just kind of the cost of doing business on the scale that the state of Nebraska conducts business. [LB585]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SHANNON ANDERSON: Yeah, and I do think it is, Senator, towards that end, I think there's very much a message sent out from the Claims Board this year to...and from the Governor's Office that this is not the way of doing business, having this kind of write-offs, and so I think the agencies have been very diligent. In this testimony we attempted to give you a flavor for the steps that they're taking in order to prove up their due diligence. In fairness, though, some of the vulnerable populations that some of the agencies take care of, we have a lot of consumer debt here. That happens in a recession. [LB585]

SENATOR LATHROP: Okay. Thanks, Shannon. And I'll just tell...share with the committee, I intend to have somebody from the AG's Office come up and talk about both the claims for the Beatrice...three of the Beatrice Six, as they've come to be known, and the Planned Parenthood attorney fee. So if anybody has questions for Shannon, I'll open it up. Senator Wallman. [LB585]

SENATOR WALLMAN: Thank you, Chairman Lathrop. Yes, Shannon, you probably knew I'd have a question. [LB585]

SHANNON ANDERSON: (Laugh) [LB585]

SENATOR WALLMAN: Now how come the Game and Parks has uncollectible funds, you know, writes off things? [LB585]

SHANNON ANDERSON: Well, they do have policy in that they do collect diligently for two years and then they have to write it off. Why are you...are you suggesting... [LB585]

SENATOR WALLMAN: Well, why are they giving credit? Who are they giving credit to? [LB585]

SHANNON ANDERSON: It would be vendors is what their explanation to me was, vendors that they haven't...I would imagine that fees, licenses that are required to be purchased, bad checks is what it comes down to. [LB585]

SENATOR WALLMAN: Okay. [LB585]

SHANNON ANDERSON: You know, generally, when somebody is not paying you, they're writing you a bad check. [LB585]

SENATOR WALLMAN: Okay. [LB585]

SHANNON ANDERSON: That I just hear, Senator. I've never done that. [LB585]

SENATOR WALLMAN: Yeah. Yeah. [LB585]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SHANNON ANDERSON: Yeah. (Laugh) [LB585]

SENATOR WALLMAN: I just wondered. Thanks. [LB585]

SENATOR LATHROP: Thanks, Shannon. I want to be clear, too, if you, members of the committee, Shannon has brought with her anybody you want to have...ask a question about to answer your concerns about any one of these charges. And it's not my intention to have them come up and testify unless you'd like to hear from them. Okay. Thanks, Shannon. [LB585]

SHANNON ANDERSON: Okay. Thank you. [LB585]

SENATOR LATHROP: Allen, you look like you want to testify. [LB585]

ALLEN BEERMANN: No, I'm just here to answer. [LB585]

SENATOR LATHROP: Okay. We're glad you're here and we should acknowledge congratulations on your award this...was it last Saturday? [LB585]

ALLEN BEERMANN: It was. [LB585]

SENATOR LATHROP: Yeah. Well deserved. You're a fine Nebraskan. [LB585]

ALLEN BEERMANN: And thanks to the Legislature for their courtesy of the resolution they adopted. That was very moving. Thank you. [LB585]

SENATOR LATHROP: Yeah. Yeah. Well, you're a great friend of the state and this body. [LB585]

ALLEN BEERMANN: I'll just leave a testimony sheet, unless there's someone who would have a question. [LB585]

SENATOR LATHROP: That would be perfect. Does anybody have any questions about the press fees? Okay. I see none. Thanks, Allen. And, Mr. Cookson, I think you're up. [LB585]

DAVID COOKSON: Chairman Lathrop, members of the committee, my name is David Cookson, C-o-o-k-s-o-n, chief deputy attorney general. At the Chairman's pleasure, which matter would you like to start with? [LB585]

SENATOR LATHROP: Well, let's start with...and I'm just going in the order that Shannon presented these, there are three claims from White, Gonzalez, and Winslow,

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

and some of us have been immersed in this as we passed the statute that allowed for these claims, Senator Rogert's bill, but maybe you could go through the circumstances, how you arrived at the damages, were these people represented and why did the Attorney General settle them for the amounts as indicated. [LB585]

DAVID COOKSON: Sure. [LB585]

SENATOR LATHROP: Let's start there. [LB585]

DAVID COOKSON: Starting with the background for senators who may not have... I don't think Senator Smith was here during the discussion, back in 2008 or 2009, in the course of litigating an issue with two inmates serving life sentences--Joseph White and Thomas Winslow--for murders that occurred in Beatrice back in 1986, there was a request for DNA testing pursuant to a statute the Legislature had passed. During the course of the initial testing, the DNA did not indicate either Mr. White or Mr. Winslow's DNA being present. We requested additional items be tested at the same time in order to determine if, in fact, anything showed up. [LB585]

SENATOR LATHROP: And these were people that have been convicted of a homicide in Beatrice... [LB585]

DAVID COOKSON: Yes. [LB585]

SENATOR LATHROP: ...or Gage County. [LB585]

DAVID COOKSON: There were six people who were charged for one level of crime or another. The two who were serving life were Winslow and White. And then others had served smaller amounts of time. They had testified or pled to lesser charges, had served their time and were out. And then Kathy Gonzalez, I believe, was still...or Ada Jo Taylor, one or the other was still in custody as well as a result of the convictions obtained in this case. When we got the DNA testing back, which was not available at the time they were tried, it indicated that there was no DNA that matched any of the defendants. And so our office began with the local authorities, particularly Gage County Sheriff's Office, Beatrice Police Department, and the Nebraska State Patrol, a task force to determine whether in fact these folks were even actually involved. We went back through a record that was...basically would fill a room, including all of the old videotapes. We pored over all of the old evidence, all the investigations, all the interviews, everything that went with it and subsequently, as a task force, came to the conclusion that none of the six people who had been convicted of this crime were actually guilty and that the perpetrator had, in fact, been one of the initial subjects, a gentleman who had moved to Oklahoma or lived in Oklahoma, came up to visit relatives and left again and subsequently died of disease-related causes in Oklahoma. His DNA matched the DNA found on the victim, matched the DNA in the room. It was clear he

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

was the person who actually committed the offense. As a result, we took steps to have the convictions set aside for Mr. White, Mr. Winslow. Because of timing issues, rather than have one of the convictions set aside for the woman who was still in custody, we went to the Pardons Board and arranged for an immediate pardon because setting aside her conviction would have taken a significant amount of time. The pardon process, we could get her out much quicker. As a result, all of the convictions were ultimately set aside. The pending...or the folks', who were still in jail, convictions were set aside. We then assisted the six folks in obtaining a complete pardon from the Pardons Board, in which case led to their exoneration. During the course of this, Senator Rogert, and other members I think cosponsored his bill, introduced legislation to provide for some level of compensation for folks who are wrongfully convicted and key components of that are actual innocence, not contributing to or testifying falsely that leads to the conviction of another, or providing false information, and having in fact served some time and had some level of damage. And a cap was set at \$500,000. So subsequently, after the passage of that legislation, we were approached by Robert Bartle, who is the current president of the Nebraska State Bar Association, on behalf of five of the six...or four of the six, excuse me, and then we were approached by Herb Friedman, who represents another one of the six whose claim has not been resolved. One individual, Debra Shelden, even though she...we assisted her in being exonerated and getting a full and complete pardon, still to some extent insists that she was part of the actual crime, unfortunately, when there's no evidence to suggest that at all. She had no connection with the other individual who we believe committed it and she's not, as I...she's not filed a claim yet, has she? [LB585]

_____ : She has not. [LB585]

DAVID COOKSON: She's not filed a claim under this bill. So when we got the claims, we went to the Claims Board. We entered into an agreement with Mr. Bartle that they would be denied and he could go ahead and file suit. At the same time, we indicated to him that as to Mr. White and Ms. Gonzalez, we wanted to enter into settlement negotiations immediately because we felt that those two satisfied, without question, all of the prongs of the compensation statute. Then it simply became a question of putting a dollar value on what their claims were worth. Clearly, Mr. White served the most significant amount of time in very difficult conditions, and we found no justification not to pay him the maximum amount. We did any variety of calculations, a minimum age earning for his age at the time of the conviction and education level, a variety of different run the numbers out, and they all came back over the \$500,000 threshold, so we basically offered that immediately up-front. We then felt that there needed to be some distinction between Mr. White and the others and we did do some similar analysis for Ms. Gonzalez and reached a negotiated agreement with her counsel for \$350,000. Winslow's claim is slightly different because Mr. Winslow, while he did not testify in court, did provide false information to law enforcement during the original trial that could have been used to obtain the convictions of others. Those law enforcement personnel,

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

in depositions during the course of the litigation, after initially we filed a motion for summary judgment saying that as a matter of law he had provided false testimony and information because he had alleged that in his complaint. The court denied the motion for partial summary judgment. We then proceeded to discovery. During the course of discovery, law enforcement that was involved at the time denied that they used Mr. Winslow's testimony in any fashion. Given the potential factual problem that would cause us in trying to try the case, we decided to settle it. Given the uncertainty of whether or not in fact he qualified, we settled for a significantly less amount than either White or Gonzalez. [LB585]

SENATOR LATHROP: Okay. Just as a matter of background, the DNA testing would not have been available at the time the prosecutor was prosecuting the original case that convicted these people wrongly. [LB585]

DAVID COOKSON: Right, and that was one of the requirements of the DNA statute that the Legislature passed in 2001, which was used by these folks. At the time, there were some blood tests that were used that were clearly...at the time they were state of the art but they were clearly faulty. It ended up that this case got caught up in a forensic mess in the state of Oklahoma involving a discredited forensic person who had a number of cases thrown out,... [LB585]

SENATOR LATHROP: Okay. [LB585]

DAVID COOKSON: ...which led the investigators away from the actual perpetrator toward these six folks. [LB585]

SENATOR LATHROP: Okay. Anybody have questions about that? [LB585]

SENATOR WALLMAN: Yes, I do. [LB585]

SENATOR LATHROP: Senator Wallman. [LB585]

SENATOR WALLMAN: Thank you, Chairman Lathrop. I know most these people involved in this, as you know, and I thought White was innocent from day one... [LB585]

DAVID COOKSON: Uh-huh. [LB585]

SENATOR WALLMAN: ...and some others did too. But all these people, these others besides White, pled guilty to something, you know, so they're going to get all enumerated the maximum amount here for...? [LB585]

DAVID COOKSON: No, and in fact we have not settled the claims of the other two folks that are pending, in fact because we don't think they qualify under the statute as written.

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

And our plan at the moment is we may, if we can, settle them for something less probably than the cost of a full-blown trial. It's usually in the state's interest not to go through litigation and spend money that we would otherwise use elsewhere, especially given the limited resources we have. [LB585]

SENATOR LATHROP: And basically when you settle a case you're taking into account the risks of what might happen if you proceed to trial. [LB585]

DAVID COOKSON: Right. [LB585]

SENATOR LATHROP: And in the judgment of the Attorney General and you, as the chief deputy, these settlements are fair under the circumstances and given the stated law and the time these people served? [LB585]

DAVID COOKSON: Yeah, given clearly a new brand of cases in Nebraska, there was nothing really to judge off so we tried to use earnings and other things to put some objective...at least give ourself some objective standard for where we thought we should value these cases. [LB585]

SENATOR LATHROP: David, how long did these guys spend in jail before they were freed? [LB585]

DAVID COOKSON: I believe White had been in jail for 19 years or more... [LB585]

SENATOR LATHROP: Yeah. Yeah. [LB585]

DAVID COOKSON: ...as was Winslow. [LB585]

SENATOR LATHROP: If there hadn't been a cap, this would have been a lot worse. [LB585]

DAVID COOKSON: Yeah. If you run the number... [LB585]

SENATOR LATHROP: I remember working on that bill and the cap was...the only reason it got passed was the cap because to put a number on somebody's freedom for 19 years... [LB585]

DAVID COOKSON: Even if you took a minimum wage employee and adjusted for inflation over time, you would have probably run past the cap, and that doesn't even get to whatever emotional damages they might be entitled to charge for having to spend that much time in confinement. [LB585]

SENATOR LATHROP: Okay. Any questions about those explanations? Okay. And the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

next one I'd like you to talk about is the Planned Parenthood attorney fees. [LB585]

DAVID COOKSON: This resulted from a constitutional challenge to one of the measures passed by the Legislature last year. I believe it was LB594. [LB585]

SENATOR LATHROP: That was Senator Dierks's bill. [LB585]

DAVID COOKSON: Right. [LB585]

SENATOR LATHROP: And where was this...explain where this...the process of litigation. We passed the bill here. It's signed by the Governor, and what took place after that and how do we get to...? [LB585]

DAVID COOKSON: Approximately a week before the law was to take effect under the time passage after it was signed by the Governor, a motion for a preliminary injunction was filed by Planned Parenthood seeking to stop the enforcement of the case. For the nonlawyers, an injunction in the federal courts in Nebraska require meeting four prongs. It's called the data face test. The one at issue, the significant one, in our view, at issue here was a likelihood of success on the merits. In other words, to get it you have to show immediate harm. That's one prong. But then you also have to show a likelihood that you will succeed down the road at trial or at future hearing. During...after the preliminary injunction hearing, the court issued an order and, in its discussion of likelihood of success on the merits, it was clear that that likelihood of success on the merits was significantly high and that we would more than... [LB585]

SENATOR LATHROP: For Planned Parenthood. [LB585]

DAVID COOKSON: ...yeah, more than likely not be successful. So we made...and because when the state gets sued in these constitutional challenges there are provisions under federal law that allows them to require...or to recover attorney's fees against us. Rather than further litigation that we were highly unlikely to win at any further step, we made the decision not to appeal further and, rather, have the proponents of this issue go back to the Legislature and try to fix what the court had articulated as constitutional flaws. And so as a result, the next step in the litigation, after we chose not to appeal, was the winning side, in this case suing the state, is entitled to attorney's fees. They made a motion for attorney's fees in the neighborhood of about \$150,000 roughly. We contested that significantly. The court disagreed with us and ruled in their favor in the amount that's in the claims bill. While we disagree strenuously with the court's decision, appealing an attorney's fees award is significantly difficult. The decision of the district court has to be clearly erroneous and an abuse of discretion, which is in cases like this virtually impossible to do. We thought the time spent or charged by Planned Parenthood was way over the top considering other similar cases involving constitutional challenges to abortion laws. Court disagreed with us; the lodestar for the

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

hourly rate was within the standard. And so we made a decision that rather than continue to throw money after this problem, we would simply resolve it and get it resolved in the claims bill this year. [LB585]

SENATOR LATHROP: You made a judgment at some point not to pursue that claim or pursue the defense of that particular piece of legislation, and that's a judgment you and the Attorney General made. [LB585]

DAVID COOKSON: Right. We consulted with the proponents of the issue and explained what we thought the chances were and the likelihood that we would not be successful and what the consequences of that would be, which is what we do with every piece of litigation. We examine what all of our options are. We examine what we think the likelihood of what's going to happen and what the consequences are, and then we try to make a decision what's in the state's best interest. [LB585]

SENATOR LATHROP: And proceeding any further you think just would have run up the bill on the attorney fees... [LB585]

DAVID COOKSON: Yes. [LB585]

SENATOR LATHROP: ...for Planned Parenthood in this case? [LB585]

DAVID COOKSON: Yes. [LB585]

SENATOR LATHROP: As a practical matter, the courts ordered the state to pay the money, am I right? [LB585]

DAVID COOKSON: Correct. [LB585]

SENATOR LATHROP: And while it's coming through this committee, we have little choice but to observe the order of the federal court. [LB585]

DAVID COOKSON: Yes. We've had some instances where the federal...some of the federal judges in our district have not recognized this step in the process and have tried not to the level of holding us in contempt but suggesting that we are required--and this has come up in the context of inmate litigation--that we should be required to pay these right away and not have to wait through the process or that these folks even have to file a miscellaneous claim. [LB585]

SENATOR LATHROP: So a little bit of a state, federal, judiciary, legislative process thing. [LB585]

DAVID COOKSON: Yes. [LB585]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

SENATOR LATHROP: As a practical matter, though, it's your judgment we have to pay it. [LB585]

DAVID COOKSON: Yes. [LB585]

SENATOR LATHROP: Okay. Does anybody else have questions for Dave? Okay, thanks, Dave. We...oh, I'm sorry. Senator Wallman. [LB585]

SENATOR WALLMAN: Thank you, Chairman. Yes, Counselor, welcome to this committee. [LB585]

DAVID COOKSON: Oh, I've been here before. (Laugh) [LB585]

SENATOR WALLMAN: And when you decide these decisions, is it's a fifty-fifty thing or a sixty-forty? I always ask when I hire an attorney what's the percentages, so do you use the percentage basis or what? [LB585]

DAVID COOKSON: We do on some cases. In some it's more just a looking at what the courts order, how the court's order reads and what areas would be able to persuade the judge to change their mind. In a case like this it's not...in a case, for instance, like the Bauer case, there we would put a percentage on our likelihood of winning, which would be below 1 percent. And in the case like this, we simply look at what the issues are and where we think the Eighth Circuit would come down on it eventually. [LB585]

SENATOR LATHROP: I have to say that having done this now for five years, when I look at the tort claims against the state, they really are low relative to the breadth of our operations across the entire state and the number of people we have driving cars and... [LB585]

DAVID COOKSON: One of the things that we've done, and I'd like to provide some compliment to one of my line attorneys, is when Attorney General Bruning came in, there was a significant amount of these cases that were being just settled routinely rather than tried. General Bruning named Tom Stine as head of our litigation bureau--he had been in our Department of Roads--with the mission to lower the attractiveness of suing the state on claims that did not otherwise have merit and would otherwise get settled. And I think we've been successful in that. We've noticed our numbers have gone down and we've actually reassigned people out of our litigation bureau into other areas where we have greater need because we have reduced the number of claims. [LB585]

SENATOR LATHROP: Very good. Well done I would say on the tort claims and you have little control over the rest of it. But okay, thank you for your testimony, David, and

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Transcriber's Office

Business and Labor Committee
March 14, 2011

your explanations. Do the committee members that are here want to hear from any of the administrative folks that might have... [LB585]

SENATOR SMITH: I do not. [LB585]

SENATOR LATHROP: Okay. Senator Wallman? Anyone here wish to testify as a proponent in favor of LB585 or any of the particular claims found therein? Anyone here wishing to testify in opposition to LB585 or any of the claims, individual claims found therein? Or in a neutral capacity? I see none. That will close our hearing on LB585, and my appreciation to all those who came down here on the chance that we might have a question for you. Okay. LB586, Committee Counsel. [LB585]

MOLLY BURTON: Good afternoon, Senator Lathrop, members of the committee. My name is Molly Burton, B-u-r-t-o-n, legal counsel for the Business and Labor Committee. LB586 is the counterpart to LB585. Those are for claims that have been denied. Someone whose claim is denied, they have the opportunity to ask the Legislature to review that claim. It's a shell bill right now and we have nothing to fill it so... [LB586]

SENATOR LATHROP: No claims. [LB586]

MOLLY BURTON: No claims, so I don't need Shannon Anderson to testify after me, and that's it. [LB586]

SENATOR WALLMAN: We'll put some in there. (Laughter) [LB586]

SENATOR LATHROP: All right. Shannon, maybe you can just come up and make a record of the fact that we have no claims to amend into LB586 at this point in time at least. [LB586]

SHANNON ANDERSON: Shannon Anderson, S-h-a-n-n-o-n A-n-d-e-r-s-o-n, claims manager for the state of Nebraska, and that is correct, we do not have a claim this year to go into this claims bill, a claim that has...a miscellaneous claim that's been denied and that the Legislature can take up on their own accord. I will tell you though that it works because we had a claim that a senator contacted us about three months ago that we....it had not gone to the board yet. The initial responses and recommendations was to deny the claim. I reopened it, brought the agency and the claimant together, and we were able to resolve it. And so the claimant then was able to accept the judgment at the last...two Claims Board meetings ago. But that was very important to say, look, this is...that's a great hammer to have, quite frankly: Look, if you would like the Legislature to discuss this. And it works both ways. We've had claimants that didn't want to accept claims and we've explained to them, well, your course of action in this could be a bill at the Legislature and have them discuss this on the floor. So it's a terrific process to be available. So we don't have any claims now. I would imagine, Molly, the committee

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

counsel, that if something would come up it's important to have a shell bill, but we've really worked hard this year not to. So with that, I conclude my testimony. [LB586]

SENATOR LATHROP: Do you foresee any claims that you want to have denied by the Legislature? [LB586]

SHANNON ANDERSON: No, but we also had an emergency board hearing last Friday, Senator, because we didn't foresee the Planned Parenthood litigation coming down and the award of attorney's fees. So I have advised everyone that we would not...it's been our goal that as of this hearing that we would have everything in and even this morning, meaning it was still today, so that's our practice. But I understand in the past you have done some floor amendments in adding claims. But you know, again, if a claim would come up like that we would have to have a board hearing and there's several steps to go through, so it's nothing we take lightly to try to put it into a...it's not something like let's put that one in the bill. [LB586]

SENATOR LATHROP: Okay. And if you see one of those coming, you'll let Molly know right away... [LB586]

SHANNON ANDERSON: I would let you know, yes. [LB586]

SENATOR LATHROP: ...so we can make sure we make an amendment to the bill. [LB586]

SHANNON ANDERSON: Absolutely. [LB586]

SENATOR LATHROP: Any questions for Shannon? [LB586]

SENATOR SMITH: Yeah. Is there a cutoff period whenever we would not do an amendment and it would be carried over to the next year? [LB586]

SHANNON ANDERSON: Well, Senator, it's interesting on that. We have two time lines, if you will. One is just to be mindful of the traffic. This is a constituent board where we have people that have been damaged allegedly at the hands of the state and we want to...we're very sensitive under Director Castillo to have a very sound response and to do that in a timely fashion to encourage and assist agencies in their recommendations and their investigations and that. So we're always mindful. So we can't control the traffic of claims coming in and that dictates a portion of what's in the bill. Secondly, we have this very real concern of budgeting. The dollars this year, for example, we have had almost twice the amount of litigation expenses, which you heard why today. When you have the Beatrice Six cases, if you will, the Planned Parenthood, things like that, that is money that it's hard to predict budgeting from year to year how much your litigation expenses will be. And although it may seem like we've kept our claims level in that, it was a rough

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Business and Labor Committee
March 14, 2011

winter last winter. You know I've just been in this position seven months Thursday and when it snows now I get really nervous about the claims traffic. (Laugh) So ice was big, you know. So in that regard then we have a budget, so that's how we try to hold it off, be mindful of the legislative process, but we also have the concerns that if you get the cases in and we can move them through, we think it's our duty to get them moved through for the constituency. [LB586]

SENATOR LATHROP: Good. Okay. Lois is back there, about ready to throw a chair. (Laughter) [LB586]

SHANNON ANDERSON: I guess Lois agrees. (Laugh) Thank you. [LB586]

SENATOR LATHROP: All right. Thanks, Shannon. That will close our hearing on LB586. (See also Exhibit 10) [LB586]