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Business and Labor Committee  
March 02, 2015

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[LB158 LB363 LB388 LB600]

The Committee on Business and Labor met at 1:30 p.m. on Monday, March 2, 2015, in Room 2102 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB363, LB388, LB158, and LB600. Senators present: Burke Harr, Chairperson; Dave Bloomfield, Vice Chairperson; Ernie Chambers; Sue Crawford; Laura Ebke; Jerry Johnson; and John McCollister. Senators absent: None.

SENATOR HARR: I think we're ready to begin now that Senator Nordquist is here. My name is Burke Harr, and I am the Chair of the Business and Labor Committee. Just a couple of housekeeping, everyone looks like they're pretty much the same boat of people. But turn off your cell phones, have an appropriate number of copies, ten, available when you come up here. If you don't, here are our wonderful pages over here, Drew Schendt from Broken Bow and Stefani Bradley from Kansas City, who can help you. We have the light system. So each testifier will be allotted five minutes before the committee. When you see the green light, that means you can begin, Jamison. Yellow light indicates you're nearing the end of your time. And red light indicates time to wrap up your testimony. Please begin by stating your name clearly into the microphone and spelling your last name for the record. We have four bills today, all work comp related. So I will go around and ask everyone to introduce themselves, starting as I always do to the left. Senator Ebke.

SENATOR EBKE: Laura Ebke, District 32, Jefferson, Thayer, Fillmore, Saline, and a little piece of Lancaster Counties.

SENATOR CRAWFORD: Good afternoon. Senator Sue Crawford, District 45 which is eastern Bellevue, Sarpy County, Offutt.

SENATOR JOHNSON: Jerry Johnson, District 23, Saunders, Butler, and most of Colfax Counties.

SENATOR MCCOLLISTER: John McCollister, District 20, central Omaha.

SENATOR HARR: And I have two staff: Jamison Wyatt who is the committee clerk, and Meghan Chaffee who is the committee attorney. With that, we are ready to begin, housekeeping over with. Senator Nordquist, the floor is yours.

SENATOR NORDQUIST: Thank you. Senator Harr, members of the esteemed Business and Labor Committee, I'm state Senator Jeremy Nordquist from District 7 in downtown and south

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Omaha, here today to introduce LB363. When a worker is injured in an on-the-job incident, the results can be devastating. If the spouse doesn't have a job, the family income dries up. Family expenses, however, continue to accrue. On top of ordinary expenses, the worker incurs medical bills related to the injury. If those medical bills aren't paid on a timely basis by the employer's insurance carrier as required under the Nebraska Workers' Compensation Act, the additional stresses of bill collectors is added to the situation. The Nebraska Workers' Compensation Act was intended to provide a quick and efficient method of replacing a portion of a worker's lost income and to provide that the worker's medical bills be paid so that the worker can return to work quickly. To achieve the goal, the Legislature has provided that if a disability payment to the worker's lost income is delinquent, a 50 percent waiting penalty is added. This bill, LB363, is intended to mirror the waiting penalty on disability payments. If a medical bill is more than 30 days delinquent, a 50 percent waiting penalty payable to the worker would be added. The goal of the bill is to simply provide an incentive of prompt payment to medical bills. There will be those following me who can address the technical aspects of the bill and specific incidents where this has occurred, where the worker has had to go through collections and the stresses of that added on top of everything else going on with them. And I would appreciate this committee's full consideration of LB363. [LB363]

SENATOR HARR: Thank you, Senator Nordquist. Any questions for Senator Nordquist? Senator Johnson. [LB363]

SENATOR JOHNSON: In your statement of intent, "30 days after notice has been given," ongoing bills, are you referring to then the monthly statement from the medical? [LB363]

SENATOR NORDQUIST: Right, right. Yeah, it would be anything that after 30 days, exactly that. [LB363]

SENATOR JOHNSON: So it's a continuing process, the 30 days there deals with the monthly statement. [LB363]

SENATOR NORDQUIST: Right. And you know, if the insurer, the work comp insurance doesn't take care of that in a timely basis, it's just added stress for the worker and their family. And that's, you know, something that shouldn't happen in the system. [LB363]

SENATOR JOHNSON: Okay. Thank you. [LB363]

SENATOR HARR: Thank you. Senator McCollister. [LB363]

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SENATOR McCOLLISTER: Thank you, Mr. Chairman. The motivation for the bill is that the payments are not paid on a timely basis now? [LB363]

SENATOR NORDQUIST: Right, right. There are challenges. And there will be people behind me who have represented workers and probably workers themselves who have had this happen to them. And that's exactly right. [LB363]

SENATOR McCOLLISTER: Thank you, Senator. [LB363]

SENATOR HARR: Any other questions? I have a question. It says here the city of Lincoln estimates an increased cost of \$58,210 if this bill were to pass. [LB363]

SENATOR NORDQUIST: Yeah. They submitted a letter. I don't know if the committee got it yet or not. You know, if we're just talking about timely payment of medical bills, I don't see how there could be that extensive of a cost. [LB363]

SENATOR HARR: Well, their argument is it's not always received in a timely way and cannot be paid within 30 days of final award for reasons beyond the Risk Management Division's control. Do you know what those issue are? [LB363]

SENATOR NORDQUIST: I don't. I'd certainly be willing to follow up with them. Certainly if there's a delay in billing then I think we can work on that practical issue there. [LB363]

SENATOR HARR: Well, I see Mr. Gerrard in the audience, so hopefully we'll hear from him. [LB363]

SENATOR NORDQUIST: All right. And I've got a couple other bills up, so I'm going to waive closing, but I appreciate your consideration. Thank you. [LB363]

SENATOR HARR: Okay. Well, it's always a pleasure to have you in here. [LB363]

SENATOR NORDQUIST: I hope to be back, not this year, in the future though. (Laughter) [LB363]

SENATOR HARR: I wish the feelings were mutual. Anybody else willing to come up and testify as a proponent on LB363? [LB363]

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LEE LOUDON: Good afternoon, Chairman Harr and members of the Business and Labor Committee. [LB363]

SENATOR HARR: Oh, can you hold on one second. [LB363]

LEE LOUDON: Yes. [LB363]

SENATOR HARR: Sorry. We're having an issue with the tape recorder. Are we good? All right, sorry. Thank you. Please go ahead. [LB363]

LEE LOUDON: My name is Lee Loudon; it's spelled L-e-e, last name is L-o-u-d-o-n. I'm appearing on behalf of the Nebraska Association of Trial Attorneys in support of LB363. When a person suffers a work injury, one of the most critical needs is access to medical care. Prompt medical care helps an injured worker to return to work. And unpaid medical bills can damage an employee's credit and can damage medical providers who have to wait months and years to get paid. Last year, the Supreme Court of Nebraska decided a case that is an example of how much unpaid medical bills have become a problem in workers' compensation cases. The case is called Simmons v. Precast Haulers, Inc. It's found at 288 Nebraska Reports, page 480. Mr. Simmons had been run over by a fully loaded semitruck at work. And there should have been no dispute as to his right to workers' compensation benefits. The accident caused fractures to his pelvis, back, hands, arms, legs, feet, ankles, and led to the amputation of his right foot. At the time that Mr. Simmons filed suit, he had incurred almost \$1.5 million in medical expenses. But the employer had paid only \$25,000 in medical bills. The Supreme Court decided in Mr. Simmons' favor and ordered the employer to pay the outstanding medical expenses. And that's where it should have ended, but that's not how it ended. The Supreme Court sent the case back to the trial court for enforcement of its order. Under Nebraska law then the employer had 30 days to pay these bills that they should have paid before, but they didn't. There had to be yet another hearing to get them to pay the medical bills. So two months later, the trial court had another hearing and found that at that time there was over \$269,000 in Mr. Simmons' pretrial medical expenses that had not been paid, they were still unpaid, and that more than \$92,000 in home healthcare that the Supreme Court ordered to be paid that still were not paid. Now the amount of money involved in the Simmons case is unusually high. It's one of the highest amount of medical expenses I've seen in a workers' compensation case. And some may argue that that is an outlier case. It's unusual and that's not the type of case that we should make public policy on. But I would argue that even though the amount of money involved was extraordinary or unusual, this phenomena is not unusual at all, of trying to get prompt payment of medical bills in workers' compensation cases. The Legislature tried to fix this problem in 2007 with LB588 which had an effective date of January 1, 2008. It's now codified in Section 48-125.02. That provides that when an employer or a workers' compensation insurer receives notice of a work injury, it has 15 days to notify the

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medical provider as to what information is necessary to process the claim. And if it fails to do so, it's assumed that the...it has enough information to make a decision about the claim. Then after the employer or workers' compensation insurer has all of the information necessary to process the claim, the employer has 30 days to pay on the claim. And if it fails to do so, it has to pay the medical provider the bill charged rather than pursuant to any fee schedule or contracted amount. So I see LB363 as going...as accomplishing the purpose perhaps that LB588 was meant to accomplish in 2007. That is to see that there's prompt payment of these medical bills that really have no dispute in workers' compensation cases. And I urge you to support LB363. [LB363]

SENATOR HARR: Thank you very much, Mr. Loudon. Any questions for Mr. Loudon? Senator McCollister. [LB363]

SENATOR McCOLLISTER: Thank you, Mr. Chairman. How does Nebraska's current statutes in this regard compare with other states? [LB363]

LEE LOUDON: I know that other states have penalty provisions for nonpayment of medical bills and for nonpayment of compensation benefits like indemnity and permanent disability benefits. As to whether they have a 50 percent penalty like LB363 proposes, I'm not sure. I could look into it and get back to the committee if necessary. [LB363]

SENATOR McCOLLISTER: Thank you very much. [LB363]

LEE LOUDON: You're welcome. [LB363]

SENATOR HARR: Thank you. Any other questions? Senator Crawford. [LB363]

SENATOR CRAWFORD: Thank you, Chair Harr, and thank you for being here to testify. I just wanted to get your expertise on the time that starts the 30-days clock in the statute. So given the cases that you've dealt with and what that looks like on the ground. This says the 30 days starts "after notice has been given" or "entry of a final order, award, or judgment." So like the concern some people have raised is that there might still be issues that they're trying to resolve or settle. So I wondered if, in your view, if after notice has been given or entry of final order, how often are there still factors to be decided at that point? [LB363]

LEE LOUDON: Typically what happens is the employee's attorney, or the employee is unrepresented, gives enough information to the employer to make a decision about a causal relationship between the injury and either the time off work or the medical bills. And there's been a long line of case law talking about what is sufficient evidence. It would be evidence to

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show the causal relationship like from the family doctor saying that, you know, a fall down steps at work caused a broken leg. So the employee would need to give causal connection between the injury and the medical bills and the medical bill itself. And then when the employer has that information, then the 30 days would start running. [LB363]

SENATOR CRAWFORD: So the...that's the notice has been given, is when you give that information to the employer. [LB363]

LEE LOUDON: Yes, yes. And then the other part of LB363, also if you would go to trial and have a decision from the court, then the 30 days would begin to run from the date of the decision from the court. [LB363]

SENATOR CRAWFORD: Okay. Thank you. [LB363]

LEE LOUDON: So in other words, if there was a dispute between two doctors saying the broken leg was caused by the fall and one saying it was not, and you had to go to have a hearing and have a judge decide. And then at that point, the judge decides then it would be 30 days from the decision by the judge if there's a dispute between two doctors. [LB363]

SENATOR CRAWFORD: But most of the evidence gathering would be...that would be within the final order judgment, that scenario. [LB363]

LEE LOUDON: A lot of the evidence would be gathered before trial. But if you have to go to trial, then it would run from 30 days from the decision of the court. [LB363]

SENATOR CRAWFORD: Thank you. [LB363]

SENATOR HARR: Great. Senator Ebke. [LB363]

SENATOR EBKE: Yeah, okay, so help me out on how this works. You have 30 days from the day of judgment or the notice. And then the case is turned over to the insurance to pay typically. [LB363]

LEE LOUDON: Or prior to that time when typically the employer will give notice of the injury to their insurance carrier. And then the claimant or the employee's attorney is dealing directly with the insurance company. So the employer or the work comp insurance company would be

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treated the same in terms of notice, what would constitute notice of the injury to start that 30-day period running. [LB363]

SENATOR EBKE: So the insurance carrier would presumably have the information that something is liable to be coming at some point. [LB363]

LEE LOUDON: Yes. [LB363]

SENATOR EBKE: In a case where you've got the city of Lincoln, for instance, and their concern about the 50 percent penalty being potentially punitive--well, it is punitive I guess--is that a concern constitutionally? [LB363]

LEE LOUDON: No, because...and the reason it's not a concern is the Supreme Court of Nebraska has already dealt with...the provision I think is one paragraph up above in LB363 dealing with the penalty provision for nonpayment of indemnity. Indemnity just means like lost wages, temporary disability benefits, and permanent disability benefits. That was challenged a long time ago as to whether that provision was punitive, was violative of the constitution. It was held it was not. So this is the same...what we're saying is LB363, applying it to nonpayment of the medical bills is the same logic as applying it to the unpaid indemnity. And I see this as becoming...it's I think...one thing I hadn't mentioned before, it's the real cost to the providers. In this Simmons case that I talked about, there were over \$1.5 million in medical bills. Most of them were incurred by Bryan Hospital, one of the larger hospitals in the state. But imagine a medical provider from a hospital or a doctor from a smaller town who can't float hundreds of thousands or tens of thousands of medical bills while the case is ongoing. And there was...as I said, the amount involved in the Simmons case was unusual, but the phenomena is not. I deal with it every day. [LB363]

SENATOR EBKE: But the 50 percent doesn't go to those providers, correct? [LB363]

LEE LOUDON: No. [LB363]

SENATOR EBKE: It goes to the injured. [LB363]

LEE LOUDON: True, but it benefits the providers because it encourages the employers or their insurance companies to pay the providers promptly. [LB363]

SENATOR EBKE: Thank you. [LB363]

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SENATOR HARR: Thank you. Senator Johnson. [LB363]

SENATOR JOHNSON: Thank you, Chairman. So it's mentioned in there a couple times the employer's responsibility. So if it's not paid, the employer is the one stuck with the 50 percent cost. Is that where cities or the employer racks up a bill with this? They probably can't go back to their insurance company then that's supposed to be providing the funds. [LB363]

LEE LOUDON: That would again be something that the insurance company or the employer would have to work out. The employer would have, I would think, a breach of contract claim against the insurance company if the insurance company isn't doing what it's supposed to do under the policy. [LB363]

SENATOR JOHNSON: Okay. Thank you. [LB363]

SENATOR HARR: Senator McCollister. [LB363]

SENATOR McCOLLISTER: Yeah, thank you, Mr. Chairman. The 50 percent may be legal, but it seems excessive to me. I would like to see statistics to show that other states award that kind of amount. What...when a lawyer takes a workers' comp case, how are they normally paid? [LB363]

LEE LOUDON: Under the...state bar rules regulate our fees. And we're allowed to charge either by the hour or by a percentage of recovery. So if, for example, in my situation I would offer the client an hourly rate and if they're unable to pay it then a contingency fee, a percentage of what I can recover on an employee's behalf. If I cannot recover anything on the employee's behalf, I don't get paid. [LB363]

SENATOR McCOLLISTER: Is a typical contingency, what, 33 percent? [LB363]

LEE LOUDON: That's a typical one, yeah. [LB363]

SENATOR McCOLLISTER: Okay. Thank you very much. [LB363]

SENATOR HARR: Any other questions? Seeing none, thank you, Mr. Loudon. [LB363]

LEE LOUDON: Thank you. [LB363]

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SENATOR HARR: Anyone else here testifying as proponents on LB363? Mr. Howard. [LB363]

STEVE HOWARD: Good afternoon. I'm Steve Howard, S-t-e-v-e H-o-w-a-r-d, and I am counsel for the Nebraska State AFL-CIO and come before you in support of LB363. I don't want to just repeat everything that Mr. Loudon said. What he said was accurate. But I would just add to some of those comments. For instance, Senator Johnson, when you ask about the employer versus the insurer, in the Workers' Compensation Act they're treated largely the same. And the employer so many times is out of the picture in terms of decision making and in terms of the day-to-day workings of workers' compensation, getting a bill paid. In an award from the court, they're treated as essentially the same. Senator McCollister, when you ask about attorney fees, there is a contingency fee I would say in the majority of the cases. Many cases result in no fee because there's nothing for the lawyer to do but get the bills paid. And if there's a reasonable controversy, there's no attorney fee. At least half the people that come into my office, well beyond that, there's no attorney fee because hopefully workers' compensation is an automated system that compensates employees and that drives itself. But the point that I really want to make is this, is that we're in the computer age and we're in the electronic age. And on Mr. Loudon's desk are probably medical records from last Thursday or Friday. And they're already gathering dust on the insurance company's desk. And this 30-day exchange of information, it really is something that is not an unreasonable time frame. The doctors and the hospitals are used to quickly distributing the medical records that support the bill. There's a billing code that goes along with a treatment code. And it's all, in the most common scenario, very efficient and very quick. But anything that will help our members and help injured workers receive timely payment and will keep the doctors in the game and will keep quality doctors treating our employees, that's what we're interested in. So I appreciate you listening to my comments today, and I'm happy to answer anything else. [LB363]

SENATOR HARR: Thank you, Mr. Howard. Any questions for Mr. Howard? Seeing none. [LB363]

STEVE HOWARD: Thank you very much. [LB363]

SENATOR HARR: Thank you, Mr. Howard. Any other proponents? Any opponents? [LB363]

RON SEDLACEK: Good afternoon, Chairman Harr and members of the Business and Labor Committee. For the record, my name is Ron Sedlacek, S-e-d-l-a-c-e-k. I'm here today on behalf of the Nebraska Chamber of Commerce. And I've also been authorized to testify on behalf of the National Federation of Independent Business in Nebraska and then the Nebraskans for Workers' Compensation Equity group. And also have handouts, a letter from PCI that I'll give to the committee after testimony. They wish to enter also a letter in opposition. From the State

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Chamber's point of view, our labor relations council met and discussed the legislation. And we've got members, of course, on all sides of the issue: insurers, providers, and so forth. And there's no reason why someone should have to be waiting so long and incur such expenses for late medical payments. We agree with that both on the provider side as well as employers...employees, I mean. We've tried to work out this issue in past legislation. We'd like to continue to try to work out the issue. We just don't believe a 50 percent penalty straightforward is the right way to do it. We're not sure where this relationship between insurers and employers exists. If there's some reasonable controversy that the insurer is maintaining and the employer is caught holding the bag with a 50 percent penalty, how do they collect through litigation and so forth? If there's a situation where you're dealing with a medical fee schedule issue, what is and what is not part of that presents a problem there as to what is payable at that time. That's beyond the employer's control as a general rule. And then you're dealing with issues where the choice of doctor rule under current law comes into play. And that rule may have been violated and there's some issue in that regard. Nonetheless, you know, this is something that should be worked out, that we don't have providers out there waiting and waiting. But by the same token, there's got to be some forbearance on their part as well as collecting until these issues get ironed out. And that's what the goal is, is to iron these out as quickly as possible so that everybody is compensated appropriately. That's the end of my testimony. [LB363]

SENATOR HARR: Excellent. Thank you, very much. Any questions? Senator Chambers. [LB363]

SENATOR CHAMBERS: Just kind of a general question for my enlightenment and edification, if an amount that's to be paid is not paid, there's a delay, who is best able to survive that delay without any particular problem, the injured person or the company that's supposed to make the payout? [LB363]

RON SEDLACEK: Well, my intuitive response would be I would think that would be most difficult for the injured employee. [LB363]

SENATOR CHAMBERS: For what? [LB363]

RON SEDLACEK: For the injured employee. [LB363]

SENATOR CHAMBERS: I agree. You still have that modicum of humanity that I know you have despite the company you keep. I've known him for years and years. So if I didn't say something, he'd feel that I was ignoring him. (Laughter) [LB363]

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RON SEDLACEK: Even old dogs like to be patted, Senator. Thank you. [LB363]

SENATOR HARR: Any other questions? Thank you very much. [LB363]

RON SEDLACEK: (Exhibits 2 and 3) And these are the letters that I referred to. Thank you. [LB363]

SENATOR HARR: Oh, yeah. Perfect. Pass the letters around. Thank you, Drew. Any other...anyone else an opponent, opponents. [LB363]

TIM HIMES: Good afternoon. Tim Himes; my last name is H-i-m-e-s, and I'm here on behalf of the city of Omaha to testify in opposition to this proposal. As a member of this committee I think some good questions were asked, the most telling of which is the request for statistics. The proponents of this bill have offered no evidence of any kind that this is a problem that needs to be remedied in the first instance. In the second instance, there's no rational relation between the ill that this proposed legislation is purported to be addressing and the penalty. The 50 percent penalty, where does that come from? First of all, it's arbitrary. There is a provision in the Workers' Compensation Act now that provides a 50 percent waiting time penalty for unpaid indemnity. And that has been the rule for a long time. It makes sense. Injured workers shouldn't have employers slow up their payments and grind them down that way. The Workers' Compensation Act was designed to eliminate the litigation delay and to get these people paid. It's not technically lost wages. It's wages that they can't earn because they're sick. This penalty if enacted is going to be one thing. It's going to be a windfall for injured workers and their attorneys. Now the Nebraska Association of Trial Attorneys has spoken on behalf of this bill. I just attended a seminar that they put on on Friday. And they devoted a whole hour to teach attorneys how to collect these waiting time penalties. And I can tell you that there was no evidence presented there either that this is a problem. What it is, is a source of income. The city of Omaha at any one time has between 200 and 900 open workers' compensation claims. This bill, if enacted, means you don't pay a bill, a 31-day delay costs the same as a six-month delay. There's been no statistical evidence, nothing other than...the committee has been asked to imagine and the proponent of the bill said if, if an injured worker isn't paid, if these bills aren't paid. Well, there's been no evidence and no contention that the care isn't being provided and there's been no evidence provided that injured workers are suffering anything other than potential harm to their credit rating because of unpaid medical bills. I would urge the committee to demand evidence that this is a problem in the first instance. And second, I'd urge the committee to address the 30-day waiting period. That's completely arbitrary. There's been no testimony as to why it should be 30 days. And it has the potential to become an administrative nightmare not just for insurance companies but for self-insured employers like the city of Omaha. If the problem is real, and I submit there's no evidence that it's real, the delay and the penalty need to be

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reasonable and reasonably related to the harm that is alleged to exist. In the one case that was mentioned, we have \$1.5 million in unpaid medical bills. If that bill isn't paid in 31 days, what's the penalty? Fifty percent of \$1.5 million, so \$750,000 penalty payable to the worker. It doesn't make sense. It doesn't ring true. And there's been no evidence that it's a problem. NATA, the Nebraska Association of Trial Attorneys, is a plaintiffs' organization. And I understand fully. I practiced plaintiffs...I represented plaintiffs in Nebraska for 15 years before I became an assistant city attorney. I certainly understand why NATA would be in favor of this bill. It's because the potential windfall for them and their clients. And I would urge the committee to demand statistical proof, A, that it's a problem and then require that the bill be rationally put together so that it will address the evil that supposedly exists. And with that, I would be happy answer any questions. [LB363]

SENATOR HARR: Any questions? Senator Chambers. [LB363]

SENATOR CHAMBERS: We meet again. Your job as a lawyer if you were representing an injured worker would be to advocate zealously which you would do. Now that you're with the city, your responsibility is to advocate zealously for the city. I'm a taxpayer. I pay a wheel tax. I can show that the streets are very, very poorly maintained in Omaha both in terms of clearing away and also damage that happens to cars. I had to make two phone calls: one to the mayor, then one to the place where they have people who come out and do that about a very sizeable chasm near my house. And I didn't want it fixed because it was near my house, but I was able to see that and document it. Then I began to look at other streets. When I drive up Ames frequently, it happens near the driver's side near the curb. You hit great, big potholes. And you can't veer over otherwise the traffic in the other lane would hit you. So should I be able to not pay my taxes until the streets are properly fixed? [LB363]

TIM HIMES: Well... [LB363]

SENATOR CHAMBERS: You don't even have to answer that. (Laughter) I'm just letting you know that there's more than one side. But do you see that this...I won't phrase it like a leading question. Could it be that an incentive is being provided so that these claims will be paid in an expeditious manner because in most cases it's within the power of the one making the payment to determine whether it will be done expeditiously or delayed? [LB363]

TIM HIMES: Again, I can assure you that there is incentive built into the Workers' Compensation Act. And it's the unpaid indemnity. As far as would this provide an incentive? It certainly would, but I submit that, A, there's no evidence that it's a problem besides anecdotal evidence or this one horrible case. And, B, there's been no testimony that says...that demonstrates that the injured workers are being harmed here beyond some allegations that their credit rating

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might be damaged. The care is being provided otherwise there wouldn't be a bill. So it's not that the injured worker isn't being cared for. And the 30 days is not only arbitrary, it's short. [LB363]

SENATOR CHAMBERS: If the damage is to a person's credit, that is of some consequence. [LB363]

TIM HIMES: It certainly is. [LB363]

SENATOR CHAMBERS: So how would that be rectified? [LB363]

TIM HIMES: I can tell you that when I was doing plaintiffs' work, all I had to do was call the medical provider and say look, this is the subject of a lawsuit. You're going to get some money eventually. Don't turn it over to collections. I made those calls many times. [LB363]

SENATOR CHAMBERS: You think you'll ever practice in private, practice private law again? [LB363]

TIM HIMES: It's not currently plan A. [LB363]

SENATOR CHAMBERS: If you do though, give me a call. That's all that I have. Thank you. [LB363]

SENATOR HARR: Senator McCollister. [LB363]

SENATOR McCOLLISTER: Thank you, Mr. Chairman. City of Lincoln I think provided us an idea of what the extra expense would be. Does the city of Omaha have any estimate if this bill were enacted what the extra expense would be? [LB363]

TIM HIMES: I can tell you that the finance office sent out a request for that kind of information to the human relations department, the law department, and some of our, the city's paid consultants. I know that I responded. I have not seen the fiscal impact statement that the city provided. I don't even know if they submitted one. [LB363]

SENATOR McCOLLISTER: Okay. Thank you. [LB363]

SENATOR HARR: Any other questions? I guess I have a couple of questions. You say there's no evidence, that no evidence was presented and yet at the same time you say, well, what was

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brought was anecdotal, the Simmons v. Precast. So there was evidence brought. And you know, I know if the city of Omaha were forced to give a \$1.5 million loan interest free, they'd probably be down here hooting and hollering saying we've got to change something. We need to change the incentive. So I guess my first question is can I get a \$1.5 million loan for free? [LB363]

TIM HIMES: Nowhere that I know of. [LB363]

SENATOR HARR: Okay, other than maybe here. And then you say that the...you turn around and say, well, it's merely anecdotal. There's no evidence. And yet the city of Lincoln provided that evidence that there is a lot of slow play going on in that they said, hey, if we couldn't slow pay and we had to pay right away, it would cost us \$58,000. You said it would cost the city of Omaha quite a bit of money. So I think that kind of shows you there is an issue out there where...now the harm may be on the doctors and maybe we don't care about the doctors. That's not my attitude. But I don't think it's uncontroverted that there are medical bills out there that aren't being paid and that the care is being provided. And I think there's an incentive. You know, we keep trying to figure out ways to lower cost. That's what we're trying to do and put the cost where it belongs, on the individual on which it belongs. And if we...you know, doctors, if they have to float that money out there it may not be...you know, if I'm the injured worker, I may not be the one that pays it. But all of us pay it because it's not as though they can go to their creditors and say, you know what, don't worry. There's a settlement out there coming. It's a lawsuit. So they have to keep their overhead, and so we all end up paying a little bit for this type of situation. So I guess my question is we know there are medical costs that aren't paid. And we know that the cost is being borne more likely than not by the medical community. What would you recommend we do to fix this problem? [LB363]

TIM HIMES: Well, you referenced the city of Lincoln's fiscal statement. And they...I haven't seen that, but they estimated that if this bill were enacted that would be what their costs were. [LB363]

SENATOR HARR: Yeah, \$58,000 a year. [LB363]

TIM HIMES: See, I have a hard time imagining how they came up with that number to tell you the truth because it's not tracked right now. I don't know who would have that information. So to me, that's probably an educated guess. I can tell you that it has the makings of a bureaucratic and administrative nightmare. And that is the court, when they look at waiting time penalties on unpaid indemnity, the court deals with it as strict liability. That means 31 days is just as onerous as a year and a half. And so if we assume, and I'm not conceding that, if we assume that this is a problem that needs to be remedied, my recommendation would be to make the period longer and more reasonable so we're not catching insurance companies or employers who, you know, are

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slow, not by intent but in effect, and not nailing them for 50 percent penalties because they miss the deadline by a day or two. So my proposal would be 60 to 90 days and not a 50 percent penalty payable to the injured worker. Something more reasonably... [LB363]

SENATOR HARR: The lawyers themselves. [LB363]

TIM HIMES: ...related to the harm. [LB363]

SENATOR HARR: Who would you have that penalty go to then? [LB363]

TIM HIMES: Well, that's a good question. I thought about that on the way down here. Punitive damages in this state go to the school fund. That's what I'd do. I'd make it payable to some worthy charity or a needy state agency, not to the plaintiff and a third to his attorney. [LB363]

SENATOR HARR: Okay. Thank you. Any other questions based on that question I asked? Seeing none, thanks for coming down, Mr. Himes. Always a pleasure. Any other opponents? Mr. Gerrard. [LB363]

ERIC GERRARD: Senator Harr, members of the committee, my name is Eric Gerrard; that's E-r-r-i-c G-e-r-r-a-r-d, and I'm here representing the city of Lincoln. And we did submit a letter of opposition on this, but I heard Senator Harr request that I come up. I don't have more information on the \$58,000 fiscal note, but I wanted to represent to this committee that I will get more information and share it with the committee as to where exactly that cost came from. And I'll also communicate that with Senator Nordquist as soon as we have it. [LB363]

SENATOR HARR: Perfect, thank you. Based on that testimony, any other questions? Seeing none, thank you very much. Appreciate your time. Anyone in the neutral capacity? [LB363]

RICHARD REISER: Good afternoon, Senator Harr, members of the committee. My name is Richard Reiser; it's R-i-c-h-a-r-d R-e-i-s-e-r. I'm the lobbyist for the Nebraska Trucking Association. I just heard a couple questions and I thought I'd like to clarify a couple things. There was a question Senator Johnson asked about insurance. It's important to understand in workers' compensation that the insurance is not like insurance you might have on your house where they insure thousands of homes and two or three of them have a fire. Workers' compensation insurance is based on the risk-loss analysis that they do based upon your loss history. And the way it works out, the bottom line is eventually the employer is going to pay all of their own workers' compensation. And they might get that in the form of a rate increase the next year after they've had a big loss where suddenly their loss experience is worse. So the only

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point I'm trying to make here is it is real money that will cost Nebraska employers money if they have to pay these penalties. It's not some insurance company that pays for it and it's no loss to the employer. The employers will feel the loss. That's all I have. Thank you. [LB363]

SENATOR HARR: Senator McCollister. [LB363]

SENATOR McCOLLISTER: Thank you, Mr. Chairman. Would you say that employers or insurance companies are dilatory in their efforts to pay those bills? What would make those, the length of time go longer? [LB363]

RICHARD REISER: I'm not an expert on that, but I would say this, that the medical bills that come in are extensive. They're pages where it's serious injury. A hospital bill, for example, it's pages and pages. And those are routinely reviewed carefully by the insurance company checking the line items in there to verify the accuracy of the bills and to see what in those and to see if they are consistent with the amount the hospital is allowed to charge. And that takes time. Other than that, I really can't say. I have never had any experience with another company saying they just held the money back to try to cause trouble for somebody. [LB363]

SENATOR McCOLLISTER: Thanks, Dick. [LB363]

SENATOR HARR: Senator Chambers. [LB363]

SENATOR CHAMBERS: They don't make those calculations like I would with a pen and a paper, would they? [LB363]

RICHARD REISER: The loss calculations? [LB363]

SENATOR CHAMBERS: You said when they look at these amounts that are charged to make sure that that can actually be charged on these bills, you said that's what the employer is looking at and that takes time. [LB363]

RICHARD REISER: I said, Senator, it could be the employer looking at that. Normally it would be the insurance company looking at that or a bill review company that they've contracted with. [LB363]

SENATOR CHAMBERS: But they would have a way of doing that that is pretty quick I should think. [LB363]

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RICHARD REISER: They do have computer programs that do that. I think that after the computer finds something then it ends up going back to a human to look at and make a decision about. [LB363]

SENATOR CHAMBERS: I just don't see where we justify if we take all that time. But that's all that I would have. Thank you. [LB363]

SENATOR HARR: Senator McCollister. [LB363]

SENATOR McCOLLISTER: When the insurance company has an issue with the medical bills, don't they end up typically going back to the hospital or the doctor, whoever, and asking them to justify some of those expenses? Isn't that typical for them? [LB363]

RICHARD REISER: That's the way it's normally done. [LB363]

SENATOR McCOLLISTER: And so that could lengthen the time as well. [LB363]

RICHARD REISER: Certainly. [LB363]

SENATOR McCOLLISTER: Thank you. Thank you, Mr. Chairman. [LB363]

SENATOR HARR: Senator Johnson. [LB363]

SENATOR JOHNSON: Thank you, Senator Harr. We're going to get a lot of information evidently. We're asking everybody for statistics. When we get this, these statistics, will it maybe be able to tell us that let's say when the city of Lincoln comes in, that their past has been that it's been 40 days or 50, 60 days before they've gotten some checks? So they were paying the penalty. How many...how do I want to ask this? It would be interesting to find out how many businesses, employers would have to pay actually the medical bill. I know they'll pay it eventually through the ratings. You know, when you have these costs, eventually you'll pay for workmen's comp. How many of them would have to pay it that day, on the 29th day? And then do they have any time to go back to the insurance company and that be spread out, or is that going to be a cost to them? [LB363]

RICHARD REISER: You mean could they pay it on the 29th day and then later go back and say I overpaid and try to get it back? [LB363]

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SENATOR JOHNSON: Yeah. I mean, what leverage would they have to the insurance company then to speed up? The bill is already...? [LB363]

RICHARD REISER: Most employers would have very little leverage over the insurance company. Some might, but you know, most of them wouldn't have. [LB363]

SENATOR JOHNSON: But they lose whatever they have. [LB363]

RICHARD REISER: Yeah. [LB363]

SENATOR JOHNSON: Yeah. Okay, thank you. [LB363]

SENATOR HARR: Any other questions? Thank you, sir. Always a pleasure. Anyone else in the neutral capacity? Senator Nordquist waived closing on LB363. I think we have a couple of letters for the record. [LB363]

JAMISON WYATT: (Exhibits 1, 2, and 3) I have a letter of opposition from the city of Lincoln, William C. Kostner; I have a letter of opposition from Robert Hallstrom with Nebraskans for Workers' Compensation Equity and Fairness; and a letter of opposition from Korby Gilbertson representing Property Casualty Insurers Association. [LB363]

SENATOR HARR: With that, we close LB363 and move on to Senator Hansen, LB388. Senator Hansen, the floor is yours. [LB363]

SENATOR HANSEN: Thank you. Good afternoon, Chairman Harr and members of the Business and Labor Committee. My name is Matt Hansen, M-a-t-t H-a-n-s-e-n, and I'm the senator representing Legislative District 26 which is northeast Lincoln. I'm here to introduce LB388. This bill would apply only to those who are injured on the job and whose injuries were determined by the Workers' Compensation Court to have resulted in total disability. Current law provides a formula for the annual calculations of maximum weekly benefits. And although the Legislature has recognized the necessity of annually updating the allowable maximum, there was no such updating for the worker once his or her compensation amounts have been set. LB388 would simply apply the same formula used to calculate maximum benefits to the actual award of benefits on an annual basis. That is my opening, and I will yield to any questions. And I ask the committee to advance the bill. [LB388]

SENATOR HARR: Well, it's a pretty simple concept. So thank you. Any questions for Senator Hansen? Senator Johnson. [LB388]

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SENATOR JOHNSON: Thank you, Senator Harr. Would this be calculated on the...who would determine that full or cost-of-living adjustment as it moves forward? Is that some standard that's going to be out there, or who makes that decision? [LB388]

SENATOR HANSEN: Yes. It was currently a statutory process that was already in there. It is the formula set out in Section 48-121.02 which is, I believe, the formula for adjusting the current maximum payment. And so that process would continue. [LB388]

SENATOR HARR: I'm just proud Senator Hansen had read his bill. (Laughter) Any other questions for Senator Hansen? Seeing none, thank you very much. [LB388]

SENATOR HANSEN: Thank you. And I will note I will waive closing as I have to run to another committee. [LB388]

SENATOR HARR: All right, understood. Thank you very much. Any proponents on LB388? [LB388]

TODD BENNETT: (Exhibits 1 and 2) Good afternoon. Todd Bennett on behalf of Nebraska Association of Trial Attorneys but also several clients who are receiving total disability benefits at this time. This statute seems to be pretty simple on its face, but it's failed three times, as far as my understanding is, in this very committee over the past 10 or 15 years. I had a gentleman by the name Joe Swift (phonetic) that was going to attend this hearing today who's been receiving \$230 a week since 2004 and has not had an increase in that benefit whatsoever. He broke down on the interstate today by the time he got out to...out of his home, and he's unable to attend today. But I'll tell you a little bit about his story. He fought his case in 2004 and, yes, had many bills that weren't paid over an eight-year period of time while his case was on appeal. During that time, all his benefits...he didn't get paid for four and a half years. Once those benefits came in and got paid after the appeal, he still was going to receive \$230 a week with no chance of an increase. And he's still receiving that today. Two of the forms that I've asked to have a copy is simple statistics to show what the gas price was in 2004, is \$1.35 on average across the country. It was actually a little bit less than that in Nebraska. It also shows the minimum wage of \$5.15, what it was in 2004. I'm also going to introduce you to another client, Mike Tomek. He's been receiving his same check since 2002. He was a correctional officer. Over the last 12 to 13 years, a wage for his correctional status has gone up anywhere from 1 percent to 2 percent per year. Right now, he would be receiving essentially four times what he's receiving right now. And anyway, what this bill is designed to do is simply provide an adjustment to meet the needs of the clients. Ironically, we have that for mileage. We get that per year on the same formula. We do have a state maximum benefit based on the same formula each year. Social Security disability has increasing benefits based on an adjustment each year. And the funny thing is when I read

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this, the purpose of Social Security cost of adjustment set out in that statute was not brought over to the comp system. And what that purpose simply was is when inflation leaves those benefits to be insufficient to provide for you and your family, then it's time for an adjustment. That's all I simply ask as you listen to Mr. Tomek because he's the real live statistic here today. Thank you. [LB388]

SENATOR HARR: Thank you very much, Mr. Bennett. Any questions for Mr. Bennett? Hold on. All right, you are free to go. Thank you. [LB388]

MIKE TOMEK: My name is Mike Tomek, M-i-k-e T-o-m-e-k. I guess I'm going to start out by giving you a little background history. I'm not real sure on etiquette, but I'm going to give this a shot and wing it. I was working for the Department of Corrections at the Nebraska State Penitentiary. I had worked there almost ten years when I received a back injury while working there. To me, I want to say it's a career-ending injury because since then I have not been able to work. That happened in April of 2002. Fast forward 13 years later, I'm still making the same wage that I was in 2002. I guess I look at it as when I was working for the Department of Corrections, there was a lot of factors there that I could not figure out why they were not factored into my pay: shift differential, employee evaluations, stuff like that. And with the cost of living going up, the minimum wage going up, I think the only fair thing to do would...to raise my pay. I have a hard time making ends meet. And I guess I would like to see something done about this. [LB388]

SENATOR HARR: All right. Well, thank you for your testimony. Thank you for coming in, Mr. Tomek. Let me see if anyone has any questions for you. Any questions? Seeing none, thank you and thank you for the service to the state. I appreciate it. [LB388]

ELIZABETH GOVAERTS: Good afternoon. My name is Elizabeth Govaerts, G-o-v-a-e-r-t-s. I'm here on behalf of NATA. And I represent injured workers in the Workers' Compensation Court system. I can't imagine that anybody would actually oppose this bill. When a worker loses his ability to work is devastating. As you can imagine, the benefits allowed in the workers' compensation system don't make a worker whole anyway. We have a cap on the amount of wages or total disability that a worker can get anyway. So highly compensated workers are never made whole. As a practical matter, our benefits are insufficient because workers get 66 percent of their average weekly wage. Most of our injured workers are low-wage workers, minimum wage, you know, mostly hourly wage workers. None of them withhold at a rate of 33 percent anyway. So they're already taking a big pay cut to start with. Every other system that allows for disability benefits allows for an increase for cost of living. It's an extremely simple calculation. The statute already sets it out. The bill contemplates that the cost-of-living increase would occur on the year anniversary of the injury. Adding insult to injury here with having somebody who

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could be in the work force earning four times what his comp benefit is, is unconscionable. It makes a situation that's already disastrous become untenable for workers. And that's why I support this, because I've seen this disaster firsthand. [LB388]

SENATOR HARR: Thank you, Ms. Govaerts. Senator McCollister. [LB388]

SENATOR McCOLLISTER: Yeah, thank you, Mr. Chairman. One of your...in your testimony you indicated that...earlier I heard that this is the third or fourth time a bill of this type has been heard in this committee. You know, the composition of the committee is a little different this year. So I'm curious to know why those bills failed in the past if you know. [LB388]

ELIZABETH GOVAERTS: I don't know why they would have failed. And I'll tell you that the cost to insurance companies would be de minimis for this type of things. These are insurance companies who are holding...okay, let's say, for instance, that the value of somebody's total disability benefits are--I'm going to use a number I can divide--are \$300,000 over the cost of his lifetime. The insurance company holds that money and pays this out over...you know, in a weekly benefit. So the insurance company has use and it's earning interest on that money at a much higher rate than the cost-of-living increase is. So I can't imagine why it wouldn't pass because really it hurts no one and only helps in a very meaningful way an injured worker who hasn't been able to return to the workplace. [LB388]

SENATOR McCOLLISTER: Thank you for attending and thank you for your testimony. [LB388]

ELIZABETH GOVAERTS: Thank you. [LB388]

SENATOR HARR: Thank you. Senator Johnson. [LB388]

SENATOR JOHNSON: Going back to the previous question that was asked, I asked one of them. We know that the employer pays the cost of workmen's comp eventually through their ratings. So I'm not saying this is good or bad, but if this is in place, the insurance company will probably calculate a projection of what that cost will be over the lifetime, workable lifetime, of that employee. So that means that the employer...the insurance company will be reimbursed because they'll calculate it in, and that will be part of the code...coding. And the employer will end up bearing that cost. Is that correct analysis of it? [LB388]

ELIZABETH GOVAERTS: Well, that's...you know, yeah. But remember, we're talking about 1, 2 percentage-type numbers. So... [LB388]

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SENATOR JOHNSON: I realize that. [LB388]

ELIZABETH GOVAERTS: Yeah. [LB388]

SENATOR JOHNSON: But I mean it will be...it's not the insurance company that ends up with that cost because they will prorate it out. [LB388]

ELIZABETH GOVAERTS: Arguably, yeah. [LB388]

SENATOR JOHNSON: And the employer will be paying. And maybe the employer should be. [LB388]

ELIZABETH GOVAERTS: Yeah, maybe. And I don't know and I can't pretend to know how insurance actuarial stuff works. But I will say that in the scheme of things, 1 percent or 2 percent makes a huge difference to somebody who's trying to pay for their school lunches for their kids or have enough money to make sure that they can get their utilities paid. And the insurance company is earning 5 percent, 10 percent, 30 percent on the money that they're holding. So again, I don't think that it's going to ever be any...it's not going to be onerous for the insurance company or the employer. [LB388]

SENATOR JOHNSON: Thank you. [LB388]

SENATOR HARR: Thank you. Senator Chambers. [LB388]

SENATOR CHAMBERS: You know, sometimes when these hearings are going on, I'm very old. And old people sometimes lapse into reverie. Am I still in America? Is this America? [LB388]

ELIZABETH GOVAERTS: That's a good question. [LB388]

SENATOR CHAMBERS: But is it? And there's...I hear a lot of talk about how America is a compassionate place where those who have rendered service are not going to be forgotten and they're not like throwaway Dixie cups where you throw this one away and then get another one. When it's soggy, you throw it away. But people do not lose their humanity. Workers are allowed to have dignity. And those things are to be respected. And you can't put a dollar value on them. Now before I lapse into my reverie, that's the way things were and that's what I learned when I was going to law school and went to Creighton undergraduate school which is a Jesuit school. And a lot was said about ethics and human dignity. And if everything is reduced to concern

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about insurance companies and employers, and the ones who do the work and make it possible for these entities to even be, then it seems that something is disconnected. So I'm not asking you for a response, but I mainly wanted to be assured in my dotage that I still am in America. [LB388]

ELIZABETH GOVAERTS: Well, I think Senator Chambers makes a really good point. And that is that people are hurt on the job every day. And we have put into place a no-fault system because we believe that if somebody is hurt on the job they need to get compensated for that. And people who have been injured working for the benefit of a company, I don't think we should be too concerned about whether or not the company then has to fully compensate that person by paying an extra 1 percent or 2 percent. That seems to be the least of the things to factor in here. [LB388]

SENATOR HARR: Thank you. Any other questions for Ms. Govaerts? [LB388]

SENATOR CHAMBERS: Thank you. [LB388]

ELIZABETH GOVAERTS: Thank you. [LB388]

SENATOR HARR: Thank you for your time. Proponents on LB388. Mr. Howard, welcome back. [LB388]

STEVE HOWARD: Thank you. Steve Howard, for the record, S-t-e-v-e H-o-w-a-r-d, counsel for the Nebraska State AFL-CIO. Maybe this is a good time to sort of take a step back and look at what workers' compensation is. And it is a grand compromise and a grand bargain. Employers cannot be sued in Nebraska for being negligent. There is no such thing in Nebraska as a tort claim against an employer provided that they carry the coverage that they have. And so the compromise that went into effect back in the early 1900s, a century ago, is that workers gave up the rights to bring certain causes of action against their employers. Negligence in the workplace, that doesn't have really a presence in the work comp system. In exchange, we do have this no-fault system. But you know, Senator Johnson, we like to view the system from a different perspective than the discussion earlier. If an economist were to come testify before you, that person would say that if employers didn't have to pay workers' compensation in a true supply and demand free market enterprise...or relationship, workers would make more wages. So we think both employees and employers contribute to the system because it's mandatory. So it's necessary. So what is this workers' compensation? You know, it's two-thirds of an average weekly wage. And you get it, the temporary benefits that this bill addresses, so long as you are...the total disability benefits, as long as you're totally disabled. And I have a client. Her name is Cheryl (phonetic). She was hurt lifting a 12 pack of pop working in a convenience store back in 1993.

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She made \$200 a week. Two-thirds of that is \$133.33 a week. And that's been the weekly check ever since we took her to trial back in 1995. We don't take any fees on that case. But that's what she gets. But she also gets Social Security disability. Now if her work comp went up, the Social Security obligation by the Social Security Administration would go down because there's an offset. There's a maximum that you can get. And so if the federal government were represented here, they would say, well, of course, we want for total disability, those catastrophic cases...and Cheryl (phonetic) has had upwards of a dozen operations. And she has no dignity in the life that she leads right now. But the Social Security Administration would say we'd like it if she made a few more dollars per week because that means the Social Security disability would go down. But regardless, Social Security has a COLA, cost-of-living adjustment, just like almost every other system does. This wouldn't help Cheryl (phonetic) because this bill, as I read it, Senator Hansen's bill says that this would be for total disability awarded after the effective date. But it might help the next person to come along that has that unfortunate situation where they're totally disabled. They're making two-thirds of what they used to make with no chance of any increase in the future. You know, Iowa has a system that allows for that rate, the benefit rate in general to be adjusted according to dependents. So if you're married and have six children living in your home, you're going to get a different rate than a single individual. So that's another feature about the average weekly wage that I thought I would share with you. So I very much appreciate the opportunity to come before you in support of LB388. And it certainly just seems to make sense that as the price of everything else goes up, the compensation should as well. [LB388]

SENATOR HARR: Thank you, Mr. Howard. Questions? Senator McCollister. [LB388]

SENATOR McCOLLISTER: Yeah, thank you, Mr. Chairman. We've learned a lot about the grand bargain in the last couple of weeks. The way the current benefit is calculated, it's on the average wages. So it's a percentage of that amount, correct? [LB388]

STEVE HOWARD: Correct. [LB388]

SENATOR McCOLLISTER: Okay. And the fact the average wages hasn't gone up in the last three or four or five years is problematic, is it not? [LB388]

STEVE HOWARD: Well, it has gone up because the benefit schedule that the court has is higher in 2015 than it was in '14 or '13. It's not a huge increase. [LB388]

SENATOR McCOLLISTER: So the percentage goes up. [LB388]

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STEVE HOWARD: The percentage is always two-thirds of the average weekly wage except overtime. You don't get overtime counted. You get those hours counted as straight time. If you make \$10 an hour and you work 50 hours a week that's \$500, not 40 at \$10 and... [LB388]

SENATOR McCOLLISTER: So the average weekly wage has in fact increased. [LB388]

STEVE HOWARD: It has, yes. So we have a modest increase. [LB388]

SENATOR McCOLLISTER: How many states now include a COLA as this bill would envision? [LB388]

STEVE HOWARD: Senator, I don't know. That's a great question. I don't know the answer. [LB388]

SENATOR McCOLLISTER: Okay. Thank you very much. [LB388]

SENATOR HARR: Senator Chambers. [LB388]

SENATOR CHAMBERS: The term "grand bargain" was used, and you stated briefly what that was. Would you state it again as briefly as you can. [LB388]

STEVE HOWARD: The Industrial Revolution in the early 1900s brought about a lot of folks getting hurt on the job and employers were getting sued. So across the United States, all the states between about 1911, 1912 up to about 1919 enacted these laws that said if you get hurt on the job, here's what you get. It's a set formula. It's a rigid set of benefits. You don't get anything for pain and suffering. You don't get anything for your spouse, at least not in Nebraska. But the trade-off is you cannot bring a negligence action against your employer. [LB388]

SENATOR CHAMBERS: When there is a dispute...let's say that we had a court. Aesop told fables, and animals could talk. If you had a court comprising roosters as judges, and the ones who would be likely to be sued are other roosters and the ones likely to do the suing are cockroaches, well, when the cockroach goes to court and the roosters are the judges and roosters are the ones being sued, who is likely to lose? You probably don't want to say it. [LB388]

STEVE HOWARD: Well, the cockroaches. [LB388]

SENATOR CHAMBERS: Right, the roaches will always lose. [LB388]

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STEVE HOWARD: The hens are left out from the beginning it sounds like. (Laugh) [LB388]

SENATOR CHAMBERS: So when you have a powerful interest like the industrialists and those cogs, human cogs in the machine that are not going to be given the consideration because this machine will be oiled, lubricated, overhauled to make sure that it's going to be able to function in the optimum way of a machine, human beings are not dealt with in that way because they're replaceable and expendable parts. Somebody gets hurt, you get rid of them. When this grand bargain was made, there are people bound by it today who had no say in that bargain, isn't that true? [LB388]

STEVE HOWARD: Oh, absolutely. [LB388]

SENATOR CHAMBERS: So a deal was struck decades and even generations ago that had not redounded to the benefit of the workers but to those for whom they work. Because now if they could file lawsuits, there are likelihoods that they would win some of these lawsuits based on negligence, even recklessness, on the part of the employer. Is that a reasonable statement? [LB388]

STEVE HOWARD: It is in certain circumstances, yes. [LB388]

SENATOR CHAMBERS: So it's in the interest of the powerful people to maintain the system as it is so that somebody who worked for the state years ago and was injured in the process of working for the state is caught in that time warp, like an insect imprisoned in amber, and is not going to gain benefits as everything else moves forward and upward and prices increase. That person is not going to receive compensation of the same purchasing value that it should have with the increased cost of everything, is that fair? [LB388]

STEVE HOWARD: Yeah, the proportions and the ratios just don't keep up with the passage of time. That's right. [LB388]

SENATOR CHAMBERS: And when I went to that Jesuit university that I mentioned, the simple definition of justice was granting a person his or her due, that to which a person is entitled. So I'm beginning to formulate some views based on what the previous witness and what you have said, that these ideas that you all are expressing are jogging some of these old brain cells of mine. And I'm beginning to come alive again. And I'm beginning to see that things are not as they should be. And I appreciate your improving my education as did the prior witness. Thank you. [LB388]

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STEVE HOWARD: Thank you, Senator. [LB388]

SENATOR HARR: Thank you, Senator Chambers. Any other questions for Mr. Howard? Seeing none, thank you, Mr. Howard. [LB388]

STEVE HOWARD: Thank you. [LB388]

SENATOR HARR: Any other proponents? How about opponents? [LB388]

RON SEDLACEK: (Exhibits 3 and 4) Chairman Harr and members of the Business and Labor Committee, for the record, my name is Ron Sedlacek; it's spelled S-e-d-l-a-c-e-k, and I'm here on behalf of the Nebraska Chamber of Commerce. And then I'm also authorized to testify on behalf of the National Federation of Independent Business-Nebraska, and the Nebraskans for Workers' Compensation Equity and Fairness. And then I also have a couple of letters that I'll have passed out after testimony here, one from PCI signed by Korby Gilbertson also in opposition. When...I can't speak for all the entities, but I know that in our discussions at the State Chamber's labor relations council, probably the biggest concern regarding legislation, this new iteration of it--it's been around for other years as has been mentioned in the past--was a concern about the costs. However, then when we look at the fiscal note, the entire state of Nebraska paid \$686,620. Fiscal note says state average weekly wage has increased 2 percent. So what's the impact? Maybe \$13,732 which seems somewhat nominal. So the question becomes, and we'd have to agree with PCI, and that is not dealing with the costs but some of the other...a couple of the other issues that we've talked about. And that is in regard to the use of the term "total disability," whether that means temporary total and permanent total disability, or does this apply to permanent total only? I think the testimony implied permanent total only. So that would be a recommended change if the committee were to continue with advancing the bill. Also then the question becomes when does the annual increase take place? And I heard testimony, although I'm not sure that was exactly what I would call the rule that that would be. Would it be on the date of the anniversary of the injury or of the award? Or would there be some sort of common date every year, you know, an annual basis of some kind? I think administratively it would be less burdensome if there was some sort of common annual date, but leave that to the committee. What we would suggest though is that...and I'm only speaking for the State Chamber, not for PCI, not for NFIB or the other groups--is to take a look at what really...what are the costs of this and determine if this is something that could be part of an overall package on workers' compensation. We've got so many bills this year one way or the other. It's something to look at, but we'd like to get some clarity in regard to the technical. And that can be done, that can be achieved. Don't have a problem with that. So I'm not going to say we oppose the bill because of technical issues that can be resolved. [LB388]

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SENATOR HARR: Thank you, very much. I appreciate the testimony. Any questions? Senator Chambers. [LB388]

SENATOR CHAMBERS: Mr. Sedlacek, are you a lawyer? [LB388]

RON SEDLACEK: I am. [LB388]

SENATOR CHAMBERS: And to be a lawyer, you have to have completed law school successfully. [LB388]

RON SEDLACEK: Yes. [LB388]

SENATOR CHAMBERS: All right. You know what an adhesion contract is. You remember that, don't you, that term? [LB388]

RON SEDLACEK: Um-hum. [LB388]

SENATOR CHAMBERS: Can I be bound by the terms of a contract to which I am not a party? [LB388]

RON SEDLACEK: Well, if it's a...no. I'll just say no. [LB388]

SENATOR CHAMBERS: All right. So a contract entered into 50 years ago by somebody who doesn't know me, I had no privity. There was no privity between me and those who's entered this agreement, and no privity between me and anybody who's entering that agreement today. But the contract was made by somebody very powerful. The adhesion contract is based on an inequality between the two parties to the contract, isn't that right? And if it's an adhesion contract, it's void ab initio, from the beginning. It's not a contract because there could not be a meeting of the minds. [LB388]

RON SEDLACEK: Right. [LB388]

SENATOR CHAMBERS: Now when you have workers who might not even be allowed to have a job, they're given a take-it-or-leave-it situation. I doubt that the workers could have said, no, this grand bargain is not what we want. It's not a bargain because we don't have anything that we can do to say you're up here, we're down here. We wanted to bring you down a little, but it can't

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be done. It's take it or leave it. Now when I went to law school, they had a course called creditors' rights. Did they have such a course when you went there? [LB388]

RON SEDLACEK: Yes. [LB388]

SENATOR CHAMBERS: Does creditor rhyme with predator? [LB388]

RON SEDLACEK: Not always. (Laugh) [LB388]

SENATOR CHAMBERS: All right. Tell me when the word "predator" does not rhyme with the word "creditor." The only difference is the beginning letter basically, isn't it? So if I were a poet and I wanted a perfect rhyme, "creditor" and "predator" would give me that, wouldn't? [LB388]

RON SEDLACEK: Yeah, maybe. I have to look... [LB388]

SENATOR CHAMBERS: P-r and c-r... [LB388]

RON SEDLACEK: Sounds good. [LB388]

SENATOR CHAMBERS: ...and the rest of them, the letters are the same. So you teach lawyers how to handle the cases that will affect people who can pay them. Isn't that basically correct even though it's not stated like that? [LB388]

RON SEDLACEK: Yes. [LB388]

SENATOR CHAMBERS: Did you ever see a course called debtors' rights? They don't teach that in school, do they? [LB388]

RON SEDLACEK: I don't think so. [LB388]

SENATOR CHAMBERS: No, I know so because debtors didn't have rights. There were prisons of... [LB388]

RON SEDLACEK: Consumer rights, I was thinking. [LB388]

SENATOR HARR: Yeah, consumer. [LB388]

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SENATOR CHAMBERS: ...they were...well, Mitt Romney is a consumer even when he has them build the elevators to lift the cars at his garage at his house. He's a consumer. So that's different from a debtor. As Dickens had Scrooge say, don't come to me seeking charity. Don't they have workhouses for those people? And you know they have prisons for debtors, didn't they? And there are some cities who want to do that now because if you have a charge against you, an amount you're to pay and you can't pay it, they'll put you in jail despite the fact that a person cannot be jailed for debt in this country constitutionally. Those in power find ways around the constitution. Businessmen and -women don't sit still for any encroachment on what they do because they have federations, they have chambers of commerce, and others to look out for them. Debtors are not organized, so they take it or leave it. And if they get hurt in the service of the employer, that's tough. If they get hurt in the service of the state, that's tough. In order for me to understand your position here today, did you say you're not speaking against the bill? [LB388]

RON SEDLACEK: No, I have a position opposed to the bill at this time. [LB388]

SENATOR CHAMBERS: You're opposed to the bill. [LB388]

RON SEDLACEK: At this time. [LB388]

SENATOR CHAMBERS: And you're opposed on behalf of the Chamber of Commerce and the federation of businesses. And they are opposed for what reason? [LB388]

RON SEDLACEK: Their initial opposition...and I can speak for the Chamber; I won't speak for NFIB because I don't know what they... [LB388]

SENATOR CHAMBERS: Did you say you were here speaking for the federation of businesses too? [LB388]

RON SEDLACEK: That I was authorized to testify just so it's on the record that they were also opposed to the bill. [LB388]

SENATOR CHAMBERS: So you're a freebie for them, or do they pay you to do this? [LB388]

RON SEDLACEK: I'm a freebie for them. [LB388]

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SENATOR CHAMBERS: All right. Every mother is known by her daughter. Every hound is known by his children. All men are known by the company they keep. So today you're keeping company with the Chamber for pay, but you're keeping company with the business outfit for free. [LB388]

RON SEDLACEK: Yes, as a courtesy, yes. [LB388]

SENATOR CHAMBERS: So if we were going to put it in street terms that ordinary people would understand, if a woman is called that demeaning term "prostitute," then that is where a service is offered in exchange for cash. And if there's just a relationship where both parties get the same thing but they do it for fun, then it might be a mistress relationship or just a quickie or a one-night stand or something. So with the business people, you're a one-night stand in a sense? [LB388]

RON SEDLACEK: A one-night stand, I guess, yeah. [LB388]

SENATOR CHAMBERS: Quickie. But for the Chamber you get paid. [LB388]

RON SEDLACEK: Correct. [LB388]

SENATOR CHAMBERS: Okay, now what is the Chamber's official opposition? [LB388]

RON SEDLACEK: The official opposition is based on the perception that...of the cost that would be involved. As I mentioned, they had a couple of technical issues as well which could be resolved. The question of cost remains; however, looking at the fiscal note it doesn't appear to be as significant as they originally thought. That's why, speaking for them only, I'd suggest that we rethink this, take a look at it. And if there is a package of work comp issues, that might be part of it. That was the gist of my testimony. [LB388]

SENATOR CHAMBERS: So to keep with the analogy or metaphor I was using, everybody has heard this. I won't even use it. But the punch line was we know what you are. Now we're quibbling about the cost. So if the price is right then the Chamber of Commerce is not going to oppose something, is that right, if it doesn't cost them too much money? [LB388]

RON SEDLACEK: I don't know. I don't know at this point. I can't commit at this point. [LB388]

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SENATOR CHAMBERS: So if I said that the head of the Chamber of Commerce is a lying, thieving, double-crossing, backstabbing philanderer, the most you could say is, well, not as far as I know, right? (Laughter) [LB388]

RON SEDLACEK: Oh, I would try to defend them. But the social contract and an individual contract, as you know, are different. As Locke...if we want to wax philosophically, as John Locke said, the question is, is there consent of the governed? That grand contract that was talked about between worker and industry was also a situation which was a social justice issue in the sense that there were also...employers were winning all the time. I mean there would be defenses available: contributory negligence or assumption of the risk. And that's all out of the system. So that is felt to be somewhat of a balance in that regard. [LB388]

SENATOR CHAMBERS: But when we talk about social justice, we're talking about what's best for society. And there are people who make a determination of what is best for society and what constitutes justice. And it has...never goes without voice. If in order to participate in a discussion you must be able to speak and your vocal cords have been removed, you cannot participate because sign language doesn't count. When the only ones who are allowed to participate are those who are allowed to speak, even in civilized countries like in Europe they had serfs. They had indentured servants. They had peons. They even had slaves. So when the social contract is discussed, what I want to look at is what is the impact on those people who are helpless, who have no voice, who have no friends. They won't have a high-powered person such as you who is on a retainer more or less to look out for every item that might discommode them. Poor people might on occasion have their interests represented if it has a broad enough impact. Then somebody from a labor union might come. But the ones who truly need the help: If you don't work, you're not represented by a labor union. If you make your money from tips, there is no powerful organization that will speak for you. But the people who will listen to you and other powerful people will listen to those who you represent on occasion, namely business, who will say, well, those who make tips wind up making more than anybody in this establishment. So you ask them, do people work to make money? And they say, of course. Would you trade your position for the position of this one being tipped in your organization and you make more than she does by receiving tips that she does? In other words, Mr. Sedlacek, I'm not impugning you as an individual but those you represent and the kind of arguments they give to this committee and the kind of thing this committee will respond to. When we're on the floor and talking about other things, we're going to talk about compassion, concern, Americana. Then when we can do something for the people and we have the power to do it, we listen to those who say but don't do it because we would have to pay. Well, you're paying money which can be replaced. Other people have given up their ability to function. As a human being who has not been injured, who can try to get a job doing something else, but now they're damaged goods not because they committed crimes, not because they were children of a lesser god. But they were in the employ of people who make a lot of money who don't want to treat them fairly. Yet those who don't want

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to treat those injured workers fairly will come to the Legislature and say cut my taxes. I'm making enough money to pay taxes, but I don't want to pay them. And the Legislature says, you know, you're right. We're treating you unfairly. We're going to cut your taxes. You are the sounding board today. And I think I'm through with this witness. Thank you, Mr. Chairman. [LB388]

SENATOR HARR: Thank you very much. Thank you, Senator Chambers. Senator Bloomfield. [LB388]

SENATOR BLOOMFIELD: Thank you, Chairman Harr. Mr. Sedlacek, does every company that pays workmen's comp make a lot of money? [LB388]

RON SEDLACEK: No, certainly... [LB388]

SENATOR BLOOMFIELD: Thank you. [LB388]

RON SEDLACEK: ...not. [LB388]

SENATOR HARR: Any other questions? Thank you for coming. It was nice to be petted, huh. (Laughter) Any other opponents? Anyone in the neutral capacity? Seeing none, do we have letters for the record? No letters for the record. That will then close LB388, and we will move on to LB158, our own Senator McCollister. [LB388]

SENATOR MCCOLLISTER: Good afternoon, Chairman Harr and members of the committee. I'm John, J-o-h-n, McCollister, M-c-C-o-l-l-i-s-t-e-r, and I represent the 20th Legislative District in Omaha, Nebraska. I am here to continue our workers' compensation discussion and to introduce LB158. This bill will amend the Nebraska Workers' Compensation Act by adopting the rule that an employer may not be required to pay benefits to an employee who misrepresented his or her physical or mental condition in order to be hired. LB158 would place strict limits on the application of this rule. An employer will be required to prove three points: First, that the worker has knowingly and willfully made a false statement representation; second, that the employer relied on the false representation and it was a substantial factor in the hiring; and third, there was a causal connection between the false representation and the injury. These limitations would mean that the employer could only ask the court to apply the rule in narrowly defined circumstances. The rule that LB158 would adopt is the same general rule summarized by Larson, a leading expert in the field of workers' compensation law. In a 2011 decision, the Supreme Court said the rule may reflect a laudable goal, but it's the Legislature's function through the enactment of statutes to declare what the law is and what public policy is. The goal that the court

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referred to was to achieve a balance between the objectives of compensating the injured worker and protecting the employer from liability when it was inequitable to award a judgment against the employer. I would be happy to answer questions if you have any. [LB158]

SENATOR HARR: Any questions for Senator McCollister? Senator Chambers. [LB158]

SENATOR CHAMBERS: Senator McCollister, if you will indulge me, I will talk to you other than here today.... [LB158]

SENATOR McCOLLISTER: Fair enough. [LB158]

SENATOR CHAMBERS: ...because I have some issues that I'd discuss with you on it. Thank you. [LB158]

SENATOR HARR: Sounds good. Any other questions? Senator Johnson. [LB158]

SENATOR JOHNSON: Thank you. You've asked for some statistics before. Do we have evidence that there's been cases where there's been a lot of fraud in representation? [LB158]

SENATOR McCOLLISTER: Well, actually there has been some case law with regard to this. So they're fairly recent, so I'm not sure we have good statistics. But there have been some cases. And in fact, the Supreme Court asked us for some clarification because they reversed one of the opinions that was based on some of the workers' comp law. [LB158]

SENATOR JOHNSON: Okay. Thank you. [LB158]

SENATOR HARR: This is similar to earlier. There's one case just like we heard in LB363, right? [LB158]

SENATOR McCOLLISTER: One case. [LB158]

SENATOR HARR: One case, yeah. But it's recent, 2011, right? Yeah. Senator Crawford. [LB158]

SENATOR CRAWFORD: Thank you, Chair, and thank you, Senator McCollister. And I apologize if I missed when you answered this question earlier. Are there similar statutes like this in other states? [LB158]

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SENATOR McCOLLISTER: Well, it's certainly fair to ask me that question. And I'm afraid we're going to have to find that out for you. [LB158]

SENATOR CRAWFORD: Okay, okay. [LB158]

SENATOR McCOLLISTER: Thank you. [LB158]

SENATOR CRAWFORD: Thank you. And I guess I don't know if I can frame this as a question. I guess my initial reaction when I just read the bill is it made me think of all the exposes that were shown on health insurance companies back when we had preexisting conditions, like going back and hiring people to find possible misrepresentation. So the issue would be, I guess, understanding what is being very clear in statute on that standard of knowingly and willfully make a false representation. So I don't know if you have any sense of what you have in mind when you say knowingly and willfully, if you have a sense of intent in mind. [LB158]

SENATOR McCOLLISTER: Well, the operative word is narrowly applied. And so we have to assume that would do it. But it would probably take a court case or two to really define how narrowly or widely it's to be applied. [LB158]

SENATOR CRAWFORD: Thank you. [LB158]

SENATOR HARR: Any other questions for Senator McCollister? Seeing none, thank you. I assume you'll be sticking around for closing. [LB158]

SENATOR McCOLLISTER: I'll be here. [LB158]

JERRY STILMOCK: (Exhibit 1) Chairman Harr, members of the committee, my name is Jerry Stilmock, J-e-r-r-y S-t-i-l-m-o-c-k, testifying in support of LB158 on behalf of the Nebraskans for Workers' Compensation Equity and Fairness, the National Federation of Independent Business, and the Nebraska Chamber of Commerce and Industry. As Senator McCollister has explained, there was a case decided by the Nebraska Supreme Court in 1979, established defense of misrepresentation. That case made it through, through the years. And in 2011, the Nebraska Supreme Court overruled that decision in the case cited by Senator McCollister, the Bassinger case. The Supreme Court looked at the analysis, looked at the current status of the Workers' Compensation Act, and then decided that there was no statutory authority for the court back in 1979 to allow the Workers' Compensation Court nor the Nebraska Supreme Court to look at false representation or misrepresentation. The court, in 2011 in the Bassinger case, was pretty clear that the policy decision would need to come from the Legislature. And so it's based up on that

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decision that we're here before you this afternoon. And the question was asked how many states. At the time of the 2011 Bassinger decision, the Supreme Court from Nebraska reported that there were 12 other states that used this misrepresentation as a defense that could be brought affirmatively by employers. So what this would do would be reinstate the language, there would be a three-prong test that is set out in my testimony: knowingly, willfully making a false representation; the employer must have relied upon the false representation, and the reliance must be a substantial factor in the hiring; and then thirdly, a causal connection between the false representation and the injury. So a three-prong test would have to be met. And for these reasons, we ask the committee to advance the bill to General File. [LB158]

SENATOR HARR: Thank you. Any questions? Senator Crawford. [LB158]

SENATOR CRAWFORD: Thank you, Chairman Harr, and thank you, Mr. Stilmock, for being here and presenting. So I'm just trying to think through this idea of the workmen's comp is creating this grand bargain and so you don't have to prove negligence. You know, it's trying to expedite those cases. So I'm trying to understand the real risk to the employer in hiring where there is this harm from someone misrepresenting their health situation coming in. So if this woman came in and had had two back injuries and only told you about one, does that in any way impact the rate you pay for workmen's comp insurance? I mean it seems to me the idea behind workmen's comp--and I'm just learning here--is that we're trying to take that whole negligence and risk part out. And we're saying if you get hurt, we're going to make sure you're taken care of. So are you as an employer really at more risk? I mean does that really impact the amount you're paying for your insurance? Is that risk when you're hiring somebody really supposed to be a part of that calculation I guess is what I'm trying to say? [LB158]

JERRY STILMOCK: You know, I don't know about the part of the calculation, but by way of example, let me try. And maybe I'll hit your point, maybe I'll miss it by a mile. In the Hilt case, not to bore you with the facts of the case, but the Hilt case was based upon what the senator and I discussed about misrepresentation and the employment process. What the Hilt case did was the truck driver had three prior DUI convictions. And he...on the application he did not include that information, and he also used a different name than what his real name was. So the court, if I recall correctly in that 1979 case, said, you know, show us where that causal connection is between where the person was injured and the misrepresentation. So that link has to be present. In the Bassinger case, as you said, she reported on her application one of the surgeries, left the other one absent. And on the third occasion of her injury, the court said, well, we're doing away with the Hilt decision. It's a policy decision. But importantly, that causal connection is included, that it has to be tied. It, the misrepresentation, has to be tied to the injury. So would there be an increase, Senator, in the premiums as you've voiced the question? I do not know. But if the employee misrepresented material facts, the employer, you know, based the decision of

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employment on that, and in priority if I could say, the third tangent, that it has to be a causal connection. [LB158]

SENATOR HARR: Questions? Senator Chambers. [LB158]

SENATOR CHAMBERS: I'll wait until Senator Bloomfield. [LB158]

SENATOR HARR: Senator Bloomfield. [LB158]

SENATOR BLOOMFIELD: Thank you. Mr. Stilmock, do you see any kind of a time line in here anywhere? I might throw in a personal example; I had a car accident in 1965. It "boogered" my back up a little bit, but in '66 I was still able to go in the Army and serve and came out and everything. If in '94 I had not mentioned that accident to an employer and I later had to have back surgery, ten years later, could they go back to '66 and say, aha, you had an accident 25 years ago and you didn't tell us about it? [LB158]

JERRY STILMOCK: Yeah, I grin because not at the reflecting of your question posed but as the fact pattern of, you know, what would the court do? But certainly the burden on this three-prong test is going to be on the employer to prove the three elements. And if you forgot and didn't know--you didn't know but you forgot--you know, what would the court do in terms of knowingly and willingly? I don't know, sir. I'd be hard pressed to...you know, if you forgot, you forgot, especially that many years ago. And if it wasn't activated, if it wasn't bothering you. [LB158]

SENATOR BLOOMFIELD: And that was the brunt of the question was the time line. Is there any limit to the amount of time they can go back and search for something? If they find something that happened to you 25 years ago after you've been working for them for 15 or 18 years, it seems to me that maybe somewhere in there some of that should disappear. [LB158]

JERRY STILMOCK: I understand your point, sir. [LB158]

SENATOR BLOOMFIELD: Okay, thank you. [LB158]

SENATOR HARR: Senator Chambers. [LB158]

SENATOR CHAMBERS: And here is the time line that I have in mind, Mr. Stilmock: the time between when the person was employed and the time the injury occurred on the job. Now going

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back to that Jesuit university, the only thing they hate more than the fact that I graduated from Creighton is the fact that I tell people that I did. And I'm not lying. I really did. And people wonder how in the world I got out. They couldn't stop me. They would like to have. But anyway, a cause is that without which the thing you're looking at could not be. In other words, if this...if in order to have these glasses you have to have it preceded by this pen. If that pen is not there, you cannot have the glasses. So when they talk about a causal connection, it has to be something without which this other thing could not have been. That that they called a cause is an essential that must be shown. So here's what I want to ask you. Oh, first of all, what are the two groups you represent today? [LB158]

JERRY STILMOCK: National Federation of Independent Business. [LB158]

SENATOR CHAMBERS: And then... [LB158]

JERRY STILMOCK: Nebraskans for Workers' Compensation Equity and Fairness. [LB158]

SENATOR CHAMBERS: I don't see how business ever has anything to do with equity and fairness. Just like the liquor law requires you to have good moral character before you can get a liquor license, and I don't know where good moral character has anything to do with selling liquor. But that's the way they do things in Nebraska. Now you're a person who's doing an honest day's work, so I'm not criticizing you for the people you work for. If you can get the two who are going in opposite directions to get you to represent both of them, that's a tribute to you. But when we have a bill like this, once again, we are being asked do something that benefits an employer. We never look at the condition or circumstances of the employee. Now the case that Senator Bloomfield gave I think a court will out of hand say that cannot be covered by this even if he knew he had an accident and didn't tell you. There cannot be shown a causal connection between that accident all those years ago in having done all these other things without any problem with his back. Then when he came to work for you and he worked all this time and had done various things that indicated that his back was up to doing the job, and then he got a back injury. And you want to come to this bill and say, well, he misrepresented something. Is it a fact that if a person lies on an application and the lie is discovered that the person can be terminated for lying on the application? [LB158]

JERRY STILMOCK: You know, I think under the at-will, you can be terminated for any reason at any time as long it's not violative of those classes protected, Senator. [LB158]

SENATOR CHAMBERS: So it would stand to reason. So why do we even need a bill like this? I know you didn't bring it, but you're supporting it. Why do we even need a bill like this? How

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many situations do you imagine are going to happen where this is going to come into play?  
[LB158]

JERRY STILMOCK: Countless or one in the next ten years, you know, who knows really.  
[LB158]

SENATOR CHAMBERS: Okay. [LB158]

JERRY STILMOCK: We know of one and that's the one that was kicked out with an asterisk by the Supreme Court in this Bassinger case, 2011. Have there been some after that? We do not know. We just know what the court said. And as attorneys and representing clients as such, they see that language, Senator. They say, aha. This is an answer for the Legislature. [LB158]

SENATOR CHAMBERS: But this...and even that is secondhand knowledge. None of the people you represent were involved in this particular case that the court decided or that person would say, well, yeah. I know because I'm the one who hired, or I'm the hospital. So that is secondhand knowledge. No business that you represent, none of these people who are interested in equity has had anything like this happen. I've heard my colleagues on the floor say even when the health of children was involved, you don't have a lot of cases of this particular illness so we're not going to require a vaccination. Yet in other instances outside of the time frame they're talking about, children had come down with that illness. Some had very serious physical repercussions. So on the one hand when children are involved, they say we haven't had a lot of these cases so we don't need the law. When it comes to big shots, there's one case that they read about and they said change the law. I admire you for getting those businesspeople to pay somebody for doing some honest work. So you're earning everything that they are paying you. [LB158]

JERRY STILMOCK: Inside the suit I feel like it, too, sir. (Laughter) [LB158]

SENATOR CHAMBERS: That's all that I have. Thank you. [LB158]

JERRY STILMOCK: Thank you. [LB158]

SENATOR HARR: Any other questions? I have a couple questions. [LB158]

JERRY STILMOCK: Sure. [LB158]

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SENATOR HARR: And first of all, you can't fire someone...if someone files a work comp injury, you can't fire them, can you? [LB158]

JERRY STILMOCK: Now, I'm going to play judge. Now, I'm Judge Heavican and just on that fact alone, you probably better not. [LB158]

SENATOR HARR: Yeah, you can't. There is a case law out there. And I can get that for you. I guess my question is, is this causality? And what is "willful and reckless?" So I apply for a job as a desk clerk. And have you had any prior injuries? You know, I was involved in an accident 20 years ago, but nothing crazy. So I don't say, you know, I hurt my back 20 years ago. Now it's daylight-saving time. I'm desk jockey. I'm overweight. I get up on my chair that has rollers on it. I try to change the time on the clock and I fall down and I injure my back. Well, it's similar to the injury I had before. Is that within the willful reckless? It was both the same spine number. I guess my question is how do I determine what is causality and how much I have to report? Is it, if there's just a question: Name all your prior medical. Or is it: Your job will be...if I'm doing something that requires the work of my back and I have a prior back injury, I get it. But if I'm doing something that doesn't require physical activity but I hurt myself, how do I know how much information I have to give my employer? That's my question because I...look, it's hard to stand up and say, you know what, you should be allowed to lie to your boss. You should be allowed to lie to your employer. I can't do that. [LB158]

JERRY STILMOCK: I mean, that's what I'm... [LB158]

SENATOR HARR: And that's why I...you know, I don't have a problem with the bill. But my question is how much burden now is on the employee to tell every single injury they've had before? [LB158]

JERRY STILMOCK: What you said made me think of the response that I wouldn't say, except you said it, so it's okay to lie to your employer or your potential employer. [LB158]

SENATOR HARR: Yeah. [LB158]

JERRY STILMOCK: And that's the part that jumps out of the page in Bassinger and it jumps off the page on Hilt, is how far is too much? So by way of example and hopefully it will tie it together and you all will be done with me, and you'll have other questions maybe. I don't know. The first report was the employee said injury to the right side of their back, right side of their back, right side of their back. That was the injury in 1979. The injury...and I didn't tell my employer when I applied for...that 1979 injury that was to the right side of my back. And maybe

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this is too black and white. But when I went to that employer number two for a job in 1996 and I didn't say anything about the right side of my back, but I injured the left side of my back with employer number two and then this LB158 comes up, is that causally related? [LB158]

SENATOR HARR: Yeah. [LB158]

JERRY STILMOCK: You've got to have a doc then to be able to explain that the right side connected to the left side and, yes, it is causally related. [LB158]

SENATOR HARR: And I get that. [LB158]

JERRY STILMOCK: Okay, okay. [LB158]

SENATOR HARR: And if it's a job that's related to, I have to use my back. But if I have a job that doesn't require me to use my back and I injure my back by doing something while on the job, I don't know how much information I...I mean how much is on the employee to give all the information? Do I just vomit out my medical records and sign a HIPAA waiver and say here's all my medical records, look it up... [LB158]

JERRY STILMOCK: Go fish. [LB158]

SENATOR HARR: ...go fish, beforehand when I'm applying for a job? And then you're going to see, you know...gosh, we worried last week about the 30-day notice. And someone might know that I had a groin injury and we don't want this public. Well, now do I have to report every groin injury in case something happens to my groin because that was a real big concern last week. So my question is how public and how private are my own medical records when I apply for a job? [LB158]

JERRY STILMOCK: They better be pretty public in terms of telling that employer under this legislation. [LB158]

SENATOR HARR: Yeah. [LB158]

JERRY STILMOCK: And you know, we all want to think of facts that would...it's the same way I have and say, well, right side, left side. The message is, the court thought in '79 Hilt was the right decision and they gave us parameters. So you all with the policy side of workers' comp, I

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wrestle with the issue that you've raised, Senator. It's our position that with...somebody shouldn't lie. They shouldn't lie and be able to recover. [LB158]

SENATOR HARR: Perfect. I agree. [LB158]

JERRY STILMOCK: And what degree...and I'm going to stop because the two senators to my right are raising their hands, and that's my signal. [LB158]

SENATOR HARR: Okay. And I agree, you shouldn't lie to your employer. We'll start with Senator Crawford. [LB158]

SENATOR CRAWFORD: Thank you, Chairman Harr. So I guess I keep coming back to this fundamental issue of, isn't the purpose of workmen's comp to reduce litigation for both the employee and the employer, and wouldn't this do the opposite? It basically opens up a reason for litigation in any case, to go back and comb those records. [LB158]

JERRY STILMOCK: I don't know how to answer that question other than to say yes. I mean, yeah. But is it going to come up in every case? I guess, again, it depends on the facts. If there's some relevancy out there that there was some prior injury and you didn't tell me about it and you lied about it and it was what I based my decision to hire you on and it's connected to the injury, then yes. [LB158]

SENATOR HARR: Senator Ebke. [LB158]

SENATOR EBKE: Thank you, Mr. Chairman. Okay, so practically speaking, we're not really talking about, you know, vomiting out all of your medical records though, right? I mean in most cases, at least in the job applications that I've seen, it's not, tell us everything about your medical records. It's, you know, are there any...is there anything in your medical history that might prevent you from being able to carry out...lift 40 pounds or whatever, repetitive motion kinds of things? Or have job applications changed so much that they say tell us everything that's wrong with you ever? I don't know. [LB158]

SENATOR HARR: I don't know the answer. Yeah, you're right, yeah. [LB158]

JERRY STILMOCK: I think there's pre and post. And I think most people ask after the...I'm speculating on this and I shouldn't do that in front you. You deserve better than that. And I'm not able to answer that distinction, Senator, so I'll politely refrain. [LB158]

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SENATOR HARR: Thank you. Any other questions? Seeing none, thank you for coming. [LB158]

JERRY STILMOCK: Thank you. [LB158]

SENATOR HARR: I appreciate it, Mr. Stilmock. [LB158]

JERRY STILMOCK: Yes. [LB158]

SENATOR HARR: Any other proponents? Any opponents? Mr. Bennett. [LB158]

TODD BENNETT: Todd Bennett on behalf of the Nebraska Association of Trial Attorneys again. And you know, just to come to some of these points as you heard several questions here about how big of a problem is this on several of these bills? What's the statistics? What's the cost? We heard one case. That's Hilt where they originally had the rule. You heard Bassinger which overruled that in 2011. Let's not forget Hilt was created out of a criminally...what they found was criminal representation about his DUI and driving record with a different name. That's what that test rose out of. Bassinger, what the court didn't get to simply said that this test was overruled because it dealt with applicants and we're not going to hold it to applicants. That's why Bassinger was overruled. What they didn't get to in Bassinger to overrule ironically was one of the questions of a reasonable time. To me, it's also based on an affirmative act by an employer. Bassinger actually took a preemployment physical with a nurse with an evaluation signed off by the employer as to pain, symptoms, and function and performed her job until she got hurt. They didn't discuss that in that case because they didn't get to that point. But second of all, what this is really going to be doing, there's 12 other states that have this test. They adopted it per se. But there's only a handful of decisions in those states that deal with how many times this comes up. South Carolina is the one prominent one that I found that when they did it, one of the...a lot of the exceptions comes out to, what do these terms mean? In my opinion, already today we have a willful negligence standard in 48-102, 48-109, 48-127, and 48-151. It tells you what "careless" means. It tells you what "knowingly" and "willful" means. It also tells you what a "deliberate act" means and whether or not it's a causal connection. We already have that on the books. Ironically, this...they use that standard in a misrepresentation case in November 2014 at the trial court level in the case with Fleck. And in that particular case, yeah, the judge used it in that case based on the willful negligence standard. What this statute, if enacted, in and of itself as it's separate from 48-102, it will be a fishing expedition. And when I've gone over several of these things of what it means to me, when I have represented over 1,000 people in the last 20 years, first of all, number one, what's a false representation? They don't define what that is. They certainly go on to say a "physical or medical condition." Is that something that someone treated for a body part but healed? Is it something they had temporary restrictions that they must

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disclose but healed and got back to work? Did they have a fusion but yet passed a physical employment test and worked for two years, does that play a part? Several things that I have come up with, number one, is affirmative act by an employer. You're going to have cases, I can guarantee you, where somebody may have misrepresented not knowingly or wilfully. But that's what it appears to be. And they didn't say they had a back injury but yet in a medical record some years before, it's listed. Does this mean it's a permanent injury, a temporary injury, or just a mild one where they have a strain, go to the nurse in a health office in another employer setting? The second one is, is a reasonable time. There's several people that work for six months, a year, two years, three years then move on to a new employer. What if that employer comes back three years later and says we think it is causally connected and they produce a medical opinion saying such? But they passed a preemployment physical. They did the job for three years. Is that going to be entailed by this? I believe it will with this language. Is it the same body part? If they had a permanent injury to a shoulder yet somehow because they couldn't function with their shoulder in some manner that that would be applicable to another body part. To me, another big issue is they should limit it to a permanent injury if this is going to be passed because we're dealing with permanent injuries that will affect something down the road, nothing other than a permanent injury. And if it is, it should be a continuing source of a disability proved up with the burden of proof by an employer. We don't have that in this particular legislation. Second of all, we don't...Bassinger, what the Supreme Court said is we're to protect the very thing the employer was attempting to protect itself from. By this, this is opening up to several things of, did you give me all your doctors? Did you give me all the body parts? Did you get paid for a prior injury? Ironically the Second Injury Fund was repealed by the Nebraska Supreme Court in the last 20 years. That very thing dealt with a second injury coming to an employer. And it promoted the encouraged hiring of disabled injured workers. That's the goal. Otherwise what this will do will be a fishing expedition to discourage people from trying to find work. The second thing is an employer is already protected by apportionment. For schedule member injuries to necks or backs, they're only liable for the percent of the disability or impairment that is attributable to their accident. This isn't an extra cost. And the reason Nebraska also didn't in Bassinger adopt this misrepresentation test and the Larson test is because it doesn't stop the fact that they still worked. They worked. They're entitled to coverage. But the second part is someone in Nebraska is going to pay for this injury, the medical and disability. And that someone is going to be Medicaid, Medicare, health insurance, or a bankrupt employee who files bankruptcy and a provider doesn't paid. That's the effect of it. [LB158]

SENATOR HARR: Thank you, Mr. Bennett. You have the red light, sorry. Any...Senator Chambers. [LB158]

SENATOR CHAMBERS: If I understand correctly, Bassinger was the case that overruled an earlier case. And my old brain cells are starting to click in. Just about that time, there was a spread done in a popular magazine about Kim Basinger when she was younger. And I think

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somebody asked during the proceedings, this doesn't involve Kim Basinger? And all those old guys thought back to that Basinger and they said, oh, no. We can't find this person guilty. But here's what I'm going to get to in all seriousness. Senator Crawford made a good point. This would be a way to open the door to some ongoing and even serious litigation where there's not supposed to be any at all if this bill were put in place, couldn't it? [LB158]

TODD BENNETT: Correct. [LB158]

SENATOR CHAMBERS: And it would, in fact. Okay. [LB158]

TODD BENNETT: Absolutely. And I think his words were "go fish," and it will be. [LB158]

SENATOR CHAMBERS: Right. [LB158]

TODD BENNETT: Yeah. Thank you. [LB158]

SENATOR HARR: Any other questions? Seeing none, thank you, Mr. Bennett. Mr. Howard, welcome back. [LB158]

STEVE HOWARD: Thank you. Steve Howard, H-o-w-a-r-d, counsel to the State AFL-CIO. And I won't repeat everything that my friend Mr. Bennett said. I would say that State AFL-CIO is not in favor of dishonesty at the time of hire. That's not at all what the opposition is based on. The employer should be honest as well. And the physical demands of the job and what's going to be required of this potential candidate, that requires a measure of honesty. And where we see this issue come up a lot on the flip side is, does the employer have work that can accommodate an employee, is when permanent restrictions and limitations come along. And an employer, you know, not so much the employers of membership, but nonunion members will have an employer say we've got this job back for you. And you won't have to lift more than that 25 pounds your doctor says. And it turns out that after a couple of days that's pushed up to 30 and then it's 40. And then, you know, if that person gets hurt again or they get an exacerbation of their injury, there's no additional compensation. Senator Crawford, I would pick up on something that you mentioned. One of the judges of the Workers' Compensation Court came in and testified on a bill within the past several sessions. And he said if you pass this legislation, my court will be flooded with lawyers coming in to test this, and it will be ten years before the Supreme Court tells us what it really means. And I sit here and I would predict for you that the proponents of the bill would...the insurance companies would wind up paying more in litigation than they would ever save based on the merits of the bill because the concept and the defense of a preexisting condition is alive and well in the courts of Nebraska, in the Workers' Compensation Court.

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Everyone in this room that's over 40, 45 years old has degenerative changes going on in their spine. And that means dehydration of those disks. And it's DDD, degenerative disk disease. It's found on autopsy, folks that die in their 80s and 90s that had no spinal pain at all. And that's a preexisting condition. And that's a defense that we encounter on a regular basis. So the notion that this is somehow going to capture these dishonest employees, the preexisting condition defense is already out there. And the way that it will lead to more litigation is it will be based on that question of just at what point following the on-the-job injury is the condition somehow related, causally related, causal connection, back to the condition that was there at the time of hire? Is it six months in or is it a year in? And we'll be litigating over these issues. So we encourage this committee to not move LB158 out of committee. I'm happy to answer any other questions there may be. [LB158]

SENATOR HARR: Any questions for Mr. Howard? Seeing none, thank you for your time this afternoon. [LB158]

STEVE HOWARD: Thank you. [LB158]

SENATOR HARR: Any other opponents? [LB158]

DARCY TROMANHAUSER: (Exhibit 2) Good afternoon. My name is Darcy Tromanhauser. I'm a program director at Nebraska Appleseed, a nonprofit, nonpartisan organization dedicated to justice and opportunity for all Nebraskans. And I'm here to testify today to also respectfully express our opposition to LB158. I'll bring it back to the overarching point that you've heard a couple of times now, that it's in everyone's best interest to ensure that a Nebraskan injured on the job can access treatment to recover and get back to work. And while we see the three points that are required in this bill, we are still concerned that it creates an overly broad defense for employers against providing compensation and medical treatment. And that will have a harmful impact on workers. I think a lot of the scenarios that we had come up with have been previously covered by other testifiers. The other point that I would make is that in our extensive work in the area of meatpacking safety, that's led us to talk with hundreds of workers across the state in meatpacking and food processing industries. And one thing we hear repeatedly from workers is that employers regularly reject applicants with any indication of a previous injury or workers' comp claims in the past. So even if they're applying for a new job that they're recovered from the past injury and they're applying for a job that doesn't require the use of that, you know, past injury, that if you show any indication of an injury just on a practical level, people are not finding new employment. So just as another issue that intersects with all of that...with all of this, that's something that we see. And I think the other points that were made about how this will then bring up additional questions, miscommunications, and delays for people receiving workers'

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comp and support and getting them back to work, that's our other concern as well. So I'll stop there unless there are any additional questions. [LB158]

SENATOR HARR: Thank you, Ms. Tromanhauser. Any questions? Seeing none, thank you very much for coming in. [LB158]

DARCY TROMANHAUSER: Thank you. [LB158]

SENATOR HARR: Any other opponents? Anyone in the neutral capacity? Senator McCollister. As he makes his way up, I think we have letters for the record. Mr. Wyatt. [LB158]

JAMISON WYATT: (Exhibits 3, 4, and 5) I have a letter of support from Kelly Thompson with the Nebraska Chapter of the Utility Contractors Association; I have a letter of support from Bruce Rieker and Elisabeth Hurst with the Nebraska Hospital Association; and I also have a letter of support from Korby Gilbertson representing Property Casualty Insurers Association. [LB158]

SENATOR HARR: Thank you. Senator McCollister, the floor is yours. [LB158]

SENATOR MCCOLLISTER: Thank you, sir, and I'm grateful to you, Mr. Chairman and the committee. We have to ask ourselves, what is the value then of these applications? Should you answer truthfully or not? And I believe it is an important thing. What you end up with is people in the wrong jobs. And people in the wrong jobs get hurt. They cost the company money. That's the reason we have this and that's the reason that this statute should be enacted. I recognize the difficulty of laws of this sort. Causal connection, misrepresentation, materiality are all legal terms. And it comes down to a lawyer's Disney World. But the...that's the responsibility of the court and that's the responsibility of the legal system. Senator Crawford asked the question, well, if workers' comp is for the employers and there's really no cost to the employer. That's not true because I know during my time in private business we were very concerned about our experience mod and the surcharges they would apply with me, with our company. So we were sure that we hired the right people and that the claims folks submitted were accurate and fair. So, yeah, workers' compensation is an important benefit that workers receive and protection they should receive. But it's also an expensive proposition for companies and society in general. [LB158]

SENATOR HARR: Thank you. Any questions for Senator McCollister? I have a question. So I have bad knees. And if I injure my knee, if I have a job that requires me to lift objects and I don't tell, I knowingly, recklessly lie, I have no problem with that. But again, if my job doesn't require that or it's not listed in the...are we...what employee limit...or requires, is that limited to the job

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qualifications spelled out? Or is it again, I have bad knees, I injure my knees not related to the job requirement? [LB158]

SENATOR McCOLLISTER: Well, I don't think you'd probably receive benefits if they couldn't figure that injury is related to some kind of job injury, if you...if it wasn't a lifting kind of thing. If the employer asked the question and you told them that you had an injury and then you went through a preemployment physical. [LB158]

SENATOR HARR: Yeah, okay. So let me give you another example. I have bad knees. I don't tell. I'm walking in the hallway. I slip and fall, injure my knee, you know. Or better yet, I trip over a cord like Senator Hadley did, Speaker Hadley did a couple years ago. He had work comp pay for that injury. Would I as a state senator have to report all my injuries prior to, to get work comp? [LB158]

SENATOR McCOLLISTER: That's a question for the court, but I would guess they'd pay. You know, if the injury to your knee was rather casual not substantial, if you're able to walk and there was a cord across the floor, I would think that would be clear. [LB158]

SENATOR HARR: Okay. But you understand my question is how far can an employer ask and how much can they say I relied upon them? I mean, where is that limit? There has to be some duty on the employer to say, hey, here's what I relied upon. How do we determine that? Is that limited to job qualifications at the time of employment? Or is it some statement they made later? And do they have to fill out something that says I relied on my employee to be able to do X, Y, Z and that's why I hired them? Or do they get to come back later and say, no, I relied on it even though I didn't say it anywhere. [LB158]

SENATOR McCOLLISTER: I think probably just the egregious cases would be where you'd have a dispute between the employer and the insurance company and the employee. If it were absolutely clear, I'm sure that the employer wouldn't contest the benefit and the employee would receive the benefit. [LB158]

SENATOR HARR: Okay. [LB158]

SENATOR McCOLLISTER: It's a hard thing, a lot of gray areas, a lot of things at the margin on cases of this sort. [LB158]

SENATOR HARR: Thank you. I appreciate it. Senator Bloomfield. [LB158]

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SENATOR BLOOMFIELD: Thank you. Senator McCollister, I brought up earlier a time frame thing. Would you see maybe there should be a time frame in here, that if you did the job for five years or ten years without any problem, they shouldn't be able to fish back further than that? [LB158]

SENATOR MCCOLLISTER: Well, I'd probably answer the question the same way Senator Chambers kind of answered it when he said, you know, after that period of time you probably wouldn't have any basis for a claim. If that time period goes down to five years, you probably would have a better justification to receive benefits. [LB158]

SENATOR BLOOMFIELD: Do you see a reason to maybe put a time frame in your bill? Or would you object to putting a time frame in it? [LB158]

SENATOR MCCOLLISTER: I'd say, you know, depending upon the medical condition that the time periods would be different. In the example you used, back example, you know 20 years would be too long a period of time. But you know, if I...I broke my elbow. And if I were to be injured I think that would be clearly a work comp-related related injury, even though I broke my elbow 40 years ago. It's...the circumstances of each case will dictate how the results should be. [LB158]

SENATOR BLOOMFIELD: Okay. Thank you. [LB158]

SENATOR HARR: Any other questions? Seeing none, thank you. Appreciate it. Next up is LB600. Senator Ebke. [LB158]

SENATOR EBKE: Thank you, Chairman Harr and members of the Business and Labor Committee. This is the least interesting of the workmen's compensation bills for today it appears. (Laughter) For the record, my name is Laura Ebke; that's E-b-k-e. I'm presenting LB600 today. Thanks for being here. LB600 was brought to me by Nebraskans for Workers' Compensation Equity and Fairness, so we will get to hear from Mr. Stilmock again. LB600 deals with Workers' Compensation Act. Under the act, self-insured employers are required to meet specified financial security requirements to ensure adequate funds are available to pay claims in the event the self-insured employer becomes insolvent. Self-insured employers may satisfy the financial security requirements one of two ways: either by acquiring a security bond or by establishing an irrevocable workers' compensation trust agreement. These self-insured employers electing to establish a trust to satisfy financial security requirements are limited in their investments. These investments have to be either obligations of the United States or its agencies or which are federally insured. For example, some of these would be United States government bonds, certificates of deposit insured by the FDIC or FSLIC, or repurchase agreements collateralized by

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United States government bonds. So here's a little bit more background on the Workers' Compensation Act pertaining to this issue. The two security requirement methods, either security bond or an irrevocable workers' compensation trust agreement, are established in Rule 73 of the Nebraska Workers' Compensation Court. Rule 73 governs the methods by which the court establishes the amount of financial security that's required. I understand that this is an annual process by which the court reviews the loss picture of the self-insured and determines whether the amount secured by bond or held in a trust would be adequate to pay claims if the self-insured were unable to satisfy these obligations. Depending on the loss picture, the self-insured can be required to adjust the level of security required on an annual basis. I want to mention again that currently the Workers' Compensation Court will not approve a trust unless it contains a clause limiting its investment capability to vehicles, quote, which are obligations of the United States or its agencies which are federally insured. What LB600 attempts to do is simply expand that limitation. Requests have been made with the Workers' Compensation Court to broaden the investment authority, but the court has indicated that it will only broaden the investment authority if there is a change to Nebraska Revised Statute 48-145 which directs them to do so. LB600 would simply expand the authority to invest funds held in an irrevocable workers' compensation trust to allow for investments in the same manner that insurers are allowed to invest funds reserved to pay claims under the Insurers Investment Act. In other words, LB600 authorizes trust funds under the Workers' Compensation Act to be treated and authorized in the same manner as the Insurers Investment Act. Again, I bring this bill forward on behalf of the Nebraskans for Workers' Compensation Fairness and Equity. They have at least one or two people here to testify and will probably be able to explain some of the legal ramifications better than I can again and provide you with a little bit more history. Before turning this over to them though and trying to take your questions, I want to mention AM561, which I hope you have. Okay. AM561 is an amendment that's been provided to the committee. It came up after discussions with representatives from the Department of Insurance, the administrator of the Workers' Compensation Court as well as the other interested parties. They had questions regarding the potential need for additional supervision and administration of these self-insured funds. AM561 addresses that, and I know one of the testifiers coming up intends to address that amendment specifically. So if you have any questions, I will try to answer them. Otherwise, I'm sure that those who follow behind me will be better situated to do so. [LB600]

SENATOR HARR: Thank you, Senator Ebke. Any questions for the fine senator? Seeing none, thank you. Any proponents on LB600? [LB600]

CURTIS RUWE: Good afternoon. My name is Curtis Ruwe; it's C-u-r-t-i-s R-u-w-e, and I am the corporate general counsel for Crete Carrier Corporation. And we are one of the Nebraska self-insureds who funds an irrevocable trust agreement. And, Senator Harr, one question I have before I get started here, I have copies for the committee of the amendment. Does the committee already have the amendment? Okay. [LB600]

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SENATOR HARR: Yes. [LB600]

CURTIS RUWE: Then we don't need to pass it out. Given the limited time I have, the one thing I want to make very clear about what we're talking about here under the Nebraska workers' comp statutory structure is as a self-insured, we pay the majority of our Nebraska workers' comp claims out of the operational budget of Crete Carrier Corporation. The claims are not paid by the trust that we're discussing. The trust exists as a backstop in the instance that a self-insured goes insolvent or goes out of business. So we reserve our claims. The trust is based on the amount of reserves we would need, the estimated amount of reserves that would be necessary to pay claims. We also as a matter of our operations reserve that same money in our operational budget. Therefore, this trust is really what I would call shadow reserves. It's a second...it's basically a full second reserving of our claims. Now that grows over the years or it decreases over the years as the Workers' Comp Court engages in its annual review process. We're transparent in terms of what is in the trust. The court reviews that on a quarterly basis. Under our current trust agreement, there really isn't any reason we, once we've funded the trust to the amount they require, that we'd fall below it. But in the instance we did, the Workers' Comp Court would tell us, get that trust funded again or you could lose your status as a self-insured in which case we would have to go through the process of getting insurance and purchasing insurance on the open market. So what we're talking about is not the funds that are available to pay claims. These are secondly, essentially shadow reserves. And so what is being asked for here? What's being requested is essentially the ability to invest that money the same way an insurer has the freedom to invest their reserves. Now, as proposed, LB600 tied the investment authority to the Insurers Investment Act. That was intuitive in the sense that it seems like insurance money. If insurers can invest their reserves a certain way, self-insurers should be able to do the same. After discussing that with the Workers' Compensation Court and the Department of Insurance, there were some administrative difficulties associated with who would oversee those investments. Would the Department of Insurance have to become involved given the language of the Insurers Investment Act? Ultimately after some discussion between the Compensation Court, the Department of Insurance, myself, and a few others, the amendment, AM561, was essentially agreed to as a good compromise between the people who were discussing it. And essentially what that does is it ties the investment authority to Nebraska Statute 30-3209, which governs the investment authority of corporate trustees holding retirement or pension funds for certain government employees. And what that statute has is a laundry list of nine acceptable investments. And in discussing this with Mr. Morton from the Workers' Compensation Court, my understanding is that they are of the belief that that's something that they can oversee. The Department of Insurance will not need to be involved with that oversight. We can kind of continue on as business as usual. We will continue to submit quarterly statements. They will continue to review on an annual basis the amount of assets necessary to fund the trust. And so that's where we're at. We're just looking for that additional investment authority. [LB600]

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SENATOR HARR: Thank you. Any questions? Senator Chambers. [LB600]

SENATOR CHAMBERS: You want to invest that way because you'll get a bigger return on your money. [LB600]

CURTIS RUWE: That's correct. [LB600]

SENATOR CHAMBERS: And there's more risk obviously. [LB600]

CURTIS RUWE: There... [LB600]

SENATOR CHAMBERS: The bigger the return, the bigger the risk. [LB600]

CURTIS RUWE: There is more risk in the investment, and we accept that if we end up on the wrong side of that risk, the Comp Court will tell us to get on the right side of that risk. [LB600]

SENATOR CHAMBERS: And if you have to put more assets into...well, tell me how you would...if you drop below a certain level, tell me what you would be required to do in order to continue investing in that fashion. [LB600]

CURTIS RUWE: The company would be required to invest additional capital into the trust to bring it to a level acceptable by the Workers' Compensation Court. And if it did not, the Workers' Compensation Court would revoke the self-insured status. [LB600]

SENATOR CHAMBERS: Who is going to make sure that you have adequate additional capital to bring this up to where it should be? Nobody is...in other words, they're just going to look at the fund and the amount you have in it based on what you might have to pay out. But they're not going to look over here to make sure you've got capital in case this goes below a certain amount to replenish or refresh the fund with. They're not going to do that, too, are they? [LB600]

CURTIS RUWE: In terms of reviewing, for example, the operational budget of Crete Carrier on a quarterly basis, no. They would be reviewing the trust fund. [LB600]

SENATOR CHAMBERS: So you could lose everything before they even become aware that you're below what you need to be, couldn't you? They've been doing a lot of speculating on the bills today on things that could happen. And that's why we need to do it. So that could happen, couldn't it? [LB600]

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CURTIS RUWE: Given the nature of the investments that are in 30-3209 and the relative...they're reasonably conservative investments, if a business was to quickly go insolvent, it's my belief that those conservative investments are designed to make sure that what you're discussing doesn't happen. None of these investment are bet-the-company-type investments that would just make the trust, poof, go away. [LB600]

SENATOR CHAMBERS: You know, I wish that I had been aware of what this bill was before I came here today because I read something at the time that banks were doing a lot of bad things, in addition to recently when some Swiss banks had to pay a whole lot of money because things were going on and they claimed they didn't know. But one young guy had lost several billions of dollars just like that because he's betting on some German...betting on something that he shouldn't have. Now that was a high-powered banking enterprise or institution. And you would imagine that there was enough oversight so something couldn't happen where billions could go, poof. So give me an idea of the types of investments that would be made by this fund. [LB600]

CURTIS RUWE: Well, the... [LB600]

SENATOR CHAMBERS: I don't mean you have to detail one, two, three, four. [LB600]

CURTIS RUWE: No, I understand. [LB600]

SENATOR CHAMBERS: Just the types. [LB600]

CURTIS RUWE: And Section 30-3209 has a laundry list of nine things you can invest in. [LB600]

SENATOR CHAMBERS: Oh, okay. [LB600]

CURTIS RUWE: And essentially...and it's the same thing that government employees' pension benefits are invested in under Nebraska's statutory scheme. And some percentage of it can be invested in certain grade of stocks. [LB600]

SENATOR CHAMBERS: Could they invest in any...? [LB600]

CURTIS RUWE: You can't invest in DDD tranches of collateralized home mortgages. [LB600]

SENATOR CHAMBERS: Okay. [LB600]

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CURTIS RUWE: Yeah, you can't...that's not...the statute...we understand the need to tie the investments to a structure that will make sure that the money is there because the money is there for the claimants. It is not there for the self-insured. And so the goal...but we also have to increase our contributions from time to time. And a broader yet still conservative investment structure would allow for that fund to grow. And foreseeably, if handled correctly--and these are done by corporate trustees, not by the self-insureds themselves--you would end up with more money for claimants than less. [LB600]

SENATOR CHAMBERS: The reason I'm asking you these questions, first of all, you are in a business that self-insures so you would know the answers. And none of them are designed to be trick questions, but just to get into the record what it is we're being given by way of information if we should decide to pass this bill or at least advance it to the floor. Have the people, the state...what are the two state entities that looked at this: the Department of Insurance and those connected with the Workers' Comp Court? [LB600]

CURTIS RUWE: The administrator of the Workers' Compensation Court, and the Workers' Compensation Court currently oversees the trust. [LB600]

SENATOR CHAMBERS: And they have confidence that what is being recommended by this bill can feasibly be done and the responsibilities that the Workers' Comp Court has or the administrator, to be sure that things are being done in the way they should, those people are satisfied that this will work? [LB600]

CURTIS RUWE: That's my understanding. Mr. Morton from the Workers' Compensation Court is here... [LB600]

SENATOR CHAMBERS: Oh, okay. [LB600]

CURTIS RUWE: ...and I believe he will testify. So I'll let him speak for them, but that's my understanding. [LB600]

SENATOR CHAMBERS: That's all I would have then. You've been very helpful to me. [LB600]

CURTIS RUWE: Thank you. [LB600]

SENATOR HARR: Senator McCollister. [LB600]

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SENATOR McCOLLISTER: Yeah, thank you, Mr. Chairman. How many employees do you have? [LB600]

CURTIS RUWE: We have approximately 6,000. [LB600]

SENATOR McCOLLISTER: Six thousand employees. And how many employees do you hire a year? [LB600]

CURTIS RUWE: Approximately 2,400. [LB600]

SENATOR McCOLLISTER: 2,400. So a preemployment physical and an application is part of the process. [LB600]

CURTIS RUWE: Yeah, not only our own physical but the DOT-regulated physicals as well. [LB600]

SENATOR McCOLLISTER: And so a mismatch between an unhealthy individual, at least somebody with a bad back doing trucking business or kind of unloading, would be an expensive or could be a potentially expensive proposition for you. [LB600]

CURTIS RUWE: We deal with that issue. [LB600]

SENATOR McCOLLISTER: Okay. And would you say that the worker comp claims you have during the course of a year are fairly expensive? [LB600]

CURTIS RUWE: Workers' comp is a large risk for a business like ours, yes. [LB600]

SENATOR McCOLLISTER: So it's a good thing, it's a great program, but we need to be careful who we hire, isn't that correct? [LB600]

CURTIS RUWE: That's fair. [LB600]

SENATOR McCOLLISTER: Okay. Thank you, sir. [LB600]

SENATOR HARR: Any other questions? I have one question, and it's kind of a friendly amendment I'd put on there, and let me ask what your opinion is. You know, you're going to run

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into a situation where you fall below the cap and you're going to be allowed to invest. This wouldn't prevent you from investing in yourself, would it? You could invest in your own corporation. [LB600]

CURTIS RUWE: I actually don't know the answer. I actually think that 30-3209 may have some prohibitions against us investing in ourselves. [LB600]

SENATOR HARR: Okay. And if it doesn't because 30-3209 really applies to political subdivisions. And since they can't invest in themselves, I'm not sure if that prohibition would be in there. [LB600]

CURTIS RUWE: I think there... [LB600]

SENATOR HARR: Would you object if we put a prohibition in there against you investing in yourself? [LB600]

CURTIS RUWE: I think that's fair. [LB600]

SENATOR HARR: Okay. That's all I wanted. Thank you very much. I appreciate it. Any other proponents on LB600? [LB600]

JERRY STILMOCK: (Exhibit 1) Senator Harr, members of the committee, my name is Jerry Stilmock, J-e-r-r-y, Stilmock, S-t-i-l-m-o-c-k, testifying on behalf of Nebraskans for Workers' Compensation Equity and Fairness and the Nebraska Federation of Independent Business. And I've been requested to add also Nebraska Chamber of Commerce and Industry all in a support position for LB600. First of all, thank you. I neglected that the first time. Senator, thank you for introducing the measure, Senator Ebke. The amendment basically becomes the bill. And as you've heard from Mr. Ruwe as well as Senator Ebke who explained the purposes, we're really just...I think after listening to the Department of Insurance leading up to today, the Department of Insurance, Workers' Compensation Court administrator, was to locate an area in the law that already had safeguards. And that's how 30-3209 came into play. It looked at by those interested in LB600, that it was safe. It was time tested by the Legislature. It was put in place to protect, you know, the employees, present and former, of the political subdivisions in which this statute was pulled. So for the reasons that the senator has given and Mr. Ruwe has given, we'd ask you to consider advancement of LB600. Senator Harr, there are some measures down through items 8 and 9 that speak in terms of investments in a corporation, that there's percentages that are limited. You can only have so much in your trust portfolio that would be applicable if we lifted this 30-3209 over. And I believe you're correct. They do not limit self-investment for the reason

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that you gave. And I think that would be an amendment that would be satisfactory as well, sir. Thank you for thinking of that because it's all in the arena of political subdivisions, the issue you raised. Thank you. [LB600]

SENATOR HARR: Thank you. Any questions for Mr. Stilmock? Seeing none, thank you and thank you for the words. [LB600]

JERRY STILMOCK: Thank you, Senators. Yes. [LB600]

SENATOR HARR: Appreciate it. Anyone else, proponents? Anyone in the neutral...opponents? Anyone in the neutral capacity? Mr. Morton. Do we have any letters while he's walking? No letters. [LB600]

GLENN MORTON: Senator Harr, members of the committee, my name is Glenn Morton; that's M-o-r-t-o-n. I'm administrator of the Nebraska Workers' Compensation Court here today neutrally, of course. I will be happy to answer any questions. I can say though that I'm comfortable with the amendment AM561 that's been proposed. It's been worked out. We've discussed it extensively. It is probably the most boring bill that you have today, but typically it's not unusual for the court to be most concerned about the boring bills. So we did have some concerns, and I'll briefly cover those in the vein of explaining why we think the amendment would address those. The primary concern is that because it's a...the court, as Senator Ebke said in her introduction, has a very specific rule about how we establish the security of self-insured employers. That basically establishes the minimum amount of security in case the self-insurer should not be able to pay its liabilities. That security, that minimum amount can be, as also Senator Ebke said, covered by a security bond or be covered by an irrevocable trust. Security bond amounts doesn't change. The trust amounts can change based upon because they're invested. Security bonds, surety bonds are not invested, of course. And because of that, the trust agreement form that the court currently uses is for all self-insureds--well, at least for those who have trusts...have very limited sorts of investments that can be made, very conservative sorts of investments, which Senator Ebke mentioned. The concern, of course, is that if you allow more volatile, if you would, investments then how do you make sure that there's the minimum amount of security that's allowed? That's the concern. AM561 would do that by requiring that any time the balance falls below the minimum trust required by the court, the trust or self-insurer would have to kick in more trust assets. This...I think that would satisfy the primary concern that we have there. It was also mentioned that there is a...well, another point that I would make here that I think has been very critical that isn't really obvious is that these investments for this trust are not made by the self-insurer. They're made by the trustee. Now I'm...there are extensive statutes that govern the responsibilities of the trustee as a fiduciary. And there's also an investment act, prudent investor rule I think it's called, in the statutes that limits and governs the kind of

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investments a trustee can make and how they have to make those investments. So that's of major significance to me as the court administrator because there are requirements for the trustee, and investments are not made by the self-insured. They're made by that trustee. Now beyond that, there were some, if you would, kind of more technical concerns about the references to the Insurers Investment Act. That act is governed by the department...is regulated by the Department of Insurance. Their responsibilities relate to insurance companies. They don't deal with self-insured employers. That's the responsibility of the court. So with this there were the questions about to what extent would they be involved in this bill, the department? That Insurers Investment Act is very complex. It allows a long, wide range of investment types. And for those reasons we were concerned about that. And I think our concerns, my concerns in changing the reference from the Insurers Investment Act to this, statutes that deal with governing investments by...for government pensions, that satisfies that concern. Those investments are more limited under that act. They're not extremely risky investments. They're just expanding the ability though of the trustee. So that's my testimony. I'd be happy to answer any questions. [LB600]

SENATOR HARR: Thank you. Any questions? Senator Chambers. [LB600]

SENATOR CHAMBERS: Mr. Morton, to this scheme do you pledge your life, your fortune, and your sacred honor? [LB600]

GLENN MORTON: No, sir, I don't. (Laughter) What I do pledge is that in my best judgment and as the administrator of the court, that I think this is workable and appropriate. [LB600]

SENATOR CHAMBERS: Had you answered yes, it would have been over. (Laughter) Thank you. I don't have any questions. [LB600]

SENATOR HARR: Any other questions for Mr. Morton? I have a couple questions. [LB600]

GLENN MORTON: Yes. [LB600]

SENATOR HARR: How many self-insured companies are there in Nebraska? [LB600]

GLENN MORTON: It varies slightly year by year, but last year it was 41. [LB600]

SENATOR HARR: 41. [LB600]

GLENN MORTON: And three have trust agreements. [LB600]

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SENATOR HARR: And how many employees do you have currently overseeing these self-insurance policies or plans? [LB600]

GLENN MORTON: We have one CPA auditor who monitors the financial reports quarterly and every year annually and so on. That person is supervised by a manager that also is very...is knowledgeable and works with this, and support staff. But it's basically one person. [LB600]

SENATOR HARR: Okay. So we're now increasing the band of investment or what they can invest in. There's no fiscal note on it now. [LB600]

GLENN MORTON: Right. [LB600]

SENATOR HARR: Do you foresee a larger oversight role and, therefore, more employees and, therefore, a fiscal note? [LB600]

GLENN MORTON: The answer is no again, because of the trustee involvement. [LB600]

SENATOR HARR: Okay. [LB600]

GLENN MORTON: Where we have again, in my best judgment as the court administrator, believe that we can rely upon the obligations of the trustee as established by statute to do that. [LB600]

SENATOR HARR: Okay. These trustees are appointed by the work comp or by the funds? [LB600]

GLENN MORTON: The trustees are identified in the trust agreement. And we have to approve the trust agreement and we have to approve who the trustee is as part of that agreement. It's generally a bank. [LB600]

SENATOR HARR: Okay. And every change, you have to approve any change in trustee. [LB600]

GLENN MORTON: Any change in the trust, any change at all, we have to amend the trust agreement...approve it. [LB600]

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SENATOR HARR: Okay. And how much money are we talking involved in these investments across these 41 plans? [LB600]

GLENN MORTON: There are investments only related to three of those plans, which are the only three that have trust agreements. All the rest of them have security bonds. [LB600]

SENATOR HARR: Okay. And how much money is that? [LB600]

GLENN MORTON: I don't know. I can't testify...without going back and checking with our staff, I don't know. [LB600]

SENATOR HARR: Can you ballpark? My concern is are we dealing with \$40 million or are we dealing \$400 million? [LB600]

GLENN MORTON: We're not dealing with \$400 million. But I can't...again, in good conscience I can't tell you without going back and having the person who handles this tell me what kind of trust amounts we require for each trust. But it's not \$400 million. But it could be in the \$1 million or \$2 million range, yes. [LB600]

SENATOR HARR: Okay. Is it possible to get that information for us? [LB600]

GLENN MORTON: Yes, certainly I can do that. [LB600]

SENATOR HARR: Is that public? [LB600]

GLENN MORTON: Yes, it would be. [LB600]

SENATOR HARR: Okay. [LB600]

GLENN MORTON: Well, I'll have to check on that, quite frankly. [LB600]

SENATOR HARR: Okay. [LB600]

GLENN MORTON: I think it probably is, but there are some rules about what sort of information provided by self-insurers are confidential. [LB600]

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SENATOR HARR: Okay. And I'm not trying to get into...I don't want to give away proprietary information, but I do want to know how much money we're dealing... [LB600]

GLENN MORTON: We can tell you that for sure. [LB600]

SENATOR HARR: Ballpark is fine. Yeah, okay. [LB600]

GLENN MORTON: I'll get that. Okay. Yeah, we'll get that to you. [LB600]

SENATOR HARR: Thank you. I appreciate it. Senator McCollister. [LB600]

SENATOR McCOLLISTER: These funds, or the investment trusts, are they required to provide audited statements? [LB600]

GLENN MORTON: They are. We get quarterly statements from them, yes. Now I'd have to go back and look at the rules to find out whether they have to be audited or not. [LB600]

SENATOR McCOLLISTER: But that would be another level of confidence, if you did have an audited statement. [LB600]

GLENN MORTON: Yeah, we could. Now I think it's important to distinguish between the financial stability to be self-insured in the first place. Now that we monitor regularly, we monitor on a quarterly...we monitor the financials on a quarterly basis. And I think, as I recall, there is an option of providing an audited statement or some other options under our rules. But that's the basic oversight of their financial ability to be self-insured to start with, to pay their claims rather than having them insured through an insurance company. That's a different question than what we're talking about now which is simply what kind of security do we require to back it up in case. And we work very, very hard to make sure that we catch any sort of weakness in a financial position before it gets to the point where there's a bankruptcy or anything of that nature. I can tell you we do. That's why we approve them annually. If we see any sort of weakness, then we might not even approve a full year. We might even approve self-insurance for a quarter until we see the next financial statements. So we monitor all of that very closely, which became kind of interesting back when the recession was going on and we had some very big companies that were on shaky grounds. So again, we watch that very closely. But that's not what we're talking about here. We're talking about the amount of security that they have to cover and how they cover that. [LB600]

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SENATOR McCOLLISTER: So would the financial exposure where the amount of the assets, your organization would know that if those two things would occur? [LB600]

GLENN MORTON: Those two things, meaning if the trust fund fell below what the security was? Yes, we would know that. [LB600]

SENATOR McCOLLISTER: Or whether the exposure increased substantially. [LB600]

GLENN MORTON: Exposure in what sense? [LB600]

SENATOR McCOLLISTER: The workers' comp exposure or the number of employees, things like that. [LB600]

GLENN MORTON: Oh, yes. Oh, yeah. We monitor the claims of those self-insurers as a key part of our monitoring, whether their security is sufficient and whether they're strong enough to remain self-insured, yes. [LB600]

SENATOR McCOLLISTER: Thank you, sir. [LB600]

SENATOR HARR: Any others? Senator Johnson. [LB600]

SENATOR JOHNSON: Where Crete Carrier managed theirs out of their operating budget, so they don't use the trust as such. [LB600]

GLENN MORTON: The trust has nothing to do with paying their claims, as mentioned. It's... [LB600]

SENATOR JOHNSON: So they have to give you part of their operating statement then in order to quantify that. [LB600]

GLENN MORTON: Exactly, yeah. We need to know what their claims are, what their financial picture is, etcetera, etcetera, etcetera, as part of deciding whether they're handling themselves appropriately. [LB600]

SENATOR JOHNSON: Okay. Thank you. [LB600]

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SENATOR HARR: Excellent. Well, thank you for being here today and answering all these questions. [LB600]

GLENN MORTON: Thank you. [LB600]

SENATOR HARR: I believe that's all the questions we have. Senator Ebke, do you want to...? Anyone else in the neutral? Do we have more neutral? She waives closing and we are done. Thank you. [LB600]