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Business and Labor Committee
March 18, 2013

[LB307 LB324 LB536 LB537 LB584 CONFIRMATION]

The Committee on Business and Labor met at 1:30 p.m. on Monday, March 18, 2013, in Room 2000 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB584, LB307, LB324, LB536, LB537, and gubernatorial appointments. Senators present: Steve Lathrop, Chairperson; Burke Harr, Vice Chairperson; Brad Ashford; Ernie Chambers; Tom Hansen; Amanda McGill; and Norm Wallman. Senators absent: None.

SENATOR LATHROP: (Recorder malfunction)...state senator from District 12. We have a full schedule for today and a few things that are going to take a fair amount of time, so we're going to jump right in. Most of you look like you've been here before. We're going to start with the...start with some gubernatorial appointments. Those generally go fairly quickly. Then we're going to go into LB584, I think, which is...originally, it was going to be the last work comp bill we take. We're going to make it the first work comp bill we take because a couple of the witnesses have planes to catch, and so that's an accommodation. And with that, we'll start with...and welcome back Molly Burton, who's had a baby six weeks ago. She's actually still on maternity leave, so I'm even more impressed that she's here for the last day of hearings. Tomorrow is her first official day back, but we're glad to have Molly here. I think you know everybody, so we'll just jump right into Charles Cole, who is gubernatorial appointment to the Boiler Safety Code Advisory Board. And if you want to come forward, we'll take up your confirmation. Thank you. [CONFIRMATION]

CHARLES COLE: Good afternoon. [CONFIRMATION]

SENATOR LATHROP: Good afternoon. Welcome to the Business and Labor Committee. [CONFIRMATION]

CHARLES COLE: Thank you. [CONFIRMATION]

SENATOR LATHROP: Do you have anything to say? (Laughter) [CONFIRMATION]

CHARLES COLE: No, not really. (Laughter) [CONFIRMATION]

SENATOR LATHROP: All right, do we want to vote on this guy right now? (Laughter) Are you...you're...you've done this before? [CONFIRMATION]

CHARLES COLE: Yes. [CONFIRMATION]

SENATOR LATHROP: And how long have you been on the Boiler Safety Code Advisory Board? [CONFIRMATION]

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

Business and Labor Committee
March 18, 2013

CHARLES COLE: It's been so long. I know it's over five and a half years, probably more like seven or eight years. [CONFIRMATION]

SENATOR LATHROP: Okay, how many times have you been appointed?
[CONFIRMATION]

CHARLES COLE: Twice. [CONFIRMATION]

SENATOR LATHROP: Okay, are there any issues at the Boiler Safety Code Advisory Board you want this committee to be aware of, as long as you're here?
[CONFIRMATION]

CHARLES COLE: Not really, other than, do you know, are they going to pass the going-under-the-elevator program, the Fire Marshal? [CONFIRMATION]

SENATOR LATHROP: I don't know if that's going to happen this year.
[CONFIRMATION]

CHARLES COLE: Okay. [CONFIRMATION]

SENATOR LATHROP: Will that affect your ability to serve on the board or for the board to function and provide safety to Nebraskans that count on boilers to keep them warm?
[CONFIRMATION]

CHARLES COLE: No, no, no. [CONFIRMATION]

SENATOR LATHROP: Okay, okay. Anybody have any questions? Senator Chambers.
[CONFIRMATION]

SENATOR CHAMBERS: Have you ever spent time on a farm before?
[CONFIRMATION]

CHARLES COLE: Actually, I still do. I... [CONFIRMATION]

SENATOR CHAMBERS: What's the difference between a boiler and a fryer? (Laughter)
You don't even have to answer. I just thought I'd put something out there.
[CONFIRMATION]

CHARLES COLE: I'm actually a manufacturer's rep. I sell boilers for a living, so I work around them all the time. [CONFIRMATION]

SENATOR CHAMBERS: But do you know there's such a thing, a chicken, referred to as a boiler? You didn't know that? [CONFIRMATION]

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

Business and Labor Committee
March 18, 2013

CHARLES COLE: No, I didn't know that. [CONFIRMATION]

SENATOR CHAMBERS: Well,... [CONFIRMATION]

CHARLES COLE: Learned something new today. [CONFIRMATION]

SENATOR CHAMBERS: But also, a fry...you've heard of a chicken called a fryer.
[CONFIRMATION]

CHARLES COLE: Yes. [CONFIRMATION]

SENATOR CHAMBERS: But also, fryer is a device that they manufacture to cook, so
you got half of it right, so I'm for you. (Laughter) [CONFIRMATION]

CHARLES COLE: Okay. [CONFIRMATION]

SENATOR LATHROP: Came all the way from Otoe, Nebraska? [CONFIRMATION]

CHARLES COLE: Yes. [CONFIRMATION]

SENATOR LATHROP: How many people live in Otoe? [CONFIRMATION]

CHARLES COLE: 199. [CONFIRMATION]

SENATOR LATHROP: Yeah, I was going to say,... [CONFIRMATION]

CHARLES COLE: I actually live... [CONFIRMATION]

SENATOR LATHROP: ...I thought I knew all the little towns. That one is a new one to
me. [CONFIRMATION]

CHARLES COLE: There's smaller ones than that in Nebraska, so. [CONFIRMATION]

SENATOR LATHROP: Yeah, okay. Well, thanks for your service on the board. We
genuinely appreciate it. And we know that you take time out of your day to do the things
you do on that board. And so thank you, and we appreciate you coming down today.
[CONFIRMATION]

CHARLES COLE: Thank you. [CONFIRMATION]

SENATOR LATHROP: Yeah. [CONFIRMATION]

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

Business and Labor Committee
March 18, 2013

CHARLES COLE: It was nice meeting you. [CONFIRMATION]

SENATOR LATHROP: Yeah. And you're welcome to leave if you like. You don't have to stay around for the rest of the afternoon. [CONFIRMATION]

CHARLES COLE: I'll actually wait. I rode with someone. [CONFIRMATION]

SENATOR LATHROP: Anybody here to testify in support of Mr. Cole's appointment? Anyone here in opposition? How about a neutral capacity? Seeing none, that will close the hearing on the appointment of Mr. Cole for Boiler Safety Code Advisory Board and take us to Martin Kasl, also for the Boiler Safety Code Advisory Board.
[CONFIRMATION]

MARTIN KASL: Hello. [CONFIRMATION]

SENATOR LATHROP: You probably come up here, and now you're not nervous after that last one, are you? [CONFIRMATION]

MARTIN KASL: What's that? [CONFIRMATION]

SENATOR LATHROP: You're not nervous after the last one, are you?
[CONFIRMATION]

MARTIN KASL: I don't know about chicken/boiler questions though. That's concerning me. (Laughter) [CONFIRMATION]

SENATOR LATHROP: Why don't we have you give us your name and your...spell your last name for us. [CONFIRMATION]

MARTIN KASL: Yeah, Martin Kasl, K-a-s-l, and this would be my...I've been on the board for 12 years now, so I think this is my third reappointment. I fill the spot of the professional engineer on the committee, so. [CONFIRMATION]

SENATOR LATHROP: Okay. Are you guys doing anything with the code, or have you, in your time there? [CONFIRMATION]

MARTIN KASL: Yes. Most of what we have done is the adoption of, primarily, following the National Boiler Inspection Code. We haven't made any major changes to the state code, but most of it's come from the national level or clarifications of the state statutes.
[CONFIRMATION]

SENATOR LATHROP: Okay. [CONFIRMATION]

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

Business and Labor Committee
March 18, 2013

MARTIN KASL: We have seen...in the 12 years I've been on here, there's been some pretty major changes just in the administration of our group. And I think the committee and our board is doing a good job, especially with its relatively new chief that we have now. He's been here six, seven, eight years, something like that, and there have been a lot of good changes. [CONFIRMATION]

SENATOR LATHROP: Okay. [CONFIRMATION]

MARTIN KASL: So it'll be interesting to see what happens with possible change of moving. [CONFIRMATION]

SENATOR LATHROP: The boilers, these are...some homes have boilers, is that right? [CONFIRMATION]

MARTIN KASL: That's true, yes. [CONFIRMATION]

SENATOR LATHROP: But they're primarily found in big commercial buildings? [CONFIRMATION]

MARTIN KASL: Correct, the most...most of the ones that need inspections are in commercial applications. [CONFIRMATION]

SENATOR LATHROP: And currently, under our...can you give us an overview of our current inspection program and then tell us whether you think that it's adequate? [CONFIRMATION]

MARTIN KASL: Well, I think, I mean, they're operating right now. They're doing well and they're covering their expenses and, actually, I think, a little bit ahead the last couple of years. That wasn't always the case. We had a period of time that there was a large turnover in keeping the inspectors. There is a little bit of inspection now that's being done through authorized inspectors which is helping lighten the load. The state inspectors are doing all the new inspections right now, so that's kind of their priority. And then the renewed inspections, a lot of them, are being done now by other licensed, authorized inspectors that, like I said, I think, right now, the fees are such that we're covering the costs of the programming (inaudible). [CONFIRMATION]

SENATOR LATHROP: Okay, and one last question, just for the benefit of the members of this committee. What's the risk or what are we...what's the primary problem that we're trying to prevent with the boiler inspections? [CONFIRMATION]

MARTIN KASL: Well, these boilers and pressure vessels, obviously, are tanks, if you will, that are under pressure. So the concern is the safety of people that, you know, are around these tanks which could explode because of the pressure. So the inspection to

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

Business and Labor Committee
March 18, 2013

make sure that these tanks are in good working order are the primary responsibility of...
[CONFIRMATION]

SENATOR LATHROP: Is there a carbon monoxide risk when these things are not maintained properly? [CONFIRMATION]

MARTIN KASL: Of course, but that's kind of...it's more on the burner side. Primarily, the pressure vessel itself is what we are responsible for. [CONFIRMATION]

SENATOR LATHROP: Okay, very good. Any questions for Mr. Kasl? I see none. Anything else you want to tell us? [CONFIRMATION]

MARTIN KASL: Nope. [CONFIRMATION]

SENATOR LATHROP: All right. [CONFIRMATION]

MARTIN KASL: Thank you. [CONFIRMATION]

SENATOR LATHROP: I like your chances. (Laughter) We'll see if anybody is here in opposition. [CONFIRMATION]

MOLLY BURTON: He's a good guy. [CONFIRMATION]

SENATOR LATHROP: Okay. Molly says he's from McCook, and that makes him a good guy because Molly is from McCook, (laughter) which I think is the oil capital of Nebraska. Anybody here in support of Mr. Kasl's appointment? Anyone here in opposition? Or in a neutral capacity? Seeing none, that will close the hearing on Mr. Kasl's appointment. Ken Stewart, also here for appointment by the Governor to the Boiler Safety Code Advisory Board and someone with whom I'm familiar myself. [CONFIRMATION]

KENNETH STEWART: Hello, Steve. Good afternoon, everybody. [CONFIRMATION]

SENATOR LATHROP: Welcome. Why don't you start with your name, and spell your last name for us. [CONFIRMATION]

KENNETH STEWART: Ken Stewart, excuse me, S-t-e-w-a-r-t. [CONFIRMATION]

SENATOR LATHROP: Okay, Ken. Do you have any comments you'd like to share before we start the questions? [CONFIRMATION]

KENNETH STEWART: I'm stumped on the chicken boiler also. (Laugh) No, no questions. [CONFIRMATION]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: Okay. [CONFIRMATION]

KENNETH STEWART: This will be my third appointment. [CONFIRMATION]

SENATOR LATHROP: Okay. I think I've been around for one or two of them.
[CONFIRMATION]

KENNETH STEWART: Um-hum. [CONFIRMATION]

SENATOR LATHROP: So it's good to have you here. How long have you been in the industry, or how long have you been working with boilers? [CONFIRMATION]

KENNETH STEWART: Thirty-one years. [CONFIRMATION]

SENATOR LATHROP: Okay, good. Do you have any concerns with the Boiler Inspection Board you want to share with the committee, as long as you're here?
[CONFIRMATION]

KENNETH STEWART: Nothing in addition to what already was expressed, so.
[CONFIRMATION]

SENATOR LATHROP: Okay, very good. Any questions for Mr. Stewart? I see none. You're a beneficiary of a busy agenda and... [CONFIRMATION]

KENNETH STEWART: It's all right with me. (Laughter) [CONFIRMATION]

SENATOR LATHROP: Okay, good. Thanks for coming down. We appreciate that, Ken.
[CONFIRMATION]

KENNETH STEWART: Thank you. [CONFIRMATION]

SENATOR MCGILL: A man of few words. [CONFIRMATION]

SENATOR LATHROP: Yeah. Anyone else...anyone here to speak on behalf of Mr. Stewart's appointment? How about in opposition? Or in a neutral capacity? Seeing none, that will close the confirmation hearing on Mr. Stewart, and that will take us to Kurt Eberspacher. How did I do on the name? [CONFIRMATION]

KURT EBERSPACHER: Good. [CONFIRMATION]

SENATOR LATHROP: Okay, good, good. It might be because you're a reappointment.
[CONFIRMATION]

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

Business and Labor Committee
March 18, 2013

KURT EBERSPACHER: Yes. [CONFIRMATION]

SENATOR LATHROP: Let's start with your name. [CONFIRMATION]

KURT EBERSPACHER: Kurt Eberspacher, E-b-e-r-s-p-a-c-h-e-r. This is...be my second appointment to the board. I've served two years now, previously was with the state of Nebraska with their boiler section for about nine and a half years. I currently am with an insurance company, and I'm a...been elected to the board to represent the insurance side of it. [CONFIRMATION]

SENATOR LATHROP: Okay, and that's part of the process. We have an insurance person representing... [CONFIRMATION]

KURT EBERSPACHER: Representative, yes,... [CONFIRMATION]

SENATOR LATHROP: Okay. [CONFIRMATION]

KURT EBERSPACHER: ...one of the individuals that represent different areas of the trade out there. [CONFIRMATION]

SENATOR LATHROP: Okay. Do you have any concerns about the boiler inspections that we ought to know about, as long as you're here? [CONFIRMATION]

KURT EBERSPACHER: Not currently. [CONFIRMATION]

SENATOR LATHROP: Or the code? [CONFIRMATION]

KURT EBERSPACHER: The question was already asked. I attended the, I believe it was, LB437 hearing, was just curious on how that was proceeding. I think that's very important on either way it goes. Some of the wording in the proposed wording was...is crucial, I think, to everybody, but also to the insurance industry. [CONFIRMATION]

SENATOR LATHROP: Currently, we rely on the insurance industry to inspect boilers, or some inspections can happen by the insurance industries, and then we get a certificate. Is that the case? [CONFIRMATION]

KURT EBERSPACHER: Yes. If we insure a company, we provide their boiler inspections. With that, my report goes to the state. The chief boiler inspector approves it or denies it and, with that, then the certificate...I mean, they pay their invoice, then the certificate goes out for them for another year, yes. [CONFIRMATION]

SENATOR LATHROP: Okay, so in the...in a significant way, the state relies upon the

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

Business and Labor Committee
March 18, 2013

insurance companies to do the inspections and then approves them.
[CONFIRMATION]

KURT EBERSPACHER: Yes. [CONFIRMATION]

SENATOR LATHROP: Okay. Senator Wallman. [CONFIRMATION]

SENATOR WALLMAN: Thank you, Chairman. So you inspect Iowa, state of Iowa, as well as Nebraska? [CONFIRMATION]

KURT EBERSPACHER: I'm currently...oh, I can inspect in five different states currently--Iowa, Kansas, Missouri, Colorado, and South Dakota--and, if my company wants me to go more, I'll be traveling a little bit more. [CONFIRMATION]

SENATOR WALLMAN: Thank you. [CONFIRMATION]

KURT EBERSPACHER: Yep. [CONFIRMATION]

SENATOR LATHROP: Okay, any other questions, concerns, thoughts? Seeing none, okay, thanks for coming down. [CONFIRMATION]

KURT EBERSPACHER: Thank you. [CONFIRMATION]

SENATOR LATHROP: We appreciate it. [CONFIRMATION]

KURT EBERSPACHER: Yep, thank you. [CONFIRMATION]

SENATOR LATHROP: And we appreciate your service too. [CONFIRMATION]

KURT EBERSPACHER: Thanks. [CONFIRMATION]

SENATOR LATHROP: Anyone here in support of Mr. Eberspacher's appointment? Anyone here in opposition? You're pretty confident. You started for the door before we hear from the opponents. (Laughter) Boy, that's confidence. [CONFIRMATION]

KURT EBERSPACHER: Thank you. [CONFIRMATION]

SENATOR LATHROP: Okay, seeing none, we'll close the hearing. Thanks for coming down, guys. Next we have...I guess that takes us to LB584, and Senator Smith is going to introduce LB584. Welcome, Senator Smith, to your old committee. [CONFIRMATION]

SENATOR SMITH: (Exhibit 1) Thank you. It's good to be here. And good afternoon, Senator Lathrop and members of the Business and Labor Committee. And welcome

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

Business and Labor Committee
March 18, 2013

back, Ms. Burton, and congratulations. For the record, my name is Jim Smith, J-i-m S-m-i-t-h, as if I have to spell that, and I represent the 14th Legislative District in Sarpy County. I am here today to introduce LB584. LB584 would establish evidence-based utilization and treatment guidelines for medical services in workers' compensation cases. As written, LB584 would require the scope and duration of medical, surgical, and hospital services to be provided in accordance with disability guidelines. Treatment that follows the guidelines would be presumed reasonable and would be covered under workers' compensation. With LB584, an insurer would be responsible for charges related to treatment that fall inside the guidelines, unless the services were provided in cases of a medical emergency, if the services were preauthorized by the insurer, or if the services were approved by an independent medical examiner. Adopting evidence-based guidelines benefits everyone involved in workers' compensation cases. When a worker suffers an injury, the guidelines will help providers in making a timely and proper diagnosis and in prescribing treatments known to be successful, saving both time and money. It will eliminate unnecessary back-and-forth between providers and payers, helping guarantee service providers with a timely payment. Saving both time and money will also help employers, especially small businesses, who usually have to absorb the extra cost of misdiagnosis, improper treatment, and employee absence. And just as an aside here, I know, oftentimes, we think of these work comp issues related to large corporations and, by and large, that's not the case. Most are involved in small businesses, and most involve workers that want to get back to work as quickly as possible. So that's one of the reasons I accepted bringing this bill forward and bringing it to you. I do believe that it benefits these small businesses that are out there, that do need a mechanism to limit their exposure, and also to provide an opportunity for the employee to be able to get back to work as quickly as they can. And most importantly, this benefits the injured employee. When an injured employee has to go through a battery of tests and treatments that may not be the right course of action, it slows their recovery time. If that employee works for a small business, their duties can't always be absorbed, and there is a chance that a delayed absence could jeopardize their career prospects and, potentially, even their long-term job security. Early proper diagnosis and treatment helps the worker heal quickly and get back to a quality of life free from injury and pain as soon as possible. Twenty-eight states have adopted evidence-based utilization and treatment guidelines and have seen success with this policy. There is a gentleman here today, Mr. Ken Eichler, who, I think, will be testifying in a neutral capacity. And I appreciate you accommodating his travel schedule today, Senator Lathrop. Mr. Eichler has had a lot of experience with the implementation of these guidelines in different states. And we had the opportunity to visit with him, in detail, last week. He is very knowledgeable about this issue and has offered himself as a resource. And again, I'd mention, he is in a neutral capacity, and I would encourage the committee to take full benefit of that and ask him questions. He can shed more light on how these guidelines work in a practical manner and can share with you some of the experiences the other states have had in implementing this. In closing, the adoption of evidence-based guidelines makes sense. It makes sense for all businesses, and it

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

Business and Labor Committee
March 18, 2013

makes sense for the employee. It provides the medical provider with a template for easy diagnosis and treatment for common workers' comp-related injuries. It guarantees quicker payment. It protects small businesses from loss of critical personnel, and it helps the injured worker heal and resume his or her life as quickly as possible. I do know there is some concern with respect to the language in the green copy of LB584, and we do have an amendment drafted to, hopefully, accommodate those concerns. It is my understanding testimony following mine will clarify the amendment's purpose. So again, thank you. I appreciate your time. [LB584]

SENATOR LATHROP: Very good. Thanks, Senator Smith. Any questions for Senator Smith? I see none. It looks like Bob Hallstrom is ready to jump into the chair next, so. [LB584]

SENATOR SMITH: Is he right behind me? [LB584]

SENATOR LATHROP: Yeah, so we can, maybe, ask Bob some questions too. We'll take proponents of LB584 first, beginning with Mr. Hallstrom. Yes. I am going to...and as many of you know, because they're mostly familiar faces in the room, that we use a light system, which is three minutes. You'll get two minutes on the green, one on the yellow. And then it will turn to red, and you will be interrupted and asked to stop with your remarks. So, please, time your remarks accordingly. I'm going to make two exceptions to that rule today because we have a witness that's going to testify in a neutral capacity who can explain, perhaps, better than the proponents or the opponents what is trying to be accomplished with this, and that's Mr. Eichler. And then we have a Dr. Martin from Sioux City who may take some additional time for that reason as well. So, Mr. Hallstrom. [LB584]

BOB HALLSTROM: (Exhibits 3 and 4) 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, as well as the National Federation of Independent Business. I've also been authorized to sign in on behalf of the Nebraska Chamber of Commerce and Industry, in support of LB584. I appreciate the Chairman allowing additional time for some of the experts that we've brought in to give the committee some additional background on utilization and treatment guidelines. I've submitted my written testimony. I will try to be brief. As Senator Smith indicated, we think this is a win-win-win for employees, employers, and medical providers, in terms of the employee, prompt and appropriate treatment, a quicker return to functionality, both at home and at work, for the employer. A quicker return to work, obviously, affects their bottom line. And for the medical provider, if they provide within the parameters of the treatment guidelines, we have a presumption that those services are reasonable and necessary, and that should reduce disputes over medical reimbursements. Senator Smith has submitted an amendment. The amendment is designed to address some concerns of getting the Workers'

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

Business and Labor Committee
March 18, 2013

Compensation Court involved without having them have to get in the middle of political frays. If you'll look at the amendment, the original green copy of the bill only referenced the Official Disability Guidelines, or the ODG. The amendment would open it up and expand it to a statutory directive that the ACOEM and ODG guidelines would be authorized. That would allow the Workers' Compensation Court, perhaps, to be in more of a ministerial position in adopting and updating rules and regulations, much like they are for the hospital medical fee schedules. So we would encourage the committee to adopt the amendment. And I would address any questions but, again, we've got a few experts here today that may be better positioned to do so. Thank you. [LB584]

SENATOR LATHROP: Okay. I do want to ask a couple questions, Bob and, maybe, just by way of setting the stage for the testimony, in so that members who are unfamiliar with the work comp practice have an idea of what this is about. Currently, if a person is hurt in the scope and course of their employment, the law provides that the employer or its insurance company is responsible for the cost of care, 100 percent. [LB584]

BOB HALLSTROM: Correct. [LB584]

SENATOR LATHROP: Presently, the care that an employee receives is between the employee and his physician or her physician? [LB584]

BOB HALLSTROM: Correct. [LB584]

SENATOR LATHROP: There is not a requirement in current law that a physician secure prior approval from an insurance carrier or an employer before performing any particular type of treatment. [LB584]

BOB HALLSTROM: That's my understanding. [LB584]

SENATOR LATHROP: And the treatment guidelines would basically set out a step-by-step process for the care and treatment of particular types of injuries, for example, a herniated lumbar disc. [LB584]

BOB HALLSTROM: Correct. [LB584]

SENATOR LATHROP: Okay, and your...you maintain, and those who favor the bill would maintain, that it provides for treatment that's consistent and that it is evidence-based... [LB584]

BOB HALLSTROM: That is correct. [LB584]

SENATOR LATHROP: ...and that, if you deviate from what would be evidence-based care, that you have to secure the approval of some third party. [LB584]

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

Business and Labor Committee
March 18, 2013

BOB HALLSTROM: That is correct. [LB584]

SENATOR LATHROP: Okay, and that's, essentially, what the...without getting into the particulars of the bill, that's the idea behind treatment guidelines. [LB584]

BOB HALLSTROM: Yeah, and the only thing I would add, Senator, when you said there's nothing that requires a particular format of treatment under the current law, that, essentially, is still the same within the treatment guidelines. The difference is, if you practice within those protocols, then we've removed much of the contention that might otherwise surround the determination of reasonable and necessary medical services. [LB584]

SENATOR LATHROP: Okay, and with that, I think, folks on the committee now have some understanding of what we're talking about or the context. I think we took this up on an interim study, too, so. [LB584]

BOB HALLSTROM: Yes. [LB584]

SENATOR LATHROP: But I don't think Senator Hansen had the benefit of that. [LB584]

BOB HALLSTROM: Senator, I would add, also, I neglected to indicate that I had handed out some testimony that was provided by Mr. Patrick Farritor of the OHARA, LLC. They have a certified managed care plan in Nebraska which already utilizes the Official Disability Guidelines so that, I think, the medical providers should be familiar with what the treatment guidelines are in that context. [LB584]

SENATOR LATHROP: Okay, okay. [LB584]

BOB HALLSTROM: Thank you. [LB584]

SENATOR LATHROP: And with that, we will...thanks. With that, we will take the next proponent. Good afternoon. Welcome to the Business and Labor Committee. [LB584]

DOUGLAS MARTIN: (Exhibit 5) Thank you. My name is Dr. Doug Martin, M-a-r-t-i-n. [LB584]

SENATOR LATHROP: Dr. Martin, before you start, you're on the...you get the ten minutes because you're one of the two people that we're going to make an exception for today. Hopefully, you'll share with us your expertise and your knowledge, and then we can go from there. So welcome. [LB584]

DOUGLAS MARTIN: Thank you, Mr. Chairman. Mr. Chairman and members of the

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

Business and Labor Committee
March 18, 2013

committee, I speak today in support of LB584. My name is Dr. Doug Martin. I'm the current medical director for St. Luke's Center for Occupational Health Excellence in Sioux City, Iowa. I work in that capacity and take care of occupational-related injuries and illnesses. For the majority of Nebraska workers in the Siouxland area, including one of the largest meat packing plants in the world that happens to be located in Dakota City. My hometown is Louisville. I graduated from the University of Nebraska-Lincoln as an undergrad and the University of Nebraska College of Medicine. It's nice to come back to the Capitol. I've not set foot in this building for 25 years. I appreciate that. I'm here today to share my experiences with you concerning my 19 years of occupational medicine practice in Siouxland and, also, based upon my administrative experience, primarily as a past president of a national organization known as the American Academy of Disability Evaluating Physicians. Through that organization I have an opportunity to provide continuing medical education to physicians across the country on the topic of evidence-based practice in occupational medicine. Additionally, you should be aware that I am currently serving on the editorial advisory board for the Official Disability Guidelines, commonly referred to as ODG. In that capacity I am charged with reviewing and editing, on a continuous basis, those evidence-based entries in the treatment guidelines, which are used across the country as a practice tool, for the care of the injured and ill worker. We have in this country a dilemma in attempting to provide healthcare that is both appropriate and correct but, at the same time, not so costly as to bankrupt the citizenry. This, of course, is not a new issue. It's currently in the cross hairs of national debate and of public policy and has been so for at least two decades. My purpose here today is not to rehash all of those dilemmas and difficulties. I won't talk to you about solvency of Medicare. I won't talk to you about insurance coverage for all. These are all important things on a national level, but please understand that occupational medicine and workers' compensation care is not immune from these types of issues. What is important for you to know, however, is that workers' compensation care and its delivery is challenged even on a greater level. You have, no doubt, heard people talk to you about the fact that it costs more and takes longer to take care of an injury or an illness under the workers' compensation system than it might be under another disability benefit system or a private insurance company. Why is this? Well, one of the reasons is, is that there are simply more players in the game. When you are a physician dealing with a patient in a typical doctor-patient relationship, it's a one-on-one deal. You are not encumbered by outside folks trying to, sort of, impede upon that decision process. But such is not the case when we're talking about workers' compensation care. When I see a patient, it's not just the doctor and the patient. It's also the employer. It's the human resources representative. It also, sometimes, is an attorney. It, sometimes, can be a government oversight agency, like OSHA, and these are just a few of the folks that have a vested interest in the outcome. The problem is, is that, with all of these extra interactions, there is a tendency to push the healthcare provider into a situation of more defensive medicine practice. And oftentimes, what happens is that overutilization and inefficiencies of care occur as a result. And oftentimes, these things then lead to longer disability durations, a delay in recovery of

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Business and Labor Committee
March 18, 2013

the individual back to a normal state and, oftentimes, the system is then blamed as the reason for this. Within this hearing and in your deliberations elsewhere, you probably will hear arguments and conflicting data regarding cost of all of this--human resources allocation, whether or not doctors will accept such guidelines, whether or not these guidelines are, quote, unquote, cookbook medicine. There will, no doubt, be advocates and detractors, and that's all fine and well. But I simply would submit to you that the goal here is only on one, single thing, and that is to do what is in the best interest of the Nebraska patient worker. I've reviewed the language of the proposed bill and would offer that each individual state workers' compensation system is a delicate balance-and-check system. The language in the current bill does not necessarily change the overwhelming majority of occupational healthcare that is currently delivered, but it certainly goes a long way to ensure its delivery. I would point out that, regardless of whether you're an advocate or a detractor, that you need to understand the dynamic of workers' compensation care. And one of its criticisms is that it's inefficient. Although evidence-based standards in medicine are accepted across all medical care disciplines as the gold standard, the simple fact is, is that many physicians, especially primary care-based physicians, do not receive training in evidence-based medicine care in its application to taking care of work comp injuries. And I should know this; I was one of them. My original training was in family medicine, so I am a witness to that fact. To that end, I would propose that the adoption of LB584 and evidence-based treatment guidelines are good for four specific reasons. And if I could elaborate on those, the first reason is it provides for better outcomes for the injured worker. The entire point of evidence-based medicine is directed towards better outcomes. This seems to be somewhat of a misperception out there that, somehow, these evidence-based treatment guidelines are an out wire or somehow of a rogue-type of a system, but it is simply not. As a matter of fact, the overwhelming majority of these particular practice guidelines are based upon evidence-based medicine. And many of the healthcare situations that you're aware of today certainly follow those patterns, but you're simply not aware of it. Now take, for example, hospital-based care. If one of you developed chest pain and, god forbid, had a heart attack today, you would go into the hospital. And what would happen? You would be subject to what is known as a data-ordered set, which is basically an ordered set that occurs with respect to what happens to you when you hit that emergency room door. It is based upon medical research, medical science, and evidence-based practice so that, whether you go into an emergency room in Omaha or Boston, basically, you have the same things occur to you. And the reason for this is because these things have been proven to give you the best outcome. This is no different in workers' compensation, whether you're dealing with a back injury or a shoulder strain. We have good evidence and good medical literature that will tell us what we should do in those types of situations, again, oriented towards what's the best outcome for the injured worker. There are some recent examples of this. I would refer to you the examples in Ohio and Texas where implementation of ODG guidelines has realized a substantial improvement in the reduction of disability duration and days absent from work. In the written testimony that I have supplied, I've given you some of

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

Business and Labor Committee
March 18, 2013

that data for your perusal. The other part of the better outcome story has to do with respect to access to care. It seems as though that, when evidence-based practice guidelines are adopted, there is a tendency for healthcare access to improve for the worker. And earlier care is realized, and the delay in treatment is minimized. Given that occupational medicine takes a page from the sports medicine principles of early intervention, this is very, very important with respect to how the care is delivered. The second point is that it provides a better experience for the physician or other healthcare provider. We're aware of many primary care physicians in Nebraska, specifically family doctors who are already maxed out with respect to their patient panels, and the last thing in the world they want to do is take care of a work comp injury. Obviously, time efficiency and evaluation of treatment of work-related injuries is an important part of the discussion here today, and evidence-based practice guidelines go a long way in trying to help that. You may hear, from doctors not practicing occupational medicine that otherwise take care of injured workers, about the so-called administrative burden of workers' compensation care. Initially, my experience in dealing with other states and their adoption of these guidelines is that there is initial pushback from some of the organized medicine associations because they see this as just another burden or another hurdle that they have to deal with. But once they get used to it, quite the opposite occurs. They see the ODG and the ACOEM Practice Guidelines as beneficial because they're evidence-based, they're multidisciplinary, they're kept current, and they're well-balanced. Another example of this would be both the Texas and the California Medical Associations, which I have worked with in teaching their physicians the implementation of these practice guidelines, and I can tell you that there has been widespread acceptance within the medical community of these guidelines in those states. Also, the use of evidence-based guidelines has a tendency to encourage more practitioners to participate in the system. That's a very important thing, also, to pay attention to. Number three, it is good for the employer. Obviously, any improvement on healthcare delivery and healthcare outcomes for injured workers is beneficial to the employer. The reason for this is the obvious cost savings but, also, those intangible costs of getting the individual back to work faster, with the goal in mind of getting their healthcare restored to a normal state. I would refer you to some of the other states--again, Texas, California, and Ohio--in the data sets that I have included in my report with respect to the improvements in this. And the cost savings here cannot be overemphasized. Number four, it is good for the system. Please make no mistake that I am no rookie when it comes to some of the adversarial situations with respect to workers' compensation care and its system. I happen to be one of the independent medical examiners that is assigned by the Nebraska Workers' Compensation Court, and I know that there is language in this bill that deals with the situation of the IME, or independent examiner, and how this bill would affect that. And what I see, as an independent medical examiner, a lot of times is that a lot of the adversarial situations, the ones that wind up in the courts, have to do with respect to disagreements with respect to care. And if these evidence-based practice guidelines were adopted, that would go a long way to try to help with that. One last point I would make is, also, to

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

Business and Labor Committee
March 18, 2013

consider that these guidelines are evidence-based. Some folks may talk to you about other guidelines that are known as consensus-based guidelines. Basically, consensus is when you get 100 people in a room and tell them that you have to agree before you can leave and go home. And although those consensus-based guidelines sometimes can be beneficial, they simply don't hold a candle to the data that we've been able to realize with respect to evidence guidelines. Thank you. [LB584]

SENATOR LATHROP: Very good. Thanks, Dr. Martin. Any questions for this witness from any of the committee members? Senator Harr. [LB584]

SENATOR HARR: Thank you. And I'm a big fan of evidence-based, and I get that. But my question is, what happens if you have a party that is obviously injured out and the best practices does not fix that underlying issue? Then what happens? [LB584]

DOUGLAS MARTIN: If there's a situation, Senator, where you have an injury that may not be addressed in the guidelines, then what happens is, is that you have an interaction or interplay with respect to the general parameters that the evidence-based treatment guidelines actually lay out. Most of these guidelines will cover the overwhelming majority of injuries. It's stated that they cover approximately 97 to 98 percent of all injuries. But you will have situations where they will not cover some situations. The overall principles are early intervention, early aggressive detection of the problem. These are overriding principles that these evidence-based guidelines have. Then what happens is, is that if there's not specifics that talk about that there is an interaction between the provider and the individual that's covering the care, whether that's an insurance company or an employer, and a reasoned approach is generally made with respect to that. I've had that happen to me a number of times where you have situations that have come up and it's not addressed in the guidelines. So you take what's available and you go with it. And if you, basically, follow the general principles of the evidence-based practice guidelines, you'll get a good result. [LB584]

SENATOR HARR: And you say, if it falls outside a reasoned approach. My definition of "reasoned" and yours may differ. So who do you appeal to? [LB584]

DOUGLAS MARTIN: Well, you appeal to the science, basically. The evidence-based practice guidelines basically divide up care into one of three areas. One is the situations or the care that we know it does make a difference. In other words, it's something that the physician should do. We also have a situation where we have some treatments that we know are detrimental, things that a physician should not do. We also have a third category, which are called options, which means that we have data that, on one hand, says that it might help. We might have data, on the other hand, that may say it doesn't help. We may have data that says, we're not real sure. And in those types of situations, of course, there's options that can then be taken into consideration. Basically, what we're talking about with these evidence-based practice guidelines is to make sure that

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

Business and Labor Committee
March 18, 2013

the cure that's provided is either in that it's-good-for-you category or that optional category. We want to make sure we're not getting into the situation where we're doing treatments that we know are bad. [LB584]

SENATOR HARR: My question is--we don't have this law right now--are you saying people out there are doing things that are bad then? [LB584]

DOUGLAS MARTIN: Unfortunately, that's the case, yes, sir. [LB584]

SENATOR HARR: So you want to regulate the medical industry? [LB584]

DOUGLAS MARTIN: I want to provide the best quality care for the injured worker that can be given, and that's what these evidence-based practice guidelines attempt to try to solve. [LB584]

SENATOR HARR: So why are we limiting it just to workers' comp? Why don't we do that for the whole medical society, in general? [LB584]

DOUGLAS MARTIN: As a matter of fact, we currently do that, Senator. For example, in Medicare, for example, if you are under Medicare rules, so to speak, if you go into the hospital, you have a congestive heart failure problem, you have a cellulitis problem, your reimbursement is basically tying to whether or not you are following those evidence-based practice guidelines. As I indicated, in the overwhelming majority of medical care, it's already being done. It's just that we don't realize it. [LB584]

SENATOR HARR: Yeah, well, it's...we still have what's called the art of medicine, right? [LB584]

DOUGLAS MARTIN: Yes, sir. [LB584]

SENATOR HARR: And so I understand data, (inaudible) of using data. But I guess my question is, it's not always...I mean, how your body reacts is different than how mine...we're starting to learn more, depending on your background, based on where you're from, your ancestry you're from, based on what sex you are, what age you are. And I guess I need to, if we're going to do this, we need...I need more information to feel comfortable about what goes into this evidence-based, because, while I'm a fan of evidence-based, I'm not sure...someone needs to convince me a little bit more on what is evidence-based and what goes into it than what I know right now. [LB584]

DOUGLAS MARTIN: Yes, Senator. I don't think you will find the evidence-based practice guidelines to be so prescriptive that it does not take those things into consideration. And you're exactly right: As we know more about various different medical conditions, we know that genetics plays a role, we know that your

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

Business and Labor Committee
March 18, 2013

socioeconomic background makes a role, we know your ethnic background makes a difference. These evidence-based practice guidelines are not so narrow as to eliminate all of those different human conditions and variables in those factors. It's easy to deal with. I can tell you, from the perspective of dealing with meat packing workers where we have multiple ethnic backgrounds, multiple genetic problems to deal with, that they do work. There's no question about it. [LB584]

SENATOR HARR: Okay, thank you. [LB584]

DOUGLAS MARTIN: You're welcome. [LB584]

SENATOR LATHROP: I have a question for you. You're practicing over in Sioux City, Iowa? [LB584]

DOUGLAS MARTIN: Yes, sir. [LB584]

SENATOR LATHROP: Do they have treatment guidelines for work comp in Iowa? [LB584]

DOUGLAS MARTIN: No, they don't. I will disclose to you, Mr. Chairman, that I am currently part of an effort in the legislature in the state of Iowa to adopt these practice guidelines as well. [LB584]

SENATOR LATHROP: Okay. Do you treat people from South Dakota as well? [LB584]

DOUGLAS MARTIN: I do treat people from South Dakota. [LB584]

SENATOR LATHROP: They have treatment guidelines in South Dakota? [LB584]

DOUGLAS MARTIN: No, Chairman, they do not. [LB584]

SENATOR LATHROP: Okay. And one more question for you: Do you have an interest in any of the vendors who sell the treatment guidelines? [LB584]

DOUGLAS MARTIN: No. As I've indicated, I am on the editorial advisory panel for ODG. That's a volunteer position. I receive no compensation for that, and I'm here today as a volunteer. [LB584]

SENATOR LATHROP: Okay, very good. I think that's all the questions we have for you. [LB584]

DOUGLAS MARTIN: Thank you. [LB584]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: Thank you for making the trip down here and for your testimony, Doctor. [LB584]

DOUGLAS MARTIN: Thank you. [LB584]

SENATOR LATHROP: Next proponent. Anyone else here to testify in support of LB584? Anyone here in opposition to LB584 wishes to be heard? [LB584]

GREG COFFEY: Senator... [LB584]

SENATOR LATHROP: Just to be clear, Dr. Martin was on a...on the exception, from Sioux City, expert witness exception to the three-minute rule. [LB584]

GREG COFFEY: I used to be from Sioux City. [LB584]

SENATOR LATHROP: Okay. So with that, you can begin your three minutes of testimony. [LB584]

GREG COFFEY: Senator Lathrop, members of the committee, my name is Greg Coffey, last name spelled C-o-f-f-e-y. I'm here on behalf of the Nebraska Association of Trial Attorneys, in opposition to LB584. LB584 proposes that, effective January 1, 2014, the scope and duration of medical, surgical, and hospital services shall be provided in accordance with the Official Disability Guidelines in effect on such date, as published by the Work Loss Data Institute. I looked at the home page for the Work Loss Data Institute, and the very first paragraph of that Web site's home page begins: Work Loss Data Institute is an independent database development company focused on workplace health and productivity, with offices in California, Texas and Montana. WLDI products include Official Disability Guidelines, ODG, now in its 18th edition, which provides evidence-based disability duration guidelines and benchmarking data for every reportable condition. New medical treatment guidelines for work-related conditions are also available with ODG in a complete integrated product, ODG Treatment, currently in its 11th edition. Both put evidence-based medicine to work for those involved in workers' comp and nonoccupational disability, including insurers, third-party administrators, healthcare providers, case managers, employers, benefit administrators, risk managers, and claims attorneys in the management of management of return-to-work and utilization of medical services following illness and injury. This is a for-profit organization. They charge for their evidence-based medicine guideline books. It's \$300 to obtain a copy, and they come out with a new one every year. So if you are a practitioner that wants to treat patients with workers' compensation injuries, you're basically required to invest in a \$300 book every year, and anybody who wants to look at them has to do the same. These are the people who will be telling your sons and daughters who get hurt on the job what their doctors can and cannot do for them medically. If Health and Human Services were going to try to adopt treatment guidelines

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

Business and Labor Committee
March 18, 2013

to be imposed on physicians, rather than allowing those physicians to exercise their independent judgment, there would be rule-making hearings, open to the public, and someone here, within the state, would be accountable for those guidelines. With this proposed change in LB584, we're ripping medical decision-making away from licensed Nebraska physicians and abandoning that control to a private company in California whose standards are not subject to review and can be changed at any moment, without notice. It's a one-size-fit-all solution. Everyone here in Nebraska involved in a workers' compensation claim would be obligated to follow those requirements, and no one in Nebraska has any control over what those requirements mandate, not the treating doctor, not the courts, and certainly not the patient whose care is directly affected. I'll leave more of the particulars for my colleagues but welcome any questions. [LB584]

SENATOR LATHROP: Very good. Thanks, Mr. Coffey. Any questions? I see none. Thanks for coming down. Next opponent. [LB584]

RON BROWN: Good afternoon. [LB584]

SENATOR LATHROP: Welcome to the Business and Labor Committee. [LB584]

RON BROWN: (Exhibit 7) My name is Ron Brown. I was formerly a member of the Nebraska Workers' Compensation Court. I served there for 18 years. I am not here to speak on behalf of the court. I want to make that clear from the beginning. I want to talk to you about the experience Nebraska has had with managed care and why managed care has not worked in Nebraska. I have some handout material for members of the committee. Several years ago, LB757 made major changes in the Nebraska Workers' Compensation Act. The only member of the Unicameral who served at that time was Senator Chambers. One of the changes that was made in the Workers' Compensation Court was to permit managed care in Nebraska. If you look at the first page of the handout, you'll see that, beginning in 1995, there was one managed care plan. If you look at the second page, you'll see that, at its high point, managed care in Nebraska covered 112,399 employees and 2,360 employers. Since that time, the number of employees covered by managed care has diminished to 33,996. The number of employers who participate in managed care in Nebraska has diminished from its high point down to 435 employers. Why is that? If managed care provides a better product to employers at a lesser cost to employers and better care for employees, the market would indicate that more employers would participate in managed care and more employees would be covered by managed care. But that's not what's happened. Employers have found it at least as expensive. It provides intrusion into the patient-physician relationship. It damages employee morale who do not like their medical care dictated by an administrative handbook rather than their treating physician. Physicians do not like the intrusion into the patient-physician relationship. They do not want their treatment judgments questioned by a plan administrator who has never seen the patient. And physician groups drop out of managed care plans. If it was different

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

Business and Labor Committee
March 18, 2013

than that, if managed care was effective, you would see a trend where more employers and more employees were covered under those plans. I've got the red light. [LB584]

SENATOR LATHROP: Let me just ask this question. Your point with the managed care plan is...what do you see as the similarity between the managed care plan and implementing treatment guidelines? [LB584]

RON BROWN: Managed care is not the identical twin of these guidelines but it's the sibling of. And thankfully, Mr. Hallstrom told you that the OHARA plan has adopted many evidence-based guideline principles in its managed care plan. If the OHARA managed care plan provided better medical care at a lower cost, employers would flock to OHARA managed care. That's not what's going on. At one point, there were six managed care plans doing business in the state of Nebraska. There is now one, OHARA managed care. Some of the managed care plans were affiliated with insurance companies. Travelers Insurance Company had a big managed care plan. Hartford had a big managed care plan. They don't do business in the state of Nebraska anymore. They could not make managed care work. They could not make it profitable. So instead of letting the market dictate what is effective, the proponents of the plan are now coming to you and saying, well, we can't make it work ourselves, all the people in the insurance industry cannot make it work, so we want you to impose it on the workers' compensation system. [LB584]

SENATOR LATHROP: And the managed care plan would...does it, effectively, set out treatment guidelines, and then those treatment guidelines are managed by the plan itself? [LB584]

RON BROWN: By a plan administrator. [LB584]

SENATOR LATHROP: You're using the managed care plan as a predictor of what to expect if we had treatment guidelines, and I'm not clear on the relationship. In a managed care plan, do they stick to what they believe...the plan believes to be evidence-based care? [LB584]

RON BROWN: If you want to have your care...if you want to have the treatment paid for, you do. [LB584]

SENATOR LATHROP: Okay. And you think that's a model for what, or a similar situation to what, we get if we had the... [LB584]

RON BROWN: Yes, and the OHARA plan uses the guidelines that they're trying to get you to adopt now. [LB584]

SENATOR LATHROP: Okay, okay. Any other questions for Judge Brown? Thank you

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

Business and Labor Committee
March 18, 2013

for being here today. We always appreciate hearing from your perspective as a former judge of the court. [LB584]

RON BROWN: I also wanted to tell you there are two other medical experts here today. They're from Omaha, not from Sioux City, but they might have some more... [LB584]

SENATOR LATHROP: We might give them a little leeway when they get here. [LB584]

RON BROWN: Thank you. [LB584]

SENATOR LATHROP: Thank you. Good afternoon. [LB584]

IAN CRABB: Good afternoon. Thank you for having us here today. My name is Ian Crabb. I'm an orthopedic surgeon from Omaha, Nebraska, in practice. I've been in practice for 20 years, and I have a fairly large exposure to workers' compensation cases, both as the treating physician and as the reviewing physician. It would be a wonderful world if evidence-based guidelines really did the things that have been proposed in this room. I mean, the reality of the...I just received the guidelines from the...from our academy for nonoperative treatment of a knee, and it was 1,200 pages long. This doesn't include any surgical treatment, and so...and even then, as a practicing physician, I've opened these guidelines with the expectation that I would have the answer, that I would then know how to treat you when you came in with your knee pain or how to take care of the shoulder or whatever it would be. And then you read these guidelines and, I think, one of the earlier presenters said, there's the things we know and the things that you shouldn't do and then there's the options section. Well, the options section is 98 percent of the book. And so you're left with, you could do this, you could do that, the evidence really doesn't say whether you should do that or not. So to a...you know, the words sound really good, it's evidence-based. But we know with absolutely certainty very few things in medicine. It's a shame, but it's true. We...and there are many, many opinions, and most of the guidelines tend to be consensus-based. So from a treatment standpoint, as a treating physician, the guidelines don't give me much. I read them. It's just a laundry list of possibles. It doesn't help me with the decision-making process that I have to do every day with an individual patient. So I started to think a little bit about what the point of this bill would be, and it really shifts the relationship between us and the insurance company to where they can be even...so we do have an experience with managed care companies, and they already have the ODG. Every insurance...every TPA insurance carrier has the ODG. They already have these guidelines. When we submit a claim, they sit by a computer, they check the ODG, and they adjust the payment that they've reserved for this issue and, yet, most of them don't act on them because it's costly, because it requires someone to call you and say, hey, Doc, you know, this only should have, really, ten visits of PT. A few companies do that, but most of them do not. They choose not to. This bill would allow them to be even lazier in that regard and then, at the end of the day,

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

Business and Labor Committee
March 18, 2013

come back and say, hey, well, you weren't in the guidelines, so none of this counts. To me, that's just not...it's not...it doesn't add the value that they are saying it would add to the system, from my perspective. So to go through Dr. Martin's points, better outcomes for the injured worker, again, it would be nice if evidence-based medicine really gave us those tools on the front line. I don't believe that it does. Better exposure for...better access, I'm not quite sure how this would give better access. To me, the other issue that came up was that these guidelines would somehow improve the system and be good for the worker. Most of the contentious issues that I face in the office have to do with causation. They don't have to do with what the treatment is. It's, do we own this, did this happen on the job, or did this happen when he was out playing golf? Those are the issues. Those are where all of the stress of the system occurs. Whether we treat them with six physical therapy visits or two and a shot, you know, honestly, that's not where the stress of the system is. So personally, I don't think these do anything for the actual practice. It's a much more complicated discussion if we really are truly interested in doing that. Instead, it shifts the burden of the claim to the insurance company's favor, essentially. [LB584]

SENATOR LATHROP: Okay. Any questions for Dr. Crabb? Senator Wallman. [LB584]

SENATOR WALLMAN: Yeah, thank you, Chairman Lathrop. Yes, Doctor, thanks for coming. Would you say...I still am a farmer, I guess. I have personal injury stuff like this, you know, workmen's...it's not workmen's comp, but it's...would you say they coincide with what we have in workmen's comp, the private insurance for individuals? [LB584]

IAN CRABB: I'm not sure I understand the question. So is the current workers' compensation insurance similar to? [LB584]

SENATOR WALLMAN: Yeah, yeah. [LB584]

IAN CRABB: Yeah, um-hum. [LB584]

SENATOR WALLMAN: Okay, because I know I broke my leg once, and I was just given four weeks. And four weeks doesn't exactly heal a leg. [LB584]

IAN CRABB: Right, four weeks off of the thing, yeah. [LB584]

SENATOR WALLMAN: Yeah. [LB584]

IAN CRABB: Well, and the return to work...the workers' compensation law allows...has different return-to-work criteria to it. [LB584]

SENATOR WALLMAN: Um-hum, true. Thank you. [LB584]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: Dr. Crabb, I want to ask you a question. If treatment guidelines are put into place, to what extent does that put you in a spot, trying to practice within what we lawyers and doctors call a standard of care? [LB584]

IAN CRABB: Yeah, I mean, it's, in a sense...and it's the thing we've feared from guidelines in the very beginning because we've had guidelines for a long time. And they used to come out, printed, "These are not the standard of care," you know. But that seems to have slipped away, and they're becoming, more and more, the standard of care. And initially, guidelines tend to be all-inclusive and then, over time, they get narrowed down, not necessarily based on the evidence but based on whoever is producing the guidelines' particular bias. [LB584]

SENATOR LATHROP: But from your point of view, as a practicing physician, your duty to the patient,... [LB584]

IAN CRABB: Right. [LB584]

SENATOR LATHROP: ...subject to civil liability, is to practice within the standard of care. [LB584]

IAN CRABB: Correct, correct. [LB584]

SENATOR LATHROP: Do the...are there occasions where you would be called upon to practice in a different manner, under the guidelines, than you believe to be consistent with the standard of care? [LB584]

IAN CRABB: It's...yeah. [LB584]

SENATOR LATHROP: In other words, putting doctors in the position of either being sued for breaching the standard of care while they have maintained compliance with these guidelines or deviating from the guidelines because you believe that's what the standard of care requires. [LB584]

IAN CRABB: Yeah, absolutely, because there is some separate list of things that you can and can't do, that may change, that you're not necessarily aware of even. [LB584]

SENATOR LATHROP: Okay. I think that's all the questions we have for you today. Thank you for taking time out and coming down here today. [LB584]

STEVE HOWARD: (Exhibit 8) Good afternoon. I'm Steve Howard, H-o-w-a-r-d, appearing on behalf of the Nebraska State AFL-CIO, in opposition to LB584. And, Senator, what you just talked about was what, or was one thing that, I came today to address, and that is what happens when the guidelines present the doctor with a choice

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Business and Labor Committee
March 18, 2013

of either not getting paid to do their work or following what he or she believes is the standard of care. If the doctor follows the guidelines and doesn't...and then something goes bad, he or she may be criticized for failing to exercise that independent judgment. On the other hand, if they do exercise their judgment, then someone is going to come along and say, well, gosh, you should have followed these guidelines, they would have answered things. But I'd like to dispel the notion that there is some runaway malpractice problem in Nebraska, that physicians are...that are treating workers' compensation patients are doing so with any level of incompetence or lack of skill. You know, I think all we have to do is look at the medical hospital liability fund which is, of course, the fund that's there for the cap in medical liability cases. There's about...as of...towards the end of last year, about \$89 million in that fund, with funds paid out of less than \$6 million in the last reported year, and that's all claims. That doesn't have anything to do with work comp specifically. And so that's what the Nebraska State AFL-CIO is worried about is access to care and keeping the good doctors that are treating our membership willing to go ahead and treat workers' compensation patients. What I had handed out to you are the Colorado guidelines. And it's not the guidelines, it's just the table of contents for those guidelines, for a few of them. And what it says, a couple of pages in, after the table of contents is listed, it says that, in each case, the doctor is supposed to not omit or cross over or skip any of the steps involved, do not overlook any sections. So what's going to happen is, with every injury, the doctor is going to have to get out the guideline. And it's a little bit...well, we just reject the notion that the physicians in Nebraska are unable to do this. And so, getting back to that discussion about the doctors making a choice, I couldn't copy this stuff off because it was copyrighted. But you might look up, from May of 2004, a Dr. Merenstein. It's a doctor that got sued. And he said, I just followed the guidelines. And that was one of the first cases where there was a malpractice case involving the guidelines. He says, I'm trying to do the right thing, I'm following your guidelines. And the jury didn't agree. You might look in July of 2012, Dr. Sanjay Gupta, who you might see on television off and on, talking about this, sort of, you know, recipe- or cookbook-based medicine and whether there are too many tests that are run. So we think it ought to be on a patient-by-patient, one-on-one basis with physicians using their good, independent care to decide what's best for our Nebraska workers. So that's all I wanted to say today, but thank you. [LB584]

SENATOR LATHROP: Very good. Thanks, Steve. I see no questions. Next opponent. [LB584]

JOHN McCARTHY: Hello. I'm John, or Jack, McCarthy, and I come here as an orthopedic surgeon to address the utilization of guidelines. Well, guidelines address a quality issue. I do not believe the implementation of guidelines will improve the quality of care and has not been a concern for our patients. Guidelines, when well-designed, can provide an outline of recommendations for care. Guidelines are a way to summarize an outline for this patient care. Physicians will be asked to follow the care and, in fact, not paid if they don't follow the guidelines. For those of us who stand on the front lines for

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Transcriber's Office

Business and Labor Committee
March 18, 2013

patient care, we don't have the ability, as Dr. Martin's occupational medicine colleagues do, to manage care, 8:00 to 5:00, Monday through Friday. It is easy to say guidelines will add clarity to care. I would propose that guidelines, as we're seeing today, are to save money and not to help us care for workmen's compensation patients. Please be aware, insurers do have access today and can use guidelines. Insurers do not use these guidelines proactively. Recognize, guidelines are, theoretically, only advisory statutes for the majority of diagnosis. But guidelines become rules and rules become standards, and insurers should not set the standard of care. Please understand, orthopedics, which is 40--excuse me--70 percent of the workmen's compensation cost, do not use the occupational medicine guidelines. They guidelines are too lengthy and do not help identify care that is necessary. Guidelines, as proposed, are 4,000 pages, and the Colorado guidelines are close to these. Occupational medicine do not provide more than 10 to 15 percent of care and should not lead this care. Orthopedic guidelines continue to be developed and are accepted by most of the orthopedists. This bill is well-intended but may be premature. Guidelines, as proposed, may delay care and restrict care if, indeed, the orthopedic population backs away from care of the workmen's compensation cases. Please understand the bill is not necessary as, again, insurers can use these guidelines today. Us physicians will continue to care for our patients to the best of our knowledge and our training. In this case, I think we can achieve a good result for our injured patients with the current statute. Guidelines don't improve the challenges of workmen's compensations. Guidelines do not address causation, where most confrontation occurs. Delaying care by guidelines will increase the confrontation between parties. Again, although guidelines are well-intended, these are premature for our workmen's compensation patients. Thank you. [LB584]

SENATOR LATHROP: Dr. McCarthy, how long have you been practicing orthopedic medicine? [LB584]

JOHN McCARTHY: Twenty-seven years. [LB584]

SENATOR LATHROP: Yeah. I know you've treated an awful lot of people that I've had the privilege of representing over the years. [LB584]

JOHN McCARTHY: Yeah. [LB584]

SENATOR LATHROP: And so I'm going to ask you this question: To what extent does...do you expect the treatment guidelines would push physicians like yourself, orthopedic doctors, away from the practice of treating work-related injuries? I mean, do we get to a point where, in our effort to save the premium dollars, to save the cost of work comp claims, do we get to a point where we regulate it to such an extent that we lose the physicians that are willing to treat these folks? [LB584]

JOHN McCARTHY: It won't change our surgical care. But what it will change is how we

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

Business and Labor Committee
March 18, 2013

manage these patients. If I have to jump through 150 pages of shoulder guidelines to take care of a shoulder, I'll make him go see an occupational medicine doctor first, get all the paperwork done, come to me, and I'll treat your shoulder. When we get done with care, I'll get you back to work, we'll get you well, we'll handle complications, and I'll try and summarize. But if the guidelines...they can come back and say, well, I missed step 3 of 340, then I'll send him back to the occupational medicine doctors, deal with all the paperwork. I think what orthopedic surgeons do won't change. But I think the patients will have a lot more hoops, and the confrontations will be a lot higher. That's my concern. [LB584]

SENATOR LATHROP: Okay. Senator Wallman has got a question for you. [LB584]

SENATOR WALLMAN: Thank you, Chairman Lathrop. Yeah, thanks for coming, Doc. Has your compensation changed, over the years, much through the court system, or has it stayed pretty flat? [LB584]

JOHN McCARTHY: We've been challenged by the courts as well, as Dr. (sic--Judge) Brown will tell you. Over the last six years, we've taken small decreases. The court has been pleasant to work with. They're trying to satisfy their regulations. And maybe I'm saying that wrong. But we've had decreases in our reimbursement through the years. [LB584]

SENATOR WALLMAN: Thank you. [LB584]

SENATOR LATHROP: Okay, I think that's it. Thanks for coming down, Jack. [LB584]

JOHN McCARTHY: You bet. [LB584]

SENATOR LATHROP: Next opponent, if any. Seeing none, we'll go to neutral testimony. [LB584]

KEN EICHLER: Senator Lathrop, additional senators, thank you for having me. My name is Ken Eichler. That's E-i-c-h-l-e-r. I've traveled quite a distance, from New York, to be here today. And I appreciate your accommodating my travel schedule, as I have to be in Detroit, to assist them with opioid guidelines, with a presentation that starts at 8:00 tomorrow morning. Myself and Dr. Gary Franklin, from Washington, and others are presenting there. I do represent Reed Group, an electronic publisher of various state guidelines. I am also the vice chair, or the cochair, of the IAIABC medical issues committee. The IA is the association of workers' comp boards and commissions across the U.S. and Canada. I'm one of the five appointed members of the advisory council. We work directly with the commissioners and regulators across the country, here in the U.S., and in Canada. My company also publishes electronic versions of the ACOEM guidelines. So I've given you full disclosure. I've heard a lot of interesting testimony

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

Business and Labor Committee
March 18, 2013

today, and I didn't give you a written presentation because I wanted to be able to respond to some of the testimony today and offer myself as a resource here to the state. I believe evidence-based medicine and guidelines can benefit all stakeholders. Evidence-based medicine guidelines and guidelines themselves have a goal not of cost containment, which many will claim, but a goal as to expedite and facilitate the delivery of appropriate care to an injured worker. The end goal is to facilitate functional improvement, to be able to get people to function in life. Work is a subset of life. We shouldn't be focusing on lifting 10 or 20 pounds in the workplace. But we should be functioning on being able to lift a child or a grandchild or a bag of groceries, to be able to bend and stoop to tie our shoes, to get something out from under the bed, to be able to reach above the shoulder to get a hanger, to be able to do stovetop cooking, or drive our car. These guidelines will help expedite that. There are a lot of folks speaking today that I think are speaking from the heart and truly believe what they're saying but haven't necessarily experienced state guidelines. I've traveled the country. I hail out of New York. I've been on advisory councils. I've been in the adoption of guidelines. I've worked with several states through the adoption process over the last six years. I've seen guidelines work. I've seen guidelines fail. I believe you have an opportunity to make guidelines work in your state. I believe, by expediting the care, we can cut down the transactional time to expedite the care. I'll give you an example of the state of Louisiana, which adopted guidelines a few years ago, about a year and a half to two years ago. In the first year of the implementation of guidelines, the delay in care dropped on disputed cases--and I'm talking about disputes on medical issues--from 12 to 18 months to less than 30 days. The savings in litigation costs: over \$20 million in one year. Those litigation costs translate into savings on premiums. Who pays the premiums? We all do, as stakeholders. Evidence-based medicine provides approval and recommendations. It is not, in any way, cookbook medicine. It is not managed care. It is not directed care. A guideline is, simply, a guideline. And I don't think that many folks have addressed the concept of how guidelines are used where the rubber hits the road, where it really happens. Under treatment guidelines, whether it's ODG or ACOEM, they both function in similar ways. As long as there is documented functional improvement, further care is generally authorized. Different treatments fall into the categories of recommended, not recommended, no recommendation, or not covered. If something is listed as recommended and if you ideally adopt a common ODG concurrently, if any of the treatments are considered recommended or approved by ODG or ACOEM, it's a green light to move forward very quickly, no authorization required. The carrier is the only one who is required to pay. The provider doesn't have to put in a request for authorization. If a treatment is not recommended, if there is no recommendation, or if it's not covered, then that opens the door for their provider to file a variance request to the carrier, with the appropriate regulations and rules adopted by your state Workers' Comp Courts here. There will be stipulations, as I understand it, on the amount of time a carrier has to respond to that, to eliminate the delays. And failure to authorize will, hopefully, become a passive authorization, not a denial, so that a carrier cannot ignore, cannot fail to respond, because if they do, it's autoapproved. It's autopaid. It protects the injured

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

Business and Labor Committee
March 18, 2013

worker. Variances, there can be controls on how long it takes to resolve a dispute. And again, they fail to respond, automatic authorization. I mentioned continued improvement. As long as there is functional improvement, you're protecting your injured workers. You're a state that, as I understand, the majority of your residents live within, I believe it's, 100 miles of Omaha. You had folks here in this room earlier today. I believe the gentleman was from this town that had 200 residents or so. You've got a lot of small towns with not that many docs. We need to improve the access. Docs have not historically dropped out of the system when evidence-based medicine guidelines are adopted in any state that we have worked in. Doctors threaten to drop out. They don't drop out. They fiscally cannot afford to if 10 percent or more of their practice is workers' comp. The amount of time it takes for a doc to process a claim with guidelines is actually faster. And I'd love to have the experience to work...to step into these doctors' offices who said it may slow it down because all of the guidelines are available with electronic versions, with crosswalks linking ICD and CPT codes. ICD are the diagnostic codes that physicians use. CPT codes are the procedure codes. They can simply plug in a diagnostic code and the treatments pop up as recommended or not recommended. Conversely, if they want an MRI of the knee and it's still a rule-out diagnosis and they're not sure what the diagnosis is, they can put in the CPT code, get the associated diagnostic codes, and know it's approved or not approved or find out what needs preauthorization. It is a road map. It's opening the hand of cards that the insurance company is using and the physicians are using so everybody knows where they stand, they know how to proceed. We can control poor quality of care. I was involved in the Montana adoption of guidelines. Montana, like yourselves, is a rural state. We found that there were more spinal cord stimulators, more fusions, and more artificial disc implants being done in the state of Montana per capita than there are in New York, California, or Texas, the three largest workers' comp states in the nation. The one physician in Montana who is doing more back surgeries than anyone else was doing more artificial disc replacements than the chief of spinal surgery at the Hospital for Special Surgery in New York who pioneered the procedure. So patients are getting unnecessary care. It hurts the patient at times. All this does is create a check and balance. We've got docs here who obviously practice good medicine. But there are a lot of docs who just don't know. This will help provide that road map to protect the injured worker from poor care. There are patients who go to physical therapy, ad infinitum, months, years on end, offered by pain management docs or physical medicine docs--not improving. We're not helping them. When... [LB584]

SENATOR LATHROP: Mr. Eichler. [LB584]

KEN EICHLER: Yes, sir. [LB584]

SENATOR LATHROP: You testified or came here in a neutral capacity. [LB584]

KEN EICHLER: Yes. [LB584]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: And you sound very much like a proponent. [LB584]

KEN EICHLER: I apologize. [LB584]

SENATOR LATHROP: Do you want to give us the downside that has you sitting in the chair as a neutral testifier? [LB584]

KEN EICHLER: Yes, I will. Okay, downsides of guidelines. The steps required to implement are a downside. The state has to look at full training programs. The state has to consider credentialing. The state has to look at continuing education credits. The state has to look at outreach to involve all folks. The state has to look at education of all stakeholders, as I mentioned. That is a problem, to get folks on board. There have been states that don't do proper training where guidelines have been a problem. There will be the need for adoption of regulations. Without the regs, states that have adopted guidelines without regs have hit major stumbling blocks. So there are problems with the bill. When I come in neutral on the bill, per se, I am pro evidence-based medicine, but I see issues with the bill as it was originally written. I think the control needs to...I see I've got the yellow light. The state needs to turn over the control, as is in the amended bill, potentially, to the Workers' Comp Court system, in order to let them adopt by rule and reg rather than by law. It allows better control and has worked in various states. [LB584]

SENATOR LATHROP: Let me ask the question... [LB584]

KEN EICHLER: Please. [LB584]

SENATOR LATHROP: ...of you, and that is, in Nebraska, as you observe, the greatest share of the population is found in the eastern 20 percent of this state. When you get out to western Nebraska or into the Sandhills or various parts of the state, we have a lot of small communities who rely on nurse practitioners, the general practitioner to provide the care. I'm looking at these treatment guidelines for Colorado, and I'm thinking of someone who is a general practice doctor trying to treat the back sprains and strains and the knee strains and everything that happens to a patient in a smaller, rural community, before they ever go into a more populace area, to the orthopedic surgeon or the neurosurgeon. What's that person to do that's trying to treat people, trying to do their best, and now they have a work comp claim and there is a 4,000-page book or program and now they're trying to figure out what to do with somebody who has a knee strain who happened to have strained the knee at work? [LB584]

KEN EICHLER: Oh, that's really easy. When one looks at a PDF document or a paper document, it can be overwhelming. But medical offices are required...under federal programs they have to go electronic. Pretty much everyone has Internet access. They can access these guidelines. Simply plug in a keyword and the guideline comes up with

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Transcriber's Office

Business and Labor Committee
March 18, 2013

the exact section of the guideline. [LB584]

SENATOR LATHROP: But here's the question...and I'm not quarrelling with you, but to illustrate the point. [LB584]

KEN EICHLER: I understand. [LB584]

SENATOR LATHROP: If I'm a physician out in...I don't know what town I'm going to pick on, but... [LB584]

KEN EICHLER: A small town. [LB584]

SENATOR LATHROP: ...a town out in the Panhandle, a small town. I'm a family practice doctor and I've done 1,000 knee strains, but now this comes into place. Instead of just...you know, maybe my practice is to put them into a splint, give them an anti-inflammatory, something for pain, and have them come back in four weeks. That might even be exactly what the treatment guidelines require, but now I've got to go look, right? I've now got to go look and find out. Whether it's on-line or in the 4,000-page book with the treatment guidelines, I've got to stop what I'm doing and go look it up. And I...and are we getting better care? Do I...does the family practice doctor out in western Nebraska, in the small town, not getting it right, right now? [LB584]

KEN EICHLER: I couldn't tell you whether he's getting it right or not, because if he's treating within guidelines, he's going to get the expedited payments, he's going to get the expedited authorization. I think the issue here is by checking the...you know, you're asking, is it going to take, is he going to have the time, is he going to be able to find it? The time he will spend in checking against the guidelines will be far less than the time he will spending fighting back and forth and not being able to treat patients in dealing with the insurance carrier. By looking... [LB584]

SENATOR LATHROP: So the advantage is we've now created or made the relationship between the physician trying to get paid and the insurance carrier such a hassle that the incentive is to take some of the hassle out of it? [LB584]

KEN EICHLER: You've significantly taken the hassle, because, right now, they're treating in a vacuum. They're not sure if they're going to get paid. They're taking a risk by using their judgment on whether or not they're going to be able to get paid. But with the guidelines, it's opening up, it's defining that rule, the list of what can be treated, and what requires authorization. The more the doc doesn't get paid, the more he provides treatment or he or she provides treatment and is not getting the payment, and the more his office manager or accounts receivable person has to go back and forth and back and forth, the more they're going to want to drop out of the system, versus the E's of communication. [LB584]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: Okay, let me ask this. [LB584]

KEN EICHLER: Please. [LB584]

SENATOR LATHROP: Where these have been implemented, what specialty seems to be most affected by the introduction of the treatment guidelines? Is it the occupational medicine guy, or is the orthopedic surgeon? [LB584]

KEN EICHLER: The orthopedic surgeons are actually positively impacted. I did a...I was involved in a study for the American Academy of Orthopaedic Surgeons, using the data in New York because New York had the best data source available right now, and it was found where over 80 percent of overall variances...and, let me qualify, a variance is when you're treating above and beyond the guidelines, if you're not documenting functional...if there is no functional improvement, if you want to do something that's just not recommended. Over 80 percent of the overall cases may have been denied variance requests. But the majority of those that were denied were the long-term cases. Those were the cases that ended up in pain management, that ended up in physiatry, that ended up in chiropractic care, that were the prolonged cases that were going on for several years. Seventy-four to 76 percent of every orthopedic request in the state of New York was authorized. [LB584]

SENATOR LATHROP: Okay, so that tells me that the orthopedics are not the ones most adversely affected. [LB584]

KEN EICHLER: They're not adversely affected. [LB584]

SENATOR LATHROP: Who is the person? Is it occupational medicine that you're reining in with these? [LB584]

KEN EICHLER: It's not necessarily occupational medicine. There aren't that many "occ" docs out there. The occupational medicine doctors often work in a corporate setting. I know they're perceived, in many cases, to be hired guns for business when, in reality, most "occ" docs are working for corporations, looking at employee safety or employee health. The ones that are getting reined in are the pain management physicians, which are the ones that are prescribing the opioids, long term, that are killing people. It's the chiropractors that are treating forever because they believe chiropractic care is well care, and...which it shouldn't be under workers' compensation. And it's, at times, physical medicine and rehabilitation, PM&R. [LB584]

SENATOR LATHROP: Okay, I think that's all. Any other questions from any of the committee members? I see none. [LB584]

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

Business and Labor Committee
March 18, 2013

KEN EICHLER: Thank you. [LB584]

SENATOR LATHROP: We appreciate your testimony today and thank you for traveling here from New York City. Anyone else here in a neutral capacity? Seeing none, I don't see...oh, wait a minute. Glenn Morton jumped up at the last minute. [LB584]

GLENN MORTON: Thank you, Senator Lathrop. Members of the committee, my name is Glenn Morton. That's M-o-r-t-o-n. I'm administrator of the Workers' Compensation Court, appearing today on behalf of the court in a neutral capacity on LB584. I just wanted to say that the court's concerns on this bill and on this issue are with how the guidelines would be established and how they would be implemented, not with the substantive issues of which guidelines or what they would cover and that sort of thing. As Mr. Hallstrom noted, we're concerned that the statute provide some guidance and direction to the court, if this bill advances, rather than simply leave the court to its own devices and it would leave it all in rule making. At the same time, we do recognize there has to be some rule for rule making if something like this were to work, if it does advance. So the question is where you would draw that balance between having sufficient policy guidelines in the statute and then sufficient flexibility for rule making. We'd be happy to work with Mr. Hallstrom or the committee in figuring out how best to go about that. So that's my testimony. [LB584]

SENATOR LATHROP: Okay. The court has a vested interest in not running doctors off from treating work comp patients. Is that true? [LB584]

GLENN MORTON: Yes, that's true. The whole system has that vested interest. That's right. [LB584]

SENATOR LATHROP: In other words, the injured worker is going to benefit if we have many doctors who are willing to provide the care. [LB584]

GLENN MORTON: That's true. [LB584]

SENATOR LATHROP: Do you have any opinion or do you have any judgment about whether the implementation of the treatment guidelines would effectively discourage physicians from continuing to treat work-related injuries or people that have been hurt in the workplace? [LB584]

GLENN MORTON: Well, all I can say on that is I have attended a lot of seminars over the years, in a lot of different places, on guidelines and other treatment guidelines and other medical cost containment issues. And it's been only in rare instances that access to care has really been impacted. That's my experience. And it's when the actual reimbursement levels in those states have been driven down to Medicare level, where there has been a few cases where access really has been impacted. But generally,

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

Business and Labor Committee
March 18, 2013

that's not been the case. [LB584]

SENATOR LATHROP: (Exhibit 2) Okay, thanks, Glenn. Are there any other questions for Mr. Morton, the administrator of the Work Comp Court? I see none. Thank you for your testimony. Anyone else here in a neutral capacity? Seeing none, and Senator Smith waives closing. That will...before we close the hearing, I'm going to enter a couple of things into the record. We have a letter from Radcliffe and Associates on LB584 in support, on behalf of Tyson Foods, and the Property Casualty Insurers Association of America. And with that, that will close the hearing on LB584. (See also Exhibit 6.) Thank you to those who came here to testify. And if that's the only thing you came here for, you're welcome to leave. Otherwise, we will next take up LB307, and that brings us to Senator Nelson. Just one second, John, while we have a little troop movement behind you, and we'll...thank you. [LB584]

SENATOR NELSON: Lot of people in and out today. Good afternoon, Chairman Lathrop and...are we... [LB307]

SENATOR LATHROP: ...and some rearranging of people, apparently. Okay, you can start. Thanks, John. [LB307]

SENATOR NELSON: Again, good afternoon, Chairman Lathrop and members of the Business and Labor Committee. My name is John Nelson, spelled N-e-l-s-o-n, and I represent District 6 in central Omaha. I'm here today to introduce LB307, which would provide that modification of a workers' compensation award may be applied retroactively to the date on which an increase or decrease of disability actually occurred, provide for termination of compensation or adjustment of temporary disability benefits under circumstances involving employee misconduct or bad behavior, and repeal the doctrine of beneficent purposes. LB307 will authorize the Workers' Comp Court to terminate disability benefits when an employee unreasonably fails to comply with medical treatment provided by the employer or when an employee without reasonable cause refuses to comply with the physical, medical, or vocational program. In both instances, LB307 will establish the rebuttable presumption that the employee's disability would have been reduced or his or her condition would have been improved if the employee had complied with the treatment program or evaluation required by the act. The employer will still be required to prove that the employee failed to comply with the required treatment program or evaluation and that the employee's refusal was unreasonable. If the employer satisfies that burden, the presumption created by LB307 will kick in and the burden of rebuttal will shift to the employee. These provisions would overrule a recent Nebraska Supreme Court decision and create a more fair and balanced application of the act. Likewise, where an employer provides work which meets temporary restrictions imposed by a treating physician and the employee refuses to perform such accommodated work, LB307 will establish a rebuttable presumption that the employee is ineligible for temporary disability benefits. The bill also provides

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

Business and Labor Committee
March 18, 2013

that an employee's temporary disability benefits may be terminated during any period of incarceration following a conviction for a misdemeanor or felony. Section 3 of the bill will allow a modification of disability benefits to apply retroactively. When the parties cannot agree on the ground of increase or decrease in disability, a modification of disability benefits will only be effective as of the date that the increase or decrease actually occurred. This provision responds to a recent Nebraska Court of Appeals case, which held that a modification of disability benefits cannot apply retroactively. LB307 will also eliminate the requirement that an application for modification in cases where the parties cannot agree may only be filed six months after the date of the original agreement or award of benefits. Finally, LB307 will override the doctrine of beneficent purposes in order to eliminate the liberal construction of the Workers' Compensation Act in favor of the employees and restore a balanced construction of the act which does not unduly favor either the employee or the employer. In closing, LB307 will create a more equitable approach to the Workers' Compensation Act, balancing the interests of both the employer and the employee. There will be other testifiers behind me who are experts in workers' comp and who will be able to answer more detailed questions. I urge the committee to support this bill and advance it to General File. With that, I am willing to answer your questions. [LB307]

SENATOR LATHROP: Very good. Thanks, Senator Nelson. I see no questions, so we'll move right on to proponents. [LB307]

SENATOR NELSON: Thank you. [LB307]

SENATOR LATHROP: Dallas, welcome to the Business and Labor Committee. [LB307]

DALLAS JONES: Good afternoon, Senator, it's good to be back. And good afternoon to the balance of the committee. My name is Dallas Jones, D-a-l-l-a-s J-o-n-e-s, and I am testifying today on behalf of Nebraskans for Workers' Compensation Equity and Fairness. LB307 is a heavy bill and in three minutes I'm not going to be able to get in any depth on any of those issues, so I'm going to primarily address two this afternoon but answer any questions the committee may have. The first is the beneficent purpose doctrine, and I'm going to illustrate one of the reasons why that doctrine should be removed by discussing one other aspect of LB307. But first a little background. LB...excuse me. The beneficent purposes doctrine is a court-made doctrine, not something that came from the Legislature, that for a number of years the appellate courts in Nebraska have relied upon that doctrine which it made up, the Supreme Court, to expand the scope of the act and cause the act to become a bit unbalanced from the grand compromise that was reached exactly 100 years ago today, or this year, when the Workers' Compensation Act was adopted by the Nebraska Legislature. Basically, what the beneficent purposes doctrine does is it is a doctrine that has been used repeatedly by the appellate courts to essentially remove from the Legislature those public policy considerations which are more properly before the Legislature where there

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Transcriber's Office

Business and Labor Committee
March 18, 2013

can be full debate, as we're going to have here today, about any number of issues. And the court has instead continued to decide those public and economic policy questions, and it's done so because of its own court-made option...doctrine, essentially, to expand the provisions of the act. Here is an example, and this addresses one of the other provisions of LB307. There was a case addressed by the Nebraska Supreme Court in the past year called Hofferber v. Hastings Utilities. Mr. Hofferber was a gentleman who indeed had significant injuries, but Mr. Hofferber was provided every opportunity by the carrier and the employer to treat those injuries, including going from the West Coast to the East Coast to Mayo Clinic. Mr. Hofferber repeatedly refused to do that. Mr. Hofferber was ordered by the trial court to undergo that care. Mr. Hofferber refused to do that. Ultimately, the trial court had no choice. Because Mr. Hofferber refused to treat, Mr. Hofferber continued to exhibit the behavior that was just simply inappropriate, the trial judge had no other choice, he felt, but to dismiss Mr. Hofferber's petition. That went to the Supreme Court; and the Supreme Court said to the trial judge, you don't have authority to do that, and it relied upon the beneficent purposes of the act to reverse that decision. And in doing that, it also then added a requirement that, under the circumstances, even though the Legislature didn't say to that employer, you have to prove that his failure to treat is why he didn't get better, it added that particular provision. And again, it based it upon the beneficent purposes of the act to do so without there being any legislative hearings, any debate. Essentially, we ended up with a situation where the public policy of the state was upside down. The Hofferbers of the world were, in fact, rewarded for the conduct, which didn't help him, certainly didn't help the employer; and we now have a new rule because of the beneficent purposes doctrine that obligates the employer to prove something the Legislature didn't say it had to. Thank you. I'd be happy to answer any questions. There's a lot more there. [LB307]

SENATOR LATHROP: Yeah, there is. Well, there was a lot stuffed into LB307. [LB307]

DALLAS JONES: Yes, there was. [LB307]

SENATOR LATHROP: Any questions? I see none. Thanks for your testimony, Dallas. [LB307]

DALLAS JONES: Thank you. [LB307]

ROBERT J. HALLSTROM: (Exhibit 4) Chairman Lathrop, remaining 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 the Nebraskans for Workers' Compensation Equity and Fairness as well as the National Federation of Independent Business, and have been authorized by the Nebraska Chamber of Commerce and Industry to also express support for LB307. There is a lot in this bill. We have tried to address the economies of the committee and put more than one issue in this bill to just have a single hearing. I think we just basically boil this down to the portion with regard to the Hofferber v.

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Transcriber's Office

Business and Labor Committee
March 18, 2013

Hastings Utilities, and Sections 1 through 4 of the bill are addressed to grant the court additional authorization for termination of benefits under situations where we would suggest there was employee misconduct or bad behavior that would warrant the court having the authority, not the obligation but the authority, to terminate benefits under those particular circumstances. Mr. Jones has talked a little bit about the Hofferber case. He's also talked about the repeal of the doctrine of beneficent purposes. I would, therefore, focus on the remaining provisions of the modification of awards. I would note that my testimony that I've submitted does have significant discussion of both the Hofferber and the Daugherty cases for your reading pleasure. But I would just note, in the Daugherty case, this is about being able to go back and retroactively modify and award. The Daugherty case involved an employee who had come back to work after an award was entered, had returned to work with full wages for over a year and was paid those wages, then went back off of work. And ultimately, when the employer came back and attempted to modify that, the court said, you can't go back to the time when the employee actually was better and was receiving full wages, and it ended up paying benefits in addition to full-time salary during that period of time. Now we don't think that's appropriate or fair, and we'd like to overturn the Daugherty ruling, as suggested in LB307. Be happy to address any questions the committee might have. [LB307]

SENATOR LATHROP: Okay, thanks, Bob. I see no questions. [LB307]

ROBERT J. HALLSTROM: Thank you. [LB307]

SENATOR LATHROP: Anyone else here in support of LB307 wishing to testify? Seeing none, we'll go to opposition testimony, if any. [LB307]

ROBERT MOODIE: I guess I'll step up. Mr. Chairman, members of the committee, Robert R. Moodie, M-o-o-d-i-e, testifying on behalf of the Nebraska Association of Trial Attorneys. I am just going to try to address two sections of this large bill, the first one dealing with Section 2, charity work. This provision I think is either badly written or overreaching. The way the law exists now, if an employee is under a doctor's care, unable to work because of a work-related accident, the employer is required to provide temporary disability benefits. If the employee has restrictions which the employer can accommodate, then the employer will not have to pay temporary disability because the employee will be back to work, at wages, with those restrictions. This section talks about putting the employee to work in some other, either profit or nonprofit, enterprise if the employer is not able to accommodate the restrictions. What is not clear to me from reading this is whether this is a prerequisite for receiving temporary disability. There's nothing in this section that says the work offered as an alternative job must be at wages, and I can see a defendant making an argument that the employee will not be entitled to temporary disability unless he volunteers for charity work. If the purpose of the section is to limit temporary disability when the employer is willing to pay the employee to work, perform charity work, well, that's another matter. But we need to submit that the statute

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

Business and Labor Committee
March 18, 2013

needs to accommodate for what is called "suitable" employment. The nonprofit, noncharity, or charity work for which they need to be paid does need to be suitable. Already we have employers, some of whom have representatives testifying before you today, that are offering or attempt to offer light-duty work to avoid temporary disability benefits by offering that work at locations which are 100 miles away from the employees' homes and doctors. The imposition of the rebuttable presumption changes the burden of proof. Any offer of employment, no matter how unreasonable, would trigger the presumption. The second issue I would try to...briefly is Section 3, the modification. This allows the court...will allow modifications which will essentially do away with any finality of court decisions in this case. Currently, modifications can only take place six months after a decision is entered and in...because the parties who seek the modification must be able to show incapacity, which has been defined to mean an actual change in the physical condition. By eliminating the six-month waiting period and by changing incapacity to disability, the doors will be open to constant efforts to modify these awards of permanent disability based on nothing, perhaps as little as a cost-of-living increase for the employee when he goes from \$10 to \$10.50 per hour at his post-injury job. Workers' compensation cases are fluid. They do stay open longer than other cases, but we have methods of trying to deal with as much finality as we can so that the parties can rely on these decisions. Section 3 will do away with that. Thank you. [LB307]

SENATOR LATHROP: Okay, thanks, Bob. Any questions for Mr. Moodie? I see none. Next, pardon me, opponent. [LB307]

STEVE HOWARD: (Exhibit 5) Steve Howard, H-o-w-a-r-d, of the Nebraska State AFL-CIO. A lot of parts to the bill. I had a client that wanted to come today, Mr. Pinto. He couldn't come, but he had his remarks typed up, so I'd ask that they be distributed. [LB307]

SENATOR LATHROP: Okay. [LB307]

STEVE HOWARD: This goes to the issue of an employee's unreasonable refusal to undergo care. The Hofferber case was a bad case. And bad facts make bad law. It was bad. Chad Hofferber was a classmate of mine out in Hastings, class of '81, and he was just a normal, happy-go-lucky guy. And this terrible thing happened to him, and it's quite a story that happened after that. But it's not the norm, and it's not the type of case that ought to trigger a drastic, sweeping change in the law. The problem is not getting employees to avail themselves of care that's available; it's getting the care approved in the first place. And there won't be very many Chad Hofferbers coming along. It was bad for the lawyers. It was very bad for Mr. Hofferber and...but it's not the kind of case that ought to lead to an impression that there is some big, huge, sweeping problem that needs corrected. And as far as that section of the bill that says that if a person is in custody, they shouldn't be paid temporary total disability benefits; well, at first glance

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

Business and Labor Committee
March 18, 2013

that kind of makes sense. If a fellow is sitting in jail, why should he receive benefits? The part that troubles us is the notion that those benefits would never be added to the end, because, you see, when you get a permanent, body-as-a-whole injury in Nebraska, you get 300 weeks of benefits. So if a 25-year-old has a 50 percent loss of earning capacity, that covers 300 weeks. Even though they may have 40, 45 years of work left ahead of them, it only covers 300 weeks, so a little bit less than 6 years. So the system itself is designed to take a lifetime of loss of earnings and cram it into benefits at a fraction/two-thirds of the wages times the percentage over 300 weeks. So we believe that that is unfair. And the other thing that I would say is this...you know, just as our employees have a difficult time getting care approved, the notion that an employee is not availing themselves of work and, therefore, that should be a rebuttable presumption that their benefits are less, I would just point out that when a judge awards benefits for impairment to the earning power, loss of earning power, rather, the judge doesn't just look at wages, doesn't just say, well, let's see, you're not working, so that must be 100 percent loss of your wages. It's an earning power loss and it takes into account these four factors that come from that old Travelers v. Seidel case. I would argue that the judges are free right now. The court is right now free to say, I believe that that employer could have accommodated you, I think there was work available, and I lay it at the doorstep of the employee not to have taken the job, so I'm going to adjust the benefits accordingly. So we resist LB307. Thank you. [LB307]

SENATOR LATHROP: Thanks, Mr. Howard. Senator Wallman has a question for you. [LB307]

SENATOR WALLMAN: Thank you, Chairman Lathrop. Thanks for coming down. Right now, if I'm permanently disabled, my benefits are froze for the rest of my life, same? [LB307]

STEVE HOWARD: That's correct, yeah, no matter when, no matter what happens to interest rates or inflation, that's right. [LB307]

SENATOR WALLMAN: So if you have a couple back surgeries, which I'm familiar with, you might not want to do the third. [LB307]

STEVE HOWARD: Well, that's true, and to...you know, in no other part of the law does the government tell the worker or the patient you're going to have this; otherwise, you're going to financially suffer. [LB307]

SENATOR WALLMAN: No, because there's not any guarantees that you're going to get better. [LB307]

STEVE HOWARD: No, and there are always multiple opinions that come in before the judge. [LB307]

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

Business and Labor Committee
March 18, 2013

SENATOR WALLMAN: Thank you, Steve. [LB307]

STEVE HOWARD: So that's exactly right, Senator, so thank you. [LB307]

SENATOR LATHROP: Thanks, Steve. Next opponent. [LB307]

LEE LOUDON: Good afternoon, Senator Lathrop and members of the committee. My name is Lee Loudon, spelled L-o-u-d-o-n, and I'm here on behalf of the Nebraska Association of Trial Attorneys to oppose LB307. I'd like to talk about Section 1. Current Nebraska law provides that if an employee neglects or fails to avail herself of medical treatment, the court can suspend, limit, or reduce the amount of benefits the employee gets, and the employer is not liable for any aggravation of that injury when the employee doesn't avail herself of the medical treatment. What Section 1 proposes to do is to add the term to terminate the benefits as well, and this is what happened in Hofferber. In Hofferber, there was repeated occasions where Mr. Hofferber was not complying with medical treatment. The Compensation Court went beyond the current statute--which said suspend, limit, or reduce--and terminated the benefits. A year later, Mr. Hofferber was appointed a guardian and conservator, because he was mentally incapable of making decisions on his own behalf, by the County Court of Adams County. And then his...once he had an attorney, he filed suit in the Compensation Court to get those benefits reinstated. The Supreme Court reversed the trial court and said, you didn't have the power under this statute, trial court, to totally terminate the benefits. You could reduce, eliminate, or suspend the benefits but not totally cut them off. And this is what Section 1 is about. The proponents of the bill want the Compensation Court to have the power to totally terminate those benefits in a situation like Hofferber, where the person was unable to make decisions on his own behalf and had a guardian and conservator appointed. That, I don't think, is a reasonable approach to this problem. I think that the statute as it currently stands is appropriate. It worked in the Hofferber case. The employer didn't have to pay the benefits while Hofferber was resisting the medical treatment, and up until the point when he got the guardian and conservator appointed by the Adams County Court, because he couldn't make decisions on his own behalf. The other provision about the rebuttable presumption, they want to put a rebuttable presumption that the employee resists that medical treatment, that their condition would have been improved. I don't think that's an appropriate step because sometimes the evidence is in equipoise when the employee is resisting the medical treatment, and they want to put this burden on the employee to prove somehow he wouldn't have been...that the condition would not have been aggravated, and I don't think that's a fair way to do it. I think the law as it is written now works. It worked in the Hofferber case. There's not a reason to amend the statute. [LB307]

SENATOR LATHROP: Okay. [LB307]

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

Business and Labor Committee
March 18, 2013

LEE LOUDON: Thank you. [LB307]

SENATOR LATHROP: I have a question for you, if you have an opinion. When I look at Section 1 and it says, an employee's refusal or neglect to avail himself or herself of medical or surgical treatment, do you think that provision can be accomplished by missing a physical therapy appointment or missing a doctor's appointment? [LB307]

LEE LOUDON: Could that be alleged as a violation? Yes. [LB307]

SENATOR LATHROP: Yeah, I mean, is that...the way that provision is written, you could literally trigger it by missing a PT appointment. [LB307]

LEE LOUDON: Exactly, that's the concern. I've had employers say, you know, he's had one missed medical appointment because he couldn't get a ride or his car broke down; he misses again, we're going to cut him off. That has happened multiple times. [LB307]

SENATOR LATHROP: Okay, I see no other questions. Thanks for coming down here today and for your testimony, Lee. [LB307]

LEE LOUDON: Thank you. [LB307]

SENATOR LATHROP: Next opponent of LB307. [LB307]

RON BROWN: Ron Brown, B-r-o-w-n. I want to talk to you about subparagraph 7, the provision which terminates payment of workers' compensation benefits during a period of incarceration. I want you to imagine that you have a guy that's hurt on the job. He's temporarily totally disabled. The insurance company is paying he and his family temporary total disability benefits. Sometime after he is determined to be temporarily totally disabled, he's sentenced in county court for 90 or 120 days on a shoplifting charge and he's got to go sit that time in county court or in the county jail. What happens when those benefits are terminated? He's temporarily totally disabled due to his work-related injury. At the same time he's sitting in county jail. What difference does it make, regarding his total disability, whether he's sitting at home or he's sitting in county jail? He's totally disabled in either situation. But the family of the injured worker who was receiving temporary total disability benefits loses those benefits during that county jail time for 90 or 120 days or up to six months. The family then does what? Gets foods stamps? Maybe goes and gets ADC? The point is, they become...the support of the family becomes the burden of the taxpayers instead of the burden of the employer where the man was hurt in the first place. And he's temporarily totally disabled whether he's sitting at home and receiving medical care or he goes to county jail. It provides for termination of payments without an order of the court. What happens if you have a situation where he's been adjudicated, he's gone to court, the court has determined that he's temporarily totally disabled, he's got a running award of those benefits? An

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

Business and Labor Committee
March 18, 2013

insurance company, without going back to court, without any process at all, under the bill has the discretion to terminate benefits. This is...if this were adopted, this would be the only such provision allowing an insurance company to terminate benefits in an adjudicated claim in the workers' compensation system. So for that reason, I would testify in opposition to subsection 7 of the bill. [LB307]

SENATOR LATHROP: And maybe--just as a point of clarification, because you and I deal with this system, and we have three members here that probably have never had a work comp claim and certainly have never represented somebody in one--when a person gets temporary total disability benefits, they are awarded for anyone who can't work, period. Typically, it's the beginning part of a claim when you have the acute part of your convalescence, or the acute part of your injury and the heaviest part of your convalescence, when the doc writes a note and says, Lathrop can't go back to work and we'll let you know when he can. But the same term applies for someone who can never go back to work. We still call it temporary total disability benefits, but it's a running award or a permanent state. [LB307]

RON BROWN: Or it could be permanent total disability benefits. [LB307]

SENATOR LATHROP: Permanent total disability benefits,... [LB307]

RON BROWN: This applies to temporary. [LB307]

SENATOR LATHROP: ...and these would be interrupted by this provision. [LB307]

RON BROWN: Well, I think this says temporary disability, does not say...I don't think it would apply to... [LB307]

SENATOR LATHROP: But it...can't that include the running total, or no? [LB307]

RON BROWN: It could, yes, it could. [LB307]

SENATOR LATHROP: Okay, so the guy who is never going to be able to go back to work another day in his life has that stream of income interrupted because he's doing seven days for a shoplifting or a... [LB307]

RON BROWN: Whatever. [LB307]

SENATOR LATHROP: Yeah, whatever, okay. I understand your opposition, and we thank you once again for your testimony. [LB307]

RON BROWN: All right, thank you. [LB307]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: Are there any other questions? Senator...oh, pardon me, Judge. We've got a question for you from Senator Hansen. [LB307]

SENATOR HANSEN: Sorry. [LB307]

RON BROWN: I...this young man is going to come remind me that I didn't fill out my sheet if I don't do that too. [LB307]

SENATOR LATHROP: Yeah, he will. That's all right. [LB307]

SENATOR HANSEN: In your example you gave, was the person who was incarcerated, was that...did that have anything to do with the...why he was disabled? Or maybe...are you giving an example or a (inaudible)? [LB307]

RON BROWN: I'm giving you an example, I'm giving you an example. This could be...I decided a case in November of last year. [LB307]

SENATOR HANSEN: Did he get hurt while he was...in the crime? [LB307]

RON BROWN: Yeah. No, this driver...and this is one of...this does not happen very often. In 18.5 years I had two cases where somebody went to jail after they were temporarily totally disabled due to a workers' comp injury. But this man was temporarily totally disabled, and then...and his employer told him, we have no accommodated work that you can continue to do. Thereafter, he is arrested, allegedly, for theft of a beer truck in Lincoln. He was working out in Colorado at the time. He was brought back, sat in jail for 11 months, went to trial, and was acquitted. He was found not guilty. And I determined in this award that he was entitled to temporary total disability during that 11-month period. He was temporarily totally disabled before he ever got arrested. You know, I guess it's easy to pick on people who are sitting in county jail, but this guy would have been temporarily totally disabled whether he sat in the Lancaster County Jail or whether he was sitting at home. [LB307]

SENATOR HANSEN: Thank you. [LB307]

SENATOR LATHROP: I think that's it. There are no more questions. [LB307]

RON BROWN: Okay. [LB307]

SENATOR LATHROP: Thanks for your testimony and your... [LB307]

RON BROWN: Thank you. [LB307]

SENATOR LATHROP: ...taking your time to come down here today. Any other

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

Business and Labor Committee
March 18, 2013

opposition? [LB307]

GREG COFFEY: Senator Lathrop, members of the committee, my name is Greg Coffey, last name is spelled C-o-f-f-e-y. I'm appearing on behalf of the Nebraska Association of Trial Attorneys in opposition to LB307, and I'd like to address the last two areas of the bill that are proposed changes. Section 4 proposes amendments to the vocational rehabilitation section of the Nebraska Workers' Compensation Act, Nebraska Revised Statutes, Section 48-162.01, page 23 of the bill. It would provide that refusal to undertake or failure to cooperate with a physical, medical, or vocational rehabilitation program or refusal to be evaluated results in a rebuttable presumption that the injured employee's disability would have been reduced. And for the same reasons that Mr. Loudon previously discussed, opposition to rebuttable presumptions, we would advance the same argument there. But there are all kinds of unanswered questions and ambiguous areas in this proposed change. For example, what if my 65-year-old client, who hasn't attended school since he got his GED in 1966, starts a rehab plan for formal schooling but can't get the math and flunks out? Is that a, quote, unquote, failure to cooperate? Well, the language of the bill doesn't make exceptions for reasonable versus unreasonable failures to cooperate with vocational rehabilitation and certainly leaves open that possibility. We're also concerned, as I said, with the notion of establishing an arbitrary presumption rather than allowing the court to decide the case on its merits, and this act would establish an arbitrary presumption that would have to be overcome. The next area of concern is Section 5, found on page 24, changes to the Workers' Compensation Act from one that appellate courts are obligated to construe in a way that is consistent with the act's purposes--the liberal construction to advance the act's beneficent purposes--to one that provides no such direction. The liberal construction provision of current law does not relate to construing the facts of a case liberally, in favor of the party, or directs the courts to interpret anything in a particular party's favor but, rather, to interpret the law in a manner that is consistent with the purpose of the act. The Supreme Court has recently explained this liberal construction notion. Courts have raised a significant policy concern. They have concluded that workers' compensation laws reflect a policy choice that employers bear the cost of their employees' work-related injuries because they, the employers, are in the best position to avoid the risk of loss by improving workplace safety. We agree that public policy weighs against allowing employers to avoid the costs of their workplace hazards, and we must reasonably or liberally construe a statute to achieve the statute's purpose rather than construing it in a manner that defeats the statutory purpose. The necessity of this kind of guidance, the liberal construction to advance the act's beneficent purposes, is seen in the vocational rehabilitation provision that I just discussed. Without that liberal construction to advance the purposes of the act, a trial court would be permitted to conclude that a 65-year-old with a GED who flunks out of that schooling program because, in spite of honest efforts, he just doesn't get math, has failed to cooperate, and that 65-year-old with a GED would end up having his benefits reduced under this bill simply because he couldn't pass math. I am open... [LB307]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: You don't have to use all three minutes. (Laughter) [LB307]

GREG COFFEY: I don't have to, and I'm open to any questions. [LB307]

SENATOR LATHROP: You looked like you were done,... [LB307]

GREG COFFEY: I do have that client. [LB307]

SENATOR LATHROP: ...and you were looking at the yellow light like you wanted to... [LB307]

GREG COFFEY: I do have that client, by the way. [LB307]

SENATOR LATHROP: Oh, do you? [LB307]

GREG COFFEY: Um-hum. [LB307]

SENATOR LATHROP: (Exhibits 1-3) Yeah, well, let's see if there's any questions. I really don't see any. I...we do appreciate the testimony that you provided today and the perspective, the context. Anyone else here in opposition to LB307? Seeing none, anyone here in a neutral capacity on LB307? Seeing none, looks like we have a couple letters to enter into the record. One would be from Nebraska Appleseed, in a letter dated March 18, 2013, has expressed opposition; and a letter from Radcliffe and Associates on behalf of the Property Casualty Insurers Association, PCI, and Tyson Foods in support of LB307, and that's signed by Korby Gilbertson. With that, we will hear from Senator Nelson before closing the hearing. Welcome back, John. [LB307]

SENATOR NELSON: You're not giving me any option here to waive. [LB307]

SENATOR LATHROP: Oh, no, you have the option of waiving,... [LB307]

SENATOR NELSON: No, I won't waive. [LB307]

SENATOR LATHROP: ...always, in this committee. [LB307]

SENATOR NELSON: Just a couple of comments, certainly off the cuff. Part of our discussion here has related to the Hofferber case, which was a Supreme Court case, and testimony was given that it was bad law. And I think most attorneys will realize that, if there is bad law put out of the Supreme Court, you either have to follow it until they change it or they're going to have to interpret it down the road to get away from rulings that turned out to be bad law. This bill is an attempt to correct that for all future cases so that our Workers' Comp Courts don't have to look at that case and say, well, we're

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

Business and Labor Committee
March 18, 2013

required to follow that or we're going to be overruled. The other thing is that there is talk about, well, what's reasonable or what's unreasonable. In my opinion, that's for the Comp Court to decide. If there has to be a decision on whether there is an unreasonable refusal to either take temporary work or to comply with a doctor's recommendations, then I think if that becomes an issue, it has to be decided. We can't, in a bill, address every exception. There are always exceptions, there are always strange cases, and it's up to the court to decide. With that, I would, even though it's a long bill and covers a number of subjects, there are some important things in here and I would certainly urge the committee to consider them very carefully, perhaps with some amendment or some deletion. [LB307]

SENATOR LATHROP: Okay. [LB307]

SENATOR NELSON: Thank you. [LB307]

SENATOR LATHROP: They will be given careful consideration. [LB307]

SENATOR NELSON: Thank you very much. [LB307]

SENATOR LATHROP: Thanks, John. That will close our hearing on LB307 and take us to our last bill of the...well, our last work comp bill of the day, and that brings us to LB324. Pardon? [LB307]

DOUG KOEBERNICK: (Inaudible.) We just called Lautenbaugh's office (inaudible). [LB307]

SENATOR LATHROP: Okay. Apparently, we're waiting for someone. Nope, here he is, on cue. [LB307]

BRENT SMOYER: Right here. I was just outside. [LB307]

SENATOR LATHROP: Perfect timing. Okay, from Senator Lautenbaugh's office, Mr. Smoyer. [LB307]

BRENT SMOYER: Sorry, I didn't want to walk...good afternoon, Mr. Chairman, members of the committee. Senator Lautenbaugh sends his regrets. He's on a field trip right now with the General Affairs Committee. And, as we all know from elementary school, you never want to miss field trip day, at least that was back in my time. So I am here to pinch-hit for Senator Lautenbaugh. My name is Brent Smoyer, spelled S-m-o-y-e-r, and I'm here to introduce LB324. LB324, very basically and generally, would revise the interest rate applicable to an award of workers' compensation benefits in cases in which an attorney's fee is allowed from the rate provided in Section 45-104 of Nebraska statutes, which is currently 14 percent--it's the delinquent property tax

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

Business and Labor Committee
March 18, 2013

rate--to the rate provided in Section 45-103, which is the current judgment rate based around the CPI and a few other mathematical factors. Further, LB324 is also designed to allow employees, prior to the time of sustaining injuries, to opt out of having first injury reports relating to their workplace injuries made available for public inspection or copying. First injury reports, for which an employee has made an election for confidentiality, would not be open to public inspection or copying, except as necessary for the Compensation Court of Nebraska to administer and enforce other provisions of the Nebraska Workers' Compensation Act, or unless the requestor themselves is the employee who is the subject of the report or an attorney or authorized agent of said employee, the requestor is an employer, workers' compensation insurer, risk management pool, or third-party administrator that is party to the report, or an attorney or authorized agent of said party...(c) if the requestor is an authorized agent, authorized representative, attorney, investigative consultant, a litany of opportunities here. Basically, rather than break down every single one of them, they're all interrelated as far as direct contact with either somebody directly involved with the case prevents outside institutions and individuals from being able to get copies of these reports and then send offers of representation and opportunity to the individual. It's assuming the individual, if they wish to take action, will know well enough themselves that they should take action. LB324 would reinstate the defense of employee misrepresentation for employers to avoid having to pay benefits resulting from an injury or condition resulting from misrepresentation made by the employee when applying for a position with the employer. These provisions would, of course, reinstate that affirmative defense that was established in favor of employers under the Hilt Truck Lines decision by the Nebraska Supreme Court. Of course, this is just a very basic outline of what LB324 does. I know following me are the general experts, of course, that will be able to answer any questions that you may have. [LB324]

SENATOR LATHROP: We'll leave the questions to them. How's that? [LB324]

BRENT SMOYER: Please. [LB324]

SENATOR LATHROP: Okay, thanks, Mr. Smoyer. [LB324]

BRENT SMOYER: Thank you. [LB324]

SENATOR LATHROP: Those who are proponents of LB324, you may come forward. [LB324]

ROBERT J. HALLSTROM: (Exhibit 3) Chairman Lathrop, members of the committee, my name is Robert J. Hallstrom, H-a-l-l-s-t-r-o-m, here today before you as a registered lobbyist for the Nebraskans for Workers' Compensation Equity and Fairness and the National Federation of Independent Business, also authorized to indicate my support on behalf of the Nebraska Chamber of Commerce and Industry. Mr. Smoyer has done a

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

Business and Labor Committee
March 18, 2013

nice job of giving you the details regarding LB324. We are in support of the reinstatement of the affirmative defense of employee misrepresentation that had been in place since the Hilt Truck Lines case back in 1979 until the court more recently decided that that was an equitable defense that they did not have the authority to impose. So we want legislative codification of that, if you would. Second issue in LB324 has to do with authorizing an injured employee to opt out of having the first injury reports, and the information available thereon, available for public inspection. This is a bill that we've had before this committee for quite a few years. It's changed its character this year in that we are now providing the employee with the ability to opt out. If the employee does not want the sensitive healthcare information on a first injury report, for example, to be subject to public inspection, they could make that election on a form and in a manner provided by the court, and we support that concept. The third and final issue has to do with interest rate on workers' compensation awards. We've also been before this committee many times with regard to this issue. Whenever attorney fees are received or awarded in a particular case, if you don't pay expenses or medical within 30 days or if an employee appeals and receives no reduction in the award, interest accrues at the rate of 14 percent. Virtually all other money judgments are at 2 percent. In my written testimony I've provided a reference to the Russell case, which had to do with preaward interest, and in that case the court went to quite a detail in suggesting that the interest component of the statute was not designed to be a penalty but, rather, compensation for loss of use of money. We think the same application should apply in this case. Further support for making a change in this law is if the 14 percent was adopted in 1983. We went back and did the research. The interest rates at that time were between 13 and 15 percent, which may have been logical at that time. But over the passage of time, as the interest rates have fallen and risen, no change has been made in this statute. We think it ought to be tied to the money judgment rate. And finally, I've got an attachment to my testimony that shows that there are 42 statutes that are tied to Section 45-104.01, which is the 14 percent commonly referred to as delinquent real estate tax rate. Of those, 40 relate to taxes and assessments, and we believe that the interest rate on work comp awards should not be tied to that rate but should be set with other money judgment rates. With that, I'd be happy to address any questions of the committee. [LB324]

SENATOR LATHROP: Very good. Thanks, Bob. I see no questions. [LB324]

ROBERT J. HALLSTROM: Thank you. [LB324]

SENATOR LATHROP: Thanks. Any other proponents? [LB324]

DALLAS JONES: I'll grab my sheet in a second. Senator Lathrop, members of the committee, my name is Dallas Jones, D-a-l-l-a-s J-o-n-e-s. I am here testifying on behalf of Nebraskans for Workers' Compensation Equity and Fairness. I'm going to limit my discussion in the three minutes to Section 3, which is that part of the bill which deals with employee misrepresentation to get a job. Here's the scenario. The employee has a

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Transcriber's Office

Business and Labor Committee
March 18, 2013

previous health problem of some type, knows about that, applies for a job with the employer, intentionally lies about that when the employer asks the employee whether they have any problems that might prevent them from performing the essential functions of the job. The employer relies upon that misrepresentation, places the employee in a position that is too strenuous for the employee, given what we now know of the employee's previous health problems; and the employee, not surprisingly, injures him or herself and then has significant disability, sometimes, medical care, all of which has to be paid for by the employer. From 1979 until 2011, the law of Nebraska was that that claim was not compensable, and it was based upon the public policy that we're not going to award employees who lie to get a job to their own detriment. The Nebraska Supreme Court, ironically, given our previous discussion in LB307 about the beneficent purposes doctrine, changed that rule and said it would not be consistent with the beneficent purposes of the act to deny benefits to an employee who intentionally misrepresents him or herself to get a job that results in him or herself injuring themselves. So we now are at a place where the public policy of Nebraska, according to the Supreme Court, is that employees who intentionally lie to get a job, and it causes them injury because the employer relies upon that, are entitled to benefits. That point of the bill today is simply to say it ought not be the public policy of Nebraska that we are going to promote employees to intentionally lie to get a job, and that intentional misrepresentation results in their injuring themselves, causing themselves to be injured, and then the employer to have to pay for the costs of that. So we respectfully ask that you reverse the Bassinger v. Nebraska Heart decision and reinstate the employee misrepresentation rule that has served the state well for all those years. Thank you. [LB324]

SENATOR LATHROP: Dallas, I've got a question about this one. On its face, it sounds pretty easy to understand and pretty reasonable, and I wonder how it plays when you take into account the Americans with Disabilities Act. And, specifically, you do employment law, I don't. [LB324]

DALLAS JONES: Um-hum. [LB324]

SENATOR LATHROP: And so I may mischaracterize this. But if I am an employer, and let's say I run a grocery store and I want to hire a bunch of checkout people and those...I put the ad in the paper and I get a bunch of people that come in. I cannot ask them if they have a physical injury, right? [LB324]

DALLAS JONES: It... [LB324]

SENATOR LATHROP: I have to make a conditional offer of employment, right? [LB324]

DALLAS JONES: You got it. That's correct. [LB324]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: So the first thing about the way this provision gets represented is somebody lied to get the job. Actually, the employer can't even ask if you have an injury. Once they offer you the job, they can say, do you have a condition that would prevent you from doing the substantial duties of your employment? [LB324]

DALLAS JONES: That's correct. [LB324]

SENATOR LATHROP: That person can think, I'm checking out, you know, laundry soap, I'm checking out simple things, sure, I can do that, even though I know I've had a prior back surgery, and says, no, I'm fine, I can do the job. They then pick something up. It could be something off the bottom of the cart, you know, a 50-pound bag of dog food they didn't even know they'd ever have to pick up. They hurt their back or aggravate that back injury, and now we have an issue about whether the misrepresentation was knowingly and willfully made because when they made it they may have thought they can do the work, and when they went to the check stand to start checking out groceries, they...you know, they...now they're lifting 50-pound bags of dog food or something like that. So I don't know if it is as simple as it looks on its face, and so I guess I'll give you a couple minutes to... [LB324]

DALLAS JONES: Sure. [LB324]

SENATOR LATHROP: ...or some time to respond to that because there's a difference between...when you make the conditional offer of employment, the only thing you get to ask next is not, give me your medical history, but, can you do the substantial duties of the job, am I right? [LB324]

DALLAS JONES: No, it's broader than that. [LB324]

SENATOR LATHROP: Okay. [LB324]

DALLAS JONES: Once there has been a conditional... [LB324]

SENATOR LATHROP: Tell us what you can ask once you've made the decision you're going to hire somebody to be a checker at your grocery store. [LB324]

DALLAS JONES: Um-hum. [LB324]

SENATOR LATHROP: What do you get to ask before you really put them on? [LB324]

DALLAS JONES: Once a conditional offer of employment has been made by the employer, the employer has a fairly broad purview in which it can ask questions about, you know, what kind of conditions do you have, where have you been injured, have you even had workers' compensation claims. But the rub is, under the ADA, the Americans

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

Business and Labor Committee
March 18, 2013

with Disabilities Act, if the employer misuses that information in a way that denies that employee the opportunity to go to work, that's when there's an ADA claim. In other words, there has to be legitimate business reasons for the employer to deny employment under those circumstances. Employers, in your hypothetical, because, practically speaking, they don't want to invite a failure-to-hire claim,... [LB324]

SENATOR LATHROP: Sure. [LB324]

DALLAS JONES: ...limit their questions to what the essential functions of the job are, which the ADA says thou shalt not deny employment unless that employee, with or without reasonable accommodation, may not perform or is unable to perform essential functions. So in your hypothetical, Senator, I would say this. You quoted that part of the statute, or the part of the bill, rather, that I think is key to your hypothetical, which is knowingly and willfully misrepresented their physical condition when asked about it. Your hypothetical sets up a scenario where I see no circumstances under which the employer could ever successfully prevail because you build into the hypothetical that we don't know what the job was. This bill is intended to set a very high standard which says, when the employee knowingly and willfully misrepresents their condition, which the employer asks them, here's what the job involves. Now if it's fluff and it's not defined, I would submit, how is that employer ever going to prove that that employee misrepresented themselves? [LB324]

SENATOR LATHROP: Well, let's...let me change the hypothetical a little bit and do this. [LB324]

DALLAS JONES: Sure. [LB324]

SENATOR LATHROP: What if the person has the back surgery? Let's say it's a diskectomy. Okay, that's oftentimes a pretty good sign that there's a degenerative process going on in the lumbar spine, typically, as you know. [LB324]

DALLAS JONES: Um-hum. [LB324]

SENATOR LATHROP: You get through that and you go to the orthopedic or the neurosurgeon for the last time and you say, what restrictions you got for me, Doc? And the doctor says, you know, be careful, use your best judgment. You've seen people that leave the doctor's office and get nothing more than, be careful, you know,... [LB324]

DALLAS JONES: Right. [LB324]

SENATOR LATHROP: ...you're not going to be running any marathons, or they say something that isn't...you know, no lifting over 50, no lifting...you know, standing for more than an hour and a half, whatever. But the restrictions the employee is given is,

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

Business and Labor Committee
March 18, 2013

you know, be careful, use your best judgment, listen to your body. You go off now to apply to be a checker and somebody hands you a specific list that says, you know, you're going to have to lift dog food once in a while that weighs 50 pounds and stand at a check stand for eight hours at a time. [LB324]

DALLAS JONES: Um-hum. [LB324]

SENATOR LATHROP: So are they lying when they say, I think I can do it? [LB324]

DALLAS JONES: Of course not. [LB324]

SENATOR LATHROP: So it's the...I just don't want, if we pass this, to invite a bunch of litigation because we haven't been clear about the relationship between the misrepresentation and the intentional part. Is somebody intentionally misrepresenting themselves when they say, yeah, I think I can lift dog food bags, occasionally, that weigh 50 pounds from the bottom of a grocery cart,... [LB324]

DALLAS JONES: Um-hum. [LB324]

SENATOR LATHROP: ...and I think I can stand eight hours a day? And then, when they can't, somebody says, jeez, you misrepresented yourself because you had that herniated disk and the surgery back in '80. [LB324]

DALLAS JONES: But what did they misrepresent? They didn't misrepresent anything. In fact, they were entirely consistent with what their doctor told them. This bill is directed at those cases where they are given those clear restrictions, they go to their doctor, their doctor says, don't lift anything more than 30 pounds, and the employer says, this job requires you to lug sides of beef that weigh 100 pounds apiece, and the employee says, yep, I can do that, and the employer has no idea that there's a time bomb sitting there. And the employee goes out and, expectedly, just as the doctor said, injures their back. They require another back surgery. The knowingly and willfully is a very high standard that I do not think...well, I can tell you, from '87 until 2011, when I was dealing with that defense, my clients weren't raising that defense under the circumstances that you raise. It just simply didn't happen. They were raising the defense in those cases where it was clear that...there wasn't much dispute. The employee misrepresented their condition, they knew what their limitations were, and they refused to tell them. [LB324]

SENATOR LATHROP: Well, let me ask you this though. What happens if I get done with my surgery in 1980, the doctor says, don't lift more than 30 pounds, and for 20 years I go and do a job where I lift 40 pounds all day long? [LB324]

DALLAS JONES: Um-hum. [LB324]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: And then I go to the meat packing place and they go, can you lift 40 pounds? You go, well, yeah, I've been doing it for the last 20 years. [LB324]

DALLAS JONES: Right. [LB324]

SENATOR LATHROP: Now there's a restriction that says I shouldn't lift that much--it's very old and I've done a lot of it in the meantime--and now I get hurt. Is there a causal connection between the false representation and the injury when that low back finally gives? [LB324]

DALLAS JONES: Is there a causal connection between the misrepresentation and the injury, is the question. [LB324]

SENATOR LATHROP: Consideration number three,... [LB324]

DALLAS JONES: Right. It's the... [LB324]

SENATOR LATHROP: ,...because I've done it for 20 years before I ever took the job that... [LB324]

DALLAS JONES: That's right. But the question is not, is there a causal connection between the previous injury and the new injury? The question is a causal connection between the misrepresentation. Because the person didn't tell the truth, is that why they got injured? [LB324]

SENATOR LATHROP: Is it a misrepresentation though if the doctor says, don't lift more than 30 pounds, and for 20 years I've been lifting, you know, 50 pounds all day long and not having any trouble with it? [LB324]

DALLAS JONES: I would strongly advise any of my clients to walk away from that defense because I don't think it has any chance whatsoever because they've demonstrated the ability. [LB324]

SENATOR LATHROP: And that's probably...I don't think, probably, anybody sitting up here would say, jeez, this is a terrible idea, everybody ought to be able to say whatever they want and still get the job, and the employer ought to be on the line. [LB324]

DALLAS JONES: Um-hum. [LB324]

SENATOR LATHROP: I think the devil is in the detail. But we're going to hear from, it looks like, a slug of lawyers on the other side of this, as we always do. [LB324]

DALLAS JONES: My good friends are going to tell you all the reasons why I'm wrong,

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

Business and Labor Committee
March 18, 2013

and I look forward to listening to that. [LB324]

SENATOR LATHROP: Okay, and that's what makes a Business and Labor hearing. [LB324]

DALLAS JONES: Thank you. All right. You bet. [LB324]

SENATOR LATHROP: Thanks, Dallas. [LB324]

DALLAS JONES: Thank you. [LB324]

SENATOR LATHROP: Is there anyone else here in support of LB324? Seeing none, we'll go to opposition testimony. [LB324]

ROBERT MOODIE: Mr. Chairman, members of the committee, Robert R. Moodie, M-o-o-d-i-e, testifying on behalf of the Nebraska Association of Trial Attorneys. I'm going to try to quickly address Sections 2 and Section 1. First, Section 2. Section 2 is an effort by several large employers to attempt to restrict the information their employees receive about workers' compensation laws when they've been injured. This bill was not brought to you by a group of employees who are concerned about personal information. I believe it was brought by Nebraskans for Workers' Compensation Equity and Fairness. Look at their Web site if you would like to make sure you know who is involved in this organization--large employers, self-insured employers. They want to have a monopoly on providing information to their employees when they've been injured, and there is nothing currently in the workers' compensation law which requires that this information that they give be accurate or complete. They don't want their employees to be getting information from attorneys who might point out that what the employer is telling them is incomplete or, perhaps, completely wrong. Attorneys use this information to send out useful information to persons that have been injured at work. But, unlike the employers, attorneys have ethical requirements imposed by the bar association requiring that the information be accurate and even that the envelopes be marked as advertisements so they can be quickly disposed of if the recipient so desires. Few of us like getting all the advertisements we get in the mail. I sold my house last year. As soon as I did that, I started getting mailings from movers. When I moved into the new house, I started getting mailings from the merchants in my new neighborhood with offers and information about their businesses. Some of that information was helpful; some of it I disregarded. I would also point out that most of you have used the same public records to present your campaign messages to the public in the last elections. Lawyers use the public records, too, but don't be distracted. This is not a consumer protection account. It's an effort to control information and make it harder for injured workers to find competent representation. On the interest rate, I'm not going to get into everything that I would say, but I would harken back to a wise state senator who has already addressed this issue on floor debate one time in this session. Any employer that pays benefits

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

Business and Labor Committee
March 18, 2013

when they're supposed to pay them is not going to be subject to any interest. The interest applied by the workers' compensation section is only going to happen when the employer does not pay timely benefits without a reasonable controversy, does not pay timely benefits after an award of the Workers' Compensation Court. There is a public policy for encouraging people to pay their taxes on time. There is a public policy to encourage employers to pay workers' compensation benefits that the statutes require of them. Thank you. [LB324]

SENATOR LATHROP: Bob, just to clarify, they get 30 days to make payment, am I right, before the interest rate is ever imposed? [LB324]

ROBERT MOODIE: Yes, sir, yeah, absolutely. [LB324]

SENATOR LATHROP: And it's essentially on noncontroversial payments? [LB324]

ROBERT MOODIE: Absolutely. [LB324]

SENATOR LATHROP: Okay, very good. I see no questions. Thank you for your testimony once again. [LB324]

LEE LOUDON: Good afternoon, Senator Lathrop and members of the committee. My name is Lee Loudon, spelled L-o-u-d-o-n. I'm here on behalf of the Nebraska Association of Trial Attorneys to voice our opposition to Section 3 of LB324. That deals with the Bassinger case, Bassinger v. Nebraska Heart Hospital. Look at the facts of that case. It is instructive. In Bassinger, the employee had two previous back injuries before she went to work at Nebraska Heart Hospital. On her job application she listed one back injury and forgot to list one from Bryan Hospital from 2001, and the Heart Hospital argued that that failure to list one of the back injuries, even though she had listed another one, ought to be grounds for totally denying her benefits. And the Supreme Court said that, no, that this test that...the Supreme Court said that, 30-some years ago, in the Hilt case that's discussed in the Bassinger case, the Supreme Court had developed a three-part test that LB324 seeks to implement. But in the Hilt case, there was no basis for the Supreme Court to come up with that case 30-plus years ago. It wasn't part of the workers' compensation statute. The Supreme Court just adopted it. And what Bassinger did was to say that we didn't have the authority or power to do that 30-plus years ago. It wasn't part of the Workers' Compensation Act. Now in the Bassinger case that came out last year, the Supreme Court said, here are some policy reasons why we shouldn't have this Hilt test that now is in LB324. And one of the reasons it was...it said it would be unfair for someone to get a job and work months or even years, 10 or 20 years, for an employer, get hurt, and then the employer to go back and look at the application 10 or 20 years ago and say, well, look, you didn't list this back injury then and we're going to have to deny you benefits. Senator Lathrop, you said that the devil is in the details, and I'd offer a couple examples or hypotheticals why I

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

Business and Labor Committee
March 18, 2013

think Section 3 of LB324 is a bad idea. It would preclude benefits to someone who didn't tell the truth on a job application about a previous injury, then the employer finds out about it, continues to employ them, and then the employee gets hurt. And then the employer then would still be able to say, well, you didn't tell us at the time of the initial application, so we should deny your benefits. It would also not address whether the language on the job application is clear and unambiguous when it requests information about a previous injury. Also, probably 95-plus percent of my clients are non-English speaking; they're usually Spanish speaking. A lot of times they have their kids help them fill out job applications. I see errors in the job applications all the time when the employer sends them to me, not because of intent but because of the language barrier, an educational barrier, maybe a mistranslation between an interpreter and the client filling out the application. My time is up. [LB324]

SENATOR LATHROP: Very good. Thanks, Lee. I see no questions. [LB324]

LEE LOUDON: Thank you. [LB324]

SENATOR LATHROP: Thanks for your testimony. [LB324]

STEVE HOWARD: Steve Howard,... [LB324]

SENATOR LATHROP: Welcome again, Steve. [LB324]

STEVE HOWARD: Thank you...H-o-w-a-r-d, for the Nebraska State AFL-CIO. On the interest rate, again, it's not every award. It isn't like you get an award and the courts determine you're entitled to benefits and there's interest due on it. It's only when there's no reasonable controversy. If four doctors say it happened on the job and one says it didn't and you prevail, the judge believes the four doctors, there's still a reasonable controversy. What you have before you is no evidence about how this is going to cause decreased rates, decreased premiums for Nebraska employers; so we resist that part. The part about the confidentiality, you know, we have had some membership in the AFL-CIO come forward and say, maybe I don't want these first reports made available. But the literature that goes out from attorneys is informational, and it has to be accurate. Maybe a good compromise, maybe an amendment, would be to require employers, when someone gets hurt, to hand them their bill of rights; to tell the injured worker, by the way, there's this thing called Rule 50, you get to pick your family doctor to treat you. I see Rule 50 violations all the time, but there's no incentive, there's no teeth to it, you know. Then we've got to go fight to try to get the employer that said, no, no, no, you have to treat with our doctors, you can't go to a family doctor, to get that whole choice undone. I get a lot of workers coming in, and they don't know that they can get their prescriptions paid for. They're using their drug card through their health insurance, and so they're paying a copay of \$20 or more. They don't know that they can get mileage. They don't know many of the rights because it hasn't been explained to them. So maybe

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

Business and Labor Committee
March 18, 2013

a possible compromise would be we could have this confidentiality but, by gosh, when someone is injured, then there's some enforcement, there's some teeth to that Rule 50 and this set of rights that they have. And so maybe there's room for compromise there. As far as the section that has to do with the misrepresentation, my good friend Dallas Jones makes a good point, that the way that the bill is written, it speaks to the relationship between the misrepresentation versus the condition, versus the injury. But those two are interconnected, they're interwoven. I mean, you don't have a misrepresentation unless you have...you don't have a statement, I should say, about your health unless you have a condition. The term that troubles me is the term "a causal connection." You know, in the law, we lawyers think about the cause versus a cause. If it were as much as 1 percent, where it's 99 percent new, this bill would mean no compensation, zero compensation. And so we had the old 1979 case, and then we had the more recent Heart Hospital case, so that's twice in 30 years that it's really been an issue, again, anecdotal and not good enough reason to...for a sweeping amendment, so. [LB324]

SENATOR LATHROP: Very good. [LB324]

STEVE HOWARD: Okay, thank you. [LB324]

SENATOR LATHROP: Any questions for Mr. Howard? [LB324]

STEVE HOWARD: Thank you. [LB324]

SENATOR LATHROP: (Exhibits 1 and 2) I see none. Any additional opposition testimony to LB324? Seeing none, anyone here in a neutral capacity on LB324? And seeing none...this was a Nelson bill. No, Lautenbaugh, I think. We're going to put into the record two letters, one from Nebraska Appleseed, dated March 18, 2013, in opposition to LB324, and one from Radcliffe and Associates on behalf of PCI and Tyson Foods in support of LB324. And with that, we'll close the hearing on LB324. We next have claims bills, and I think we'll have a five-minute break, in between. So if you want, you can stretch your legs and... [LB324]

BREAK

SENATOR LATHROP: This is Business and Labor Committee. We are back on the air. Welcome back, if you're watching on the television. Welcome back to those of you who have returned after our short break. We will next take up the claims bills. Those are, traditionally, bills that include all the claims against the state, to be processed through the State Claims Board. Some of them are write-offs. Some of them are actually monetary claims against the state which have been approved by the board and, in some cases, also approved by the Attorney General's Office, in the case of settlements. We will begin with LB536, which is the claims approved bill, and that bill will be introduced

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

Business and Labor Committee
March 18, 2013

by our committee counsel, Molly Burton. [LB536]

MOLLY BURTON: Chairman Lathrop, my name is Molly Burton, B-u-r-t-o-n, legal counsel for the Business and Labor Committee, here to introduce LB536, which are those claims that are approved, claims against the state that are approved for payment. These claims include some tort claims, some workers' comp claims, and some agency write-off requests. Here to testify for those claims we have Mr. Cookson from the Attorney General's Office will testify on the tort claims and the workers' comp claims where the Attorney General's Office was involved. We also have some heads of agencies present to talk about some of the more, I guess, significant write-off requests we have--Mr. Winterer here from Health and Human Services. I believe we have the agency head from the Department of Roads and Department of Corrections here as well to talk about their write-off requests. I'm aware of two amendments. Also present is Shannon Anderson who is the Risk Manager who is involved in the claims process. She can also answer additional questions, towards the end of the hearing, regarding those claims. I can also talk about one of the amendments that she'll offer to the committee which changes some of the numbers that you see listed in LB536. Mr. Cookson also will discuss an amendment where court-ordered attorney fees in one of the cases that the Attorney General's Office was involved in. [LB536]

SENATOR LATHROP: Okay, thank you. You know, Shannon, I think we may have to have you come up first, just to explain the amendment to the extent we've changed numbers in any of these claims,... [LB536]

SHANNON ANDERSON: Okay. [LB536]

SENATOR LATHROP: ...so that when we get to the agency heads or to the Attorney General's Office, we're asking questions about the right number. [LB536]

SHANNON ANDERSON: Okay. [LB536]

SENATOR LATHROP: So can you visit with us about the amendment and... [LB536]

SHANNON ANDERSON: (Exhibit 1) Absolutely. Shannon Anderson, S-h-a-n-n-o-n A-n-d-e-r-s-o-n. I'm the state Risk Manager. And the amendment that we have is at...it's, very simply, on agency write-offs. Those are uncollectible or bad debts. They've arisen from the agencies for purposes of bankruptcy, death, and the uncollectibility could be the whereabouts of the debtor. So what's happened though between the time that the State Claims Board approved the claim, the debt amount that's written off, you actually had...either agency realized that it was uncollectible, which is in regards to the...I'm trying to think of it. I'm sorry, I'm looking at this. We have...it's...I've actually done this in reverse. On line 4, the \$212.76, that's the State Supreme Court actually collected approximately \$13 on a debt, so we wanted to get it to the right amount. So that will be

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

Business and Labor Committee
March 18, 2013

\$200.43. And then the other one is DHH...oh. [LB536]

SENATOR LATHROP: Wait a minute. Wait, wait, wait. I'm looking at AM619. Is that what you're working from? [LB536]

SHANNON ANDERSON: Yep, yep. And I just did the second paragraph first. So if you look at it, it's the \$2 million. The first line says, on page 3, in line 6 and 7, strike \$950,000. Is that the one you're looking at? [LB536]

SENATOR LATHROP: Yes. [LB536]

SHANNON ANDERSON: That is regarding a tort claim. I thought I'd do that...I did...I started with the write-offs in the second paragraph, unfortunately. [LB536]

SENATOR LATHROP: Okay, let's do the first...let's start at the top. [LB536]

SHANNON ANDERSON: Let's just reverse again? [LB536]

SENATOR LATHROP: Yeah. [LB536]

SHANNON ANDERSON: And just to... [LB536]

SENATOR LATHROP: Page 3, lines 6 and 17, strike \$950,000 and put \$1.2 million. [LB536]

SHANNON ANDERSON: Right, and that is in regards to a wrongful death tort claim, that Mr. Cookson will be discussing, in which the settlement amount that was given to us for the claims bill was changed to the higher amount. And that's why we're changing it on that. [LB536]

SENATOR LATHROP: And we'll talk to Cookson about that. [LB536]

SHANNON ANDERSON: You'll talk to Cookson on it. On the... [LB536]

SENATOR LATHROP: On page 5? [LB536]

SHANNON ANDERSON: ...write-offs then, the \$212 one is the Supreme Court. They're...they...we did not...you did not request a representative to be here for that one. The other one is moving from \$2,015,000 to \$2 million. That's a DHHS write-off, and that person's estate, they had a change on the estate and they asked for that not to be determined as uncollectible. And Director Winterer can speak to that one. So those are the only two changes. But that...those write-off changes result when the agency continues their process with the debt collection. So it was minimal this year. Some

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

Business and Labor Committee
March 18, 2013

years, in the past, we've had more agencies change their amounts. [LB536]

SENATOR LATHROP: Okay, so that we're clear,... [LB536]

SHANNON ANDERSON: Um-hum. [LB536]

SENATOR LATHROP: ...from our green copy, we make two changes. On page 3, lines 6 and 17, we'll put \$1.2 million in place of \$950,000. [LB536]

SHANNON ANDERSON: Right, and then the other two changes are to the funds. [LB536]

SENATOR LATHROP: And on--hang on a minute--line 19, we'll change from \$1.4 million to \$1,650,000. And then, on page 5, there are two changes. On line 13, we go from \$212.76 to \$200.43. And on page 5, line 25, we strike \$2,015,439, and we insert \$2,000,345.73. [LB536]

SHANNON ANDERSON: That is correct. [LB536]

SENATOR LATHROP: Those would be the only changes. Okay, we will have Mr. Cookson. If there are no questions for Ms. Anderson, we'll have Mr. Cookson from the AG's Office come up to address the...okay, we'll have Mr. Beermann come up and talk about the...you're excused. [LB536]

SHANNON ANDERSON: Okay, thank you. (Laughter) [LB536]

SENATOR LATHROP: Don't leave, in case we have a question for you. [LB536]

SHANNON ANDERSON: I won't leave. [LB536]

SENATOR LATHROP: Mr. Beermann, some of these involve the paying press fees, and we'll let Allen address that first. First of all, your name, if you would. [LB536]

ALLEN BEERMANN: I'm Allen Beermann, A-l-l-e-n B-e-e-r-m-a-n-n. I represent the Nebraska Press Advertising Service, located here in Lincoln, Nebraska. I am a registered lobbyist also, and I serve as executive director of the Press Advertising Service. [LB536]

SENATOR LATHROP: And what portion of the bill are you here to... [LB536]

ALLEN BEERMANN: Section 1. [LB536]

SENATOR LATHROP: Section 1. [LB536]

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

Business and Labor Committee
March 18, 2013

ALLEN BEERMANN: We are addressing only Section 1,... [LB536]

SENATOR LATHROP: Okay. [LB536]

ALLEN BEERMANN: ...which is a claim for \$72,808.58. This is a claim that would be paid through the Secretary of State's Office. It is for the publication, three times, of each constitutional amendment that appeared before the general election ballot of 2012. Very briefly, the process is this. The Legislature can propose amendments for a vote by the people. Also, you can have constitutional amendments proposed, either by initiative...and you can also have ballot issues by referendum. We had, this last year, only constitutional amendments proposed by the Legislature. We then contract with the Secretary of State's Office for this publication through the Nebraska Press Advertising Service. The Governor of the state, by contract, also designates which papers they are published in. And most governors have always designated all of the papers so everyone had the opportunity to read the amendments. And then we present the claim before the State Claims Board which, in this case, the Claims Board has approved, unanimously, this claim for \$72,808. And then, also, we are required...every newspaper files an affidavit, proof of publication, for every amendment that was published in their papers. These are filed in the Office of the Secretary of State, and they can now be found in his custody. And the reason for that is it's the Secretary of State who updates and publishes the amendments to the constitution, if any are passed. And so then, afterward, we then make the claim to the Legislature, after the Claims Board, and here we are, today, to ask that you advance, at least, this portion of the claims bill for \$72,808. And if and when that's paid, probably in June, it is then disbursed to all of the papers. [LB536]

SENATOR LATHROP: Very good. This is the typical process and procedure. [LB536]

ALLEN BEERMANN: And it's prescribed in the constitution and in the state statutes. [LB536]

SENATOR LATHROP: Very good. Thanks, Allen. Any questions for Mr. Beermann? I see none. It's always a pleasure to have you here. [LB536]

ALLEN BEERMANN: Thanks for your courtesy. [LB536]

SENATOR LATHROP: And great to see you again. [LB536]

ALLEN BEERMANN: Thank you, thank you. [LB536]

SENATOR LATHROP: Thanks, Allen. Next we will hear from the Attorney General's Office. [LB536]

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

Business and Labor Committee
March 18, 2013

DAVID COOKSON: Chairman Lathrop, members of the committee, my name is David Cookson, D-a-v-i-d C-o-o-k-s-o-n. I'm Chief Deputy Attorney General. As usual, I will defer to the Chair where you want me to start. [LB536]

SENATOR LATHROP: Yeah, and I think you, to be a little more specific, you're here on Sections 2 and 3. Is that right? [LB536]

DAVID COOKSON: Right. [LB536]

SENATOR LATHROP: Okay, and I think what we'll do is have you just walk through each of the claims. And I would invite the committee members to interrupt Mr. Cookson, as he walks through this process, to ask questions as he goes through the various claims, if you have questions or concerns or you want some clarification. [LB536]

DAVID COOKSON: And then when I conclude with that I will discuss the amendment we discussed with committee counsel. [LB536]

SENATOR LATHROP: That's fine. [LB536]

DAVID COOKSON: Okay. [LB536]

SENATOR LATHROP: Well, since we have the amended numbers, I think you can talk about it in the context or with the amended numbers. [LB536]

DAVID COOKSON: Yes. [LB536]

SENATOR LATHROP: Okay, very good. [LB536]

DAVID COOKSON: Yeah. First claim I would discuss would be \$450,000 to the client trust account for Darrel F. Parker, in care of Friedman Law Offices. I don't know how much history you want, but I'll give you some brief history. In the 1950s, in Lincoln, Mr. Parker's wife was murdered. He was an arborist for the city of Lincoln. He was charged with the murder of his wife, although he allegedly confessed after a marathon interrogation session. He had come back voluntarily to...with the...to be interrogated. At that time, the Lincoln Police Department brought in a, quote, interrogation expert, a man by the name of John Reid. Mr. Reid's claim to fame is he was...his method of interrogation was what led to the Miranda decision in 1966, in which the Supreme Court completely discredited Mr. Reid's interrogation tactics at that time. Mr. Parker continued to profess his innocence through numerous legal challenges, although, by the time a lot of the information came out, he was past the statute of limitations. With the passage of the Wrongful Conviction Act two, three years ago, whenever that was, Mr. Parker filed a claim under the act. As we went through the act, it occurred to...and Mr. Parker was incarcerated, basically, from late '50s until 1970. We went through the file, as we did

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

Business and Labor Committee
March 18, 2013

with the Beatrice Six. We went through the entire file, revisited the investigatory materials, which included an individual who'd committed a similar crime, who was seen in the area the date of the rape and murder of Mr. Parker's wife. As we went through the file, again, it became clear to us that Mr. Parker did not commit this crime and, as such, we would likely lose a challenge on this...in this matter, as had been filed by Mr. Friedman, Mr. Parker's attorney. And as a result, we agreed to settle the case for the statutory amount of \$500,000. Mr. Parker has already received \$50,000 from the Risk Manager, pursuant to statute, and the remaining claim is \$450,000. [LB536]

SENATOR LATHROP: Okay, so this is a statutory...or a claim under the statute that was passed by this Legislature just a few years ago? [LB536]

DAVID COOKSON: Correct. [LB536]

SENATOR LATHROP: Okay. You said he was incarcerated in the late '50s until 1970? [LB536]

DAVID COOKSON: Right, in 19... [LB536]

SENATOR LATHROP: How many years did he spend in the penitentiary as a result of his wrongful conviction? [LB536]

DAVID COOKSON: I believe all of that time. [LB536]

ALLEN BEERMANN: From the time he was arrested on December 14, 1955, until the time he was released in September...well, actually, it was in December of '69. [LB536]

SENATOR LATHROP: So approximately 15 years. [LB536]

ALLEN BEERMANN: Yeah. [LB536]

DAVID COOKSON: Yeah. [LB536]

SENATOR LATHROP: And was his release the result of somebody coming to the conclusion that he was actually innocent? [LB536]

DAVID COOKSON: He had challenged his conviction and the voluntariness of his confession. The 8th Circuit had indicated that it needed to be retried. And rather than go through the retrial, there was an agreement that he would not pursue any further appeals and he would be released. [LB536]

SENATOR LATHROP: He professed his innocence, and he actually found somebody with the same MO that was in the area where this happened? [LB536]

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

Business and Labor Committee
March 18, 2013

DAVID COOKSON: Right, the actual... [LB536]

SENATOR LATHROP: Your conclusion was somebody else did it. [LB536]

DAVID COOKSON: The actual LPD investigation indicated another person. That person, before he died, had confessed to his attorneys that he had killed Mrs. Parker. [LB536]

SENATOR LATHROP: Okay, and for that reason, the \$450,000 represents the statutory maximum, minus the \$50,000 he has already received. [LB536]

DAVID COOKSON: Right. We concluded that winning his... [LB536]

SENATOR LATHROP: And you're permitted to pay up to \$50,000 without our authority, and that's why that happened? [LB536]

DAVID COOKSON: Yeah, that's the typical practice. [LB536]

SENATOR LATHROP: Okay, got it. Just wanted to clarify it for the committee members. You can go on to...does anybody have a question about that wrongful conviction claim? Okay, seeing none, you may proceed then to the next claim. [LB536]

DAVID COOKSON: The next claim is for the estate of Michael Stodolka through...and his attorney, Woody Bradford. Just in the interest of disclosure, Senator Harr was also involved in this case. [LB536]

SENATOR LATHROP: And in the interest of disclosure, at one time, that was a file in my office. [LB536]

DAVID COOKSON: Correct. [LB536]

SENATOR LATHROP: And I have a conflict on file, but that's...our claim is only for a small amount, for costs. [LB536]

DAVID COOKSON: That was my understanding as well. [LB536]

SENATOR LATHROP: Okay. [LB536]

DAVID COOKSON: This case involves a Department of Roads action. For those of you familiar with the interstate entrance ramp across from Toyota on...as you're heading into Omaha, it's a fairly long entrance ramp. At that location, at the time of Mr. Stodolka's accident, there was a 9-inch or greater drop-off from the actual pavement. There wasn't

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

Business and Labor Committee
March 18, 2013

a shoulder, per se. There was a fairly significant rut. There is witness testimony that that rut had been there for over 18 months. Mr. Stodolka's vehicle went off the roadway, hit the rut, he oversteered, then ended up going down the hill that is there, next to that ramp, rolled over a number of times, was ejected from the vehicle and, basically, run over by the vehicle and killed at the accident site. State...claim was brought by his estate. In Nebraska, we're limited in what we can argue, in terms of a seat belt liability. It's capped at 5 percent of comparative negligence. Likewise, we concluded that his negligence in oversteering would be, likely, no more than 10 to 15 percent of the liability. We offered to settle the case, initially, for \$1 million. There was a mediation held. He had...obviously, there was some...he actually may have survived the crash briefly, as...if I recall correctly. There was accommodation made for subrogation claim. And after the mediation, we...during the mediation, we raised our offer to \$1.25 million. Obviously, he's already been paid \$50 million (sic) out of the Risk Manager's fund, as was done in... [LB536]

SENATOR LATHROP: Fifty thousand? [LB536]

DAVID COOKSON: Fifty thousand, excuse me. And so the claim has been amended for \$1.2 million. [LB536]

SENATOR LATHROP: Okay. Does anybody have any questions about that terrible accident? By the way, there is still ruts in that area. I get on it every morning. So the roads guys need to get out there and throw something in the...along the edge of the on-ramp--a little editorial from the Chair of the committee... [LB536]

DAVID COOKSON: I always like it when my clients are put on notice. [LB536]

SENATOR LATHROP: ...who has to approve the...has to approve all these claims bills. [LB536]

DAVID COOKSON: The next claim is a workers' compensation claim, in number 3. This is to Regina Seamann and Rodney Rehm, her attorney. The claim was actually settled for \$200,000; again, \$50,000 was paid by the Risk Manager. The workers' compensation claim in this case was handled by our third-party administrator, which is F.A. Richard and Associates. They came to our office requesting settlement authority of \$200,000 for Ms. Seamann's permanent disability claim. Ms. Seamann was a Norfolk Regional Center employee who was attacked by a patient in, I want to say it was, 2009...2006. She was receiving permanent disability benefits through March of 2012, based on a 50 percent loss of earning. Her current treating doctors are of the opinion she's permanently unable to return to work due to her physical and psychological injuries. High probability, we believe, the Workers' Comp would find her permanently, totally disabled, thus, obligating us to pay benefits for the remainder of her life. We are paying a lump-sum claim, the disability portion, for \$200,000. And... [LB536]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: Pretty straightforward. [LB536]

DAVID COOKSON: Yeah. [LB536]

SENATOR LATHROP: Has that been approved by the Work Comp Court? [LB536]

DAVID COOKSON: I...yes. [LB536]

SENATOR LATHROP: Subject to our approval. [LB536]

DAVID COOKSON: Right. [LB536]

SENATOR LATHROP: Okay. [LB536]

SENATOR WALLMAN: Was he (sic) hurt by a resident of the place or...? [LB536]

DAVID COOKSON: Yeah, she was attacked by a resident at Norfolk Regional Center. [LB536]

SENATOR WALLMAN: Or she, I mean. [LB536]

SENATOR LATHROP: Okay, okay. All right, and do you have, in addition to the claims that you've just gone through in Sections 2 and 3, an additional amendment that reflects the payment of attorney fees required by a court decision? [LB536]

DAVID COOKSON: Correct, yes. [LB536]

SENATOR LATHROP: All right. Can one of you guys get... [LB536]

DAVID COOKSON: And we've provided a copy of the judgment to counsel. I have a copy here for the Chairman, if he'd like. [LB536]

SENATOR LATHROP: Okay. [LB536]

DAVID COOKSON: This involves the legal challenge to the Sex Offender Registry statute. Those of you who were here in 2009 remember that this challenge was filed in the week before Christmas, in 2009. It challenged all of the Sex Offender Registry attributes in what was then LB285, brought by Senator Pirsch, and LB97, brought by Senator White and Senator Lautenbaugh. LB97 was a merger of Senator Lautenbaugh's bill and LB15, which was Senator White's bill. On Final Reading those two bills were combined. The basic challenge that the plaintiffs made in that case were to the changes to the Sex Offender Registry, proposed by the State Patrol, to

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

Business and Labor Committee
March 18, 2013

accommodate the Adam Walsh Act. The district court found that all of those provisions were constitutional, having been upheld both at the U.S. Supreme Court level, the multiple circuit court level, and multiple times in the Nebraska district courts. What remained...so basically, 90 percent of the lawsuit was dismissed at the preliminary injunction and summary judgment stage, back in '09 and 2010. [LB536]

SENATOR LATHROP: There was some prohibition against being in certain places or participating in Facebook or something like that? [LB536]

SENATOR MCGILL: This is the on-line stuff, right? [LB536]

DAVID COOKSON: This was...the issues that were then left to be contested were the Internet prohibitions, which was primarily e-mail identifiers. It had a provision that these folks, if they were registered offenders and had perpetrated an attack or their crime on a child, their computers would be subject to being monitored or searched. Much of it was cutting edge. Some of it had been upheld in other jurisdictions. Subsequent, or while the legislation was pending, the U.S. Attorney's Office had changed its rules and guidelines, unbeknownst to those of us who were working on it, and had gone from something we had modeled after to something that was different. And the judge basically indicated that, had we followed the U.S. attorneys, some of the statute might have been upheld. So, nonetheless, we went to trial on those issues. There were numerous experts, cost. Our experts were from the National Center for Missing and Exploited Children. The plaintiffs had some psychological experts from around the country. And so there was a judgment entered in favor on the remaining 8 percent or 10 percent of the claims after trial; and then, of course, having sued us under 1983, they're entitled to recover attorneys' fees. Their attorneys' fees claim was in the neighborhood of \$800,000. We submitted to the court \$250,000. The judge came back with \$292,000. [LB536]

SENATOR LATHROP: Okay, and so the amendment is for \$292,564.88 in fees and \$9,896.56 in costs. [LB536]

DAVID COOKSON: Correct. [LB536]

SENATOR LATHROP: And that is court-ordered? [LB536]

DAVID COOKSON: Yes. [LB536]

SENATOR LATHROP: Okay. [LB536]

DAVID COOKSON: It's contained in the judgment that I've provided you a copy. [LB536]

SENATOR LATHROP: Okay. Right, but we...I mean, we're here to approve it. [LB536]

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

Business and Labor Committee
March 18, 2013

DAVID COOKSON: Yeah. [LB536]

SENATOR LATHROP: But as a practical matter, it's been ordered by the district court, federal district court. [LB536]

DAVID COOKSON: Correct, right. [LB536]

SENATOR LATHROP: Okay. [LB536]

DAVID COOKSON: And just a side note: We were prepared to offer settlement of more than the amount the court ordered, but the plaintiffs were not interested in talking to us about settlement. So we actually... [LB536]

SENATOR LATHROP: That happens, that happens. [LB536]

DAVID COOKSON: We ended up saving a little bit of money. [LB536]

SENATOR LATHROP: Every once in a while that happens. Okay, anybody have questions about that? It is an important lesson for members of the Legislature. When we pass unconstitutional laws, we end up paying about \$200,000, on average, in attorney fees. [LB536]

DAVID COOKSON: I would...on these particular cases, I will say that there are differing decisions in other jurisdictions and, ultimately, this may be upheld. But we felt it was not cost-effective to appeal this, at this time. [LB536]

SENATOR LATHROP: Okay, okay. I see no questions on that particular claim. That is...do you anticipate any amendment to the claims bill before this gets to the floor? [LB536]

DAVID COOKSON: We've been in discussions on a couple of other cases that are pending. I'm not optimistic, based on discussions we've had. [LB536]

SENATOR LATHROP: Okay. Okay, well, we'll see how those discussions go. And if they prove fruitful, then you can let our office know and we'll have a hearing on any remaining claims. [LB536]

DAVID COOKSON: Yeah. Yeah, there are two remaining cases where we have offers out... [LB536]

SENATOR LATHROP: Okay. [LB536]

DAVID COOKSON: ...that would be beneficial if we could settle. [LB536]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: And we did discuss that last week. [LB536]

DAVID COOKSON: Yeah. [LB536]

SENATOR LATHROP: Okay, thanks, Dave. [LB536]

DAVID COOKSON: Thank you. [LB536]

SENATOR LATHROP: No other questions for Mr. Cookson? Okay, with that, that will take care of the Attorney General's portion and bring us to some agency write-offs. And I think we'll take up Health and Human Services and Mr. Winterer, the CEO. I will say, if this is right, this may be the lowest number for write-offs that I've seen Health and Human Services wander in here with in my seven years. [LB536]

KERRY WINTERER: (Exhibit 2) We aim to please. (Laugh) Senator Lathrop and other members of Business and Labor Committee, my name is Kerry Winterer. That's spelled K-e-r-r-y. Last name is W-i-n-t-e-r-e-r. I have the privilege of being the CEO of the Department of Health and Human Services, here to testify in support of LB536, specifically, I think, Section 5 of that bill, that would permit write-off of certain debts. I am distributing to you my testimony. I don't know that I necessarily need to read that, in the interest of time, unless you would like me to do that. There are also a couple of other attachments to that which I was hoping would be helpful to you. One is a narrative description of each area, and the other one...each area for write-off, each program, if you will. The other one is a spreadsheet which, essentially, breaks it down, specifically, program by program, in terms of what we're talking about and, also, the reasons for write-offs. In most cases...and the Chairman was kind enough to mention that we're down from...I think our write-off request last year was about twice this amount. There's a lot of things going on, a lot of reasons why our agency has significant write-offs. Most of these are actually very small amounts. There's about 1,540 debts that are owed from 1,540 individuals. There are very few large ones. There are a few large ones in this. Typically...I just want to make a couple points. These have been determined to be uncollectible, for a variety of reasons, but typically because the debtor has passed away, there is no recovery in probate, debt may have been discharged in bankruptcy, debt was determined to be uncollectible when we passed it over to the collection agency, or the debt may be past the statute of limitations. I would be happy to respond to any particular questions. I think, if you look at the handouts, I think that they may be pretty helpful in identifying very specific issues in each one of these programs and the reasons for it. Even with some of these large items, they are made up by a whole host of smaller write-off amounts that add up to that large amount. [LB536]

SENATOR LATHROP: So it's everything from overpaying a benefit to trying to get reimbursement from somebody who has the inability to pay for a variety of reasons.

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

Business and Labor Committee
March 18, 2013

[LB536]

KERRY WINTERER: Yeah, I mean, they basically fall into, essentially, two broad categories. One is an overpayment of benefits, and that could be because of an error in submission on the part of the recipient. The recipient may have not notified us on a timely basis that circumstances have changed and that a benefit no longer should be paid. In some cases, it may have been an error on our side, in terms of not timely changing an amount of a benefit. In the Medicaid situation, for example, there was a computer glitch back in, I think, 2006 that caused us to pay a variety of Medicare Part B claims. When we have individuals that are eligible for Medicare and Medicaid, we end up paying Part B. There was a host of those claims that were paid in error because of a computer glitch. Many of those have been recovered. But most of them that are being written off now are those that, by virtue of the death of the recipient, can no longer be claimed. So that's one. Overpayments are one broad category. The other broad category is when there may be a share in cost which could happen, in most cases, because of being a resident of the facility. There is...because of a family's or an individual's ability to pay, they are anticipated or expected to share in the cost of providing that care. In some cases, at least, the family or the residents, resident, him or herself, do not make those payments. We end up having to collect and, for many of these same reasons, those become uncollectible, frequently because of the death of the beneficiary but for some other reasons as well. [LB536]

SENATOR LATHROP: Yeah, in short, it's just, sort of, the cost of doing business with people who don't have a lot of resources. [LB536]

KERRY WINTERER: That's right, because many people that we're providing services and benefits to, even though we've overpaid, they typically have needed the services in the first place. They have no resources to pay that back to us, even if the... [LB536]

SENATOR LATHROP: Right, right. [LB536]

KERRY WINTERER: Even if there was a mistake on their part, there's really no prospect to recover those dollars. [LB536]

SENATOR LATHROP: Okay. I have a question for you, while I have you here. Last year, we took up a number of claims from providers. They were subcontractors of providers in the privatization. [LB536]

KERRY WINTERER: Yes. [LB536]

SENATOR LATHROP: And there was a concern that the payment of those claims would lead to more claims. Does this claims bill include any providers who were not paid under the... [LB536]

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

Business and Labor Committee
March 18, 2013

KERRY WINTERER: No. [LB536]

SENATOR LATHROP: Did we receive claims from any of those folks? Or did all of it end last year? [LB536]

KERRY WINTERER: It pretty much ended those particular claims. I mean, we didn't end up with a similar circumstance with any other contractor. This was, as you know, one contractor for whom we didn't have the resources, at that time, under the contract, to make the payments. [LB536]

SENATOR LATHROP: Right. [LB536]

KERRY WINTERER: There has been no fallout or there's been no subsequent claim, at least, relative to us, by the... [LB536]

SENATOR LATHROP: Okay. [LB536]

KERRY WINTERER: ...on the part of any other subcontractor. [LB536]

SENATOR LATHROP: I just wanted to make sure that, when we paid that, that we didn't have, from some other provider or some other, yeah, subcontractor of other providers, nobody else came forward. [LB536]

KERRY WINTERER: Right. [LB536]

SENATOR LATHROP: Okay, good. Does anybody have any questions or concerns you want to express to Mr. Winterer here? I see none. [LB536]

KERRY WINTERER: All right, thanks. [LB536]

SENATOR LATHROP: Thank you for coming down. We appreciate your attention to this and your willingness to come before the committee to explain the write-offs. [LB536]

KERRY WINTERER: Thank you. [LB536]

SENATOR LATHROP: And with that, we'll go to the Department of Roads. Welcome. [LB536]

RANDY PETERS: Thank you. [LB536]

SENATOR LATHROP: Let's start with your name, and then we'll have you tell us what portion of the claims bill you have and how come it's there. [LB536]

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

Business and Labor Committee
March 18, 2013

RANDY PETERS: Very good. My name is Randy Peters. That's R-a-n-d-y P-e-t-e-r-s. And I'm the director of the Department of Roads. Good afternoon. I'm here to testify in support of LB536 and the...I'm sorry I can't reference the section. It's the write-off claims for the Department of Roads. [LB536]

SENATOR LATHROP: Section 5,... [LB536]

RANDY PETERS: Section 5. [LB536]

SENATOR LATHROP: ...line 21 and 22,... [LB536]

RANDY PETERS: Thanks. [LB536]

SENATOR LATHROP: ...\$66,141.77. [LB536]

RANDY PETERS: That is correct. That is it. [LB536]

SENATOR LATHROP: All right, how did we get there? [LB536]

RANDY PETERS: Well, the department strives to maintain 10,000 miles of highway. And every year people have crashes, unfortunately, like you heard about with the interstate ramp and the shoulder drop-off. When they have crashes oftentimes it involves running into a piece of state hardware--guardrail, traffic signal, stop sign. When that happens, we have people in our accident records section who read the accident report, identify the property damage, send out a letter, try and collect from the insurance company or the driver for the state damage. They collect thousands that way. Sometimes they are unable to locate the people or they don't get cooperation; then we hand those cases over to the Attorney General's staff within our agency and they pursue the collection. In the case of this \$66,000 in write-offs, there are more than 53 cases of stop signs, guardrails, bridge ends, traffic signal control boxes that...I have a list. I could go into more detail but... [LB536]

SENATOR LATHROP: No, you don't need to tell us about every guardrail. [LB536]

RANDY PETERS: That's the process. So I'm confident that we have an effective damage control process in place, and I will attempt to answer any questions you have. [LB536]

SENATOR LATHROP: There's no stopping people from running into stuff. [LB536]

RANDY PETERS: We try and try and try. (Laughter) We have a strategic safety plan, but it's not got to zero yet. [LB536]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: Okay, well, sometimes they travel through those construction areas too quickly. [LB536]

RANDY PETERS: Indeed. [LB536]

SENATOR LATHROP: Okay, any questions for our friends from the Department of Roads? I see none. Thanks for coming down, Mr. Peters. [LB536]

RANDY PETERS: Thank you. [LB536]

SENATOR LATHROP: Corrections is up. [LB536]

SHARON M. LINDGREN: I apologize. Mr. Houston could not make it today, so I am here on his behalf. My name is Sharon Lindgren. I'm associate legal counsel for the Nebraska Department of Correctional Services. One of my responsibilities is to handle tort claims submitted against the Department of Correctional Services. And just so everyone can appreciate how minimal the write-off is, we are number one in tort claims throughout all of the state agencies. [LB536]

SENATOR LATHROP: Number one in low? [LB536]

SHARON M. LINDGREN: We get volume. [LB536]

SENATOR LATHROP: Oh, you have...you're number one? Oh, well, listen,... [LB536]

SHARON M. LINDGREN: We're number one in volume. We have more... [LB536]

SENATOR LATHROP: ...nobody...nobody...(laugh). [LB536]

SHARON M. LINDGREN: We have more... [LB536]

SENATOR LATHROP: In Judiciary Committee, we...I...no, wait a minute. In Judiciary Committee, we have to put in place things to slow down the tort claims. [LB536]

SHARON M. LINDGREN: What we do to slow down tort claims is I say no an awful lot and Shannon Anderson supports me in doing so. I make the recommendations to the Claims Board. [LB536]

SENATOR LATHROP: So some of them might be frivolous? (Laughter) [LB536]

SHARON M. LINDGREN: Some of them might be. [LB536]

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Transcriber's Office

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: Okay. Anyway, I interrupted you. [LB536]

SHARON M. LINDGREN: We can go into odd topics. The last time I was before the Claims Board, we had a nice discussion on photo tickets, so it's also a part of a learning process. [LB536]

SENATOR LATHROP: All right, let's talk about the ones you don't think are frivolous. [LB536]

SHARON M. LINDGREN: We are at requesting a write-off in the amount of \$18,124.35. Basically, it affects three funds. One of them is the canteen; other is the general facility case fund. These are claims that range over a number of years. And we know that all of the people who incurred the debts are deceased, had no estates, and we will not be able to collect from them, which is not unusual in our business. The majority of the claim is a write-off that is the result of the bankruptcy of Oriental Trading in Omaha, Nebraska. We had an arrangement whereby they had a private company working within our facility at the Omaha Correctional Center. It employed inmates to put together the packages. They'd bring in the items. And when you go to a conference or something, you know, you end up with a little package of goodies. And that's what our inmates would do. And because it was a private venture, our inmates, at that time, were earning minimum wage or in excess of minimum wage, which is a very good salary for an inmate. OCC is a transitional facility. It means that inmates are close to being released, unless they do something to change their custody level. And so this was allowing, at one point, 40 to 45 inmates making minimum wage to save money, prepare for their release, support families. It was a very, very good program. Problem was, is when it was set up, the arrangement was the department would pay the inmates' wages and then would be reimbursed by Oriental Trading. And everything was going along perfectly fine until we hit a point when they missed a reimbursement, then they missed two reimbursements, and then they filed bankruptcy. It was very unexpected. The good news is, is we did pay all of the inmates. None of the inmates lost any money as a result of this. They received all of their wages, and the fund overseen by Cornhusker State Industries is the one that lost the money. Went through the bankruptcy, settled for approximately 14 percent on what they owed us. It was the best that we thought we could get. Therefore, I'm asking that you approve the request to write off these amounts. Any questions? [LB536]

SENATOR LATHROP: Okay. How much of that \$18,000 is Oriental Trading? [LB536]

SHARON M. LINDGREN: Seventeen thousand four-hundred dollars and two cents is Oriental Trading. We settled the bankruptcy for \$2,844.98. Looked at it, and they're just...they had a list of creditors that just went pages and pages and pages. And to try to go in and fight it for the difference would not have made any sense. It would not have been cost-effective. Also, just for everyone's reference, this is not General Fund money because Cornhusker State Industries has their own revolving fund. [LB536]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: Okay, very good. Any questions? I don't see any. Thanks for coming. Thanks for processing all those tort claims. I know you want to be number one again next year, huh? (Laugh) [LB536]

SHARON M. LINDGREN: It's unbelievable, the volume that we get, ranging from...I think my lowest one was 2 cents for a lost comb, ranging to \$400 quadrillion or something like that, so. [LB536]

SENATOR LATHROP: Quadrillion? [LB536]

SHARON M. LINDGREN: Yeah. [LB536]

SENATOR LATHROP: Okay. That's a lot of money, I assume. Shannon, we may have you come back up and talk about the...see if anybody has questions about the remaining write-offs. We have, in Section 5, just a few that have no been addressed, like the Supreme Court, the Military Department. Can you just... [LB536]

SHANNON ANDERSON: Sure. [LB536]

SENATOR LATHROP: ...so that we have some record that we've actually given them attention? [LB536]

SHANNON ANDERSON: Um-hum. The Supreme Court write-off was basically for copies in their operation, and they are always, usually...typically, they're one of the lowest in dollar amounts for claims. For the military, that's a series of scholarship dollars that they make available to students, and the student drops out of school, and then they have difficulty. It becomes uncollectible in trying to find the student. They're not in school. They're no longer a member of the military. The Legislative Council, this was for copies, and it was for an out-of-state person. I believe it was in New York. And they made several attempts. We allow the agencies to either determine, by a number of attempts over a certain amount of time, and they can declare it uncollectible. But at \$157, they were then running into the cost of collection exceeding the amount to be collected. For Department of Administrative Services, those are vendor contracts, typically, for telecommunications for the communications office and its vendors who have gone out of business--videoconferencing, things like that, that have gone bankrupt. For the Department of Motor Vehicles, this is the administrative procedures hearings, when a license has been taken, when a DWI/DUI arrest has been made. With the change in the law, they will not have to have those transcripts and incur those costs, so they expect this debt to go away, going forward. And then for the... [LB536]

SENATOR LATHROP: Okay. [LB536]

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

Business and Labor Committee
March 18, 2013

SHANNON ANDERSON: And then State Fire Marshal, which is on lines 4 and 5 of page 6, those are inspections that they had gone through and they had not received payment, again the businesses who are out of business, bankrupt, things like that, so. [LB536]

SENATOR LATHROP: Okay, does anybody have... [LB536]

SHANNON ANDERSON: And the inspections are regarding the licensing, so. [LB536]

SENATOR LATHROP: Okay. Anybody have questions for Ms. Anderson? [LB536]

SENATOR WALLMAN: Yes, I do. [LB536]

SENATOR LATHROP: Senator Wallman. [LB536]

SENATOR WALLMAN: Thank you, Chairman Lathrop. Yeah, like, the Department of Administrative Services, you said that was out of state? [LB536]

SHANNON ANDERSON: No, no. The one for out of state was for the Legislative Council, on the copies. For ours, typically it's communication. And Risk Management is a member of the Department of Administrative Services. It was communication charges and services. They were operational expenses, uncollectible because the organizations had gone out of business, alleged they are not responsible for the debt. So we had communication companies that bought each other, and then they didn't assume the debt of the company that they bought beforehand, or they had filed bankruptcy. And so there was eight accounts. They were incurred between November 11, 2006, through October 21, 2010, for that \$2,200, so. [LB536]

SENATOR WALLMAN: Okay, thanks. [LB536]

SHANNON ANDERSON: And then, Mr. Chairman, if I may remind persons: typically, this committee asks about statute of limitations, and we don't have a statute of limitations within the Miscellaneous Claims Act, for example. What they'll use is under the civil statutes, Section 25, and it's section...excuse me, Chapter 25, Section 211. It's a four-year statute of limitations. So that's the other thing. Generally, what happens in front of the State Claims Board with that is that it's the vendor who will use the statute of limitations against an agency and say that they failed to pay us. And so we will use the statute of limitations either not to pay it or to say that we participated in not paying it, and then we'll pay it with the miscellaneous claims. [LB536]

SENATOR LATHROP: Okay. Senator Hansen has a question. [LB536]

SENATOR HANSEN: Very briefly, do you ever use bill collectors, private bill collectors?

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

Business and Labor Committee
March 18, 2013

[LB536]

SHANNON ANDERSON: Yes. Yes, we do. In fact,... [LB536]

SENATOR HANSEN: They're pretty good. [LB536]

SHANNON ANDERSON: Yeah, and that's why we hope to keep the numbers down. This is probably also...we only had nine claims for uncollectible debts this year. And as Chairman Lathrop pointed out, the DHHS was significantly lower than it has been in the past. Department of Administrative Services maintains, I believe it's two open contracts with collection agencies, that any agency within the state can use that contract to go out and commission them to go out and find the debts, and we do that. What happens at the Claims Board is that we require, for each debt that's to be written off, a series of documentation. And so if you have used a collection agency, that would be one of the questions that you have to answer on our forms. Where we have found the most successful agencies in going after collectible debt and then determining when a debt is uncollectible is when finance works with legal. And that's when we get the documentation, and they're bringing their numbers down. [LB536]

SENATOR HANSEN: Thank you. [LB536]

SENATOR LATHROP: I think that's it. [LB536]

SHANNON ANDERSON: Riveting as it may be, yes. [LB536]

SENATOR LATHROP: Riveting. I can tell you, it's a lot simpler than it's been in a long time. [LB536]

SHANNON ANDERSON: Oh, good. Thank you. [LB536]

SENATOR LATHROP: No, I mean, when we look at the claims that we dealt with, with the failed attempt to privatize that happened last year, and then we've had some years where we've sat here and looked at huge write-offs and more tort claims. So the number of tort claims...we did raise the statutory limit that you can pay out, 50 without our approval, right? [LB536]

SHANNON ANDERSON: Right. What happens is that, at \$5,000, I can approve a claim. At \$50,000, the board can approve a claim. And so what we've interpreted it to mean is that the board can allow that \$50,000...and the Attorney General's Office, we work very closely with them, that oftentimes they will assist in a settlement negotiation if we can get them some cash up-front, before it's approved by the court and by the parties, so that's why. And it's the same thing with workers' comp. [LB536]

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

Business and Labor Committee
March 18, 2013

SENATOR LATHROP: But having the board be able to approve things up to 50 has diminished the number of claims that we're dealing with. [LB536]

SHANNON ANDERSON: It's tremendous help, exactly. Absolutely, absolutely. [LB536]

SENATOR LATHROP: Yeah, yeah. I can tell there's...from the first time I sat through one of these hearings to today, it's much better. [LB536]

SHANNON ANDERSON: (Laugh) Yeah, right. [LB536]

SENATOR LATHROP: Okay, very good. That will close the hearing on LB536 and bring us to LB537. [LB536]

MOLLY BURTON: Chairman Lathrop, members of the committee, my name is Molly Burton, legal counsel for the Business and Labor Committee, here to introduce LB537, which is the denied claims bill. And actually, if you look at the bill, it's a shell bill which we put in just in case someone appeals to the Legislature for a claim that was denied by the State Claims Board. And there are no claims as of this date. [LB537]

SENATOR LATHROP: Which is also unusual but good. Okay, anybody have questions about LB537? Very good. That will close the hearing on LB537. Let me ask a question. If we don't have any content for LB537, do we even bother to move it to the floor? [LB537]

SHANNON ANDERSON: No, I'd hold it, and then wait until next year. [LB537]

SENATOR LATHROP: We just let it sit there and... [LB537]

SHANNON ANDERSON: Yeah, and then we would...if we have a denied claim next year...one of the...we do a lot of work with agencies, reminding them that, under the Miscellaneous Claims Act and the state...the contracts act, the appeals, if you will, go to the Legislature. And so we want them to understand, on the district...on the Tort Claims Act, if you deny the claim, it goes through the district court for a bill. [LB537]

SENATOR LATHROP: Goes...sue, right. [LB537]

MOLLY BURTON: So you get a little different...it's helpful, to me, when you get some claims and that agencies don't want to pay on, I'll say, you know, the appeal goes to the Legislature; you want to think this thing through on how much you want to dig in on this, so. [LB537]

SENATOR LATHROP: Okay, very good. [LB537]

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

Business and Labor Committee
March 18, 2013

SHANNON ANDERSON: We'd like them not to have...we'd like to have a reasonable bill in front of you, but... [LB537]

SENATOR LATHROP: I would say I'm surprised that we're done and it's not 5:00. [LB537]

SENATOR MCGILL: Yay. [LB537]

SENATOR HANSEN: I am too. [LB537]

SENATOR MCGILL: Nice job. [LB537]

SENATOR LATHROP: That was a lot...that was a long day. [LB537]

SHANNON ANDERSON: It was because I said I wouldn't testify. I had pages for you, Senator. (Laughter) [LB537]

SENATOR LATHROP: Thanks for sparing us. Okay. [LB537]