MINUTES OF THE
SENATE COMMITTEE ON COMMERCE AND LABOR

Seventy-third Session
April 28, 2005

The Senate Committee on Commerce and Labor was called to order by Chair Randolph J. Townsend at 8:33 a.m. on Thursday, April 28, 2005, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4406, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Randolph J. Townsend, Chair
Senator Warren B. Hardy II, Vice Chair
Senator Sandra J. Tiffany
Senator Joe Heck
Senator Michael Schneider
Senator Maggie Carlton
Senator John Lee

GUEST LEGISLATORS PRESENT:

Senator Mark E. Amodei, Capital Senatorial District
Assemblyman Jerry D. Claborn, Assembly District No. 19
Assemblyman John Oceguera, Assembly District No. 16
Assemblyman David R. Parks, Assembly District No. 41

STAFF MEMBERS PRESENT:

Kevin Powers, Committee Counsel
Jeanine Wittenberg, Committee Wittenberg
Scott Young, Committee Policy Analyst
Jane Tetherton, Committee Secretary

OTHERS PRESENT:

John (Jack) E. Jeffrey, Southern Nevada Building and Construction Trades

Robert A. Ostrovsky, Employers Insurance Company of Nevada, A Mutual Company
John F. Wiles, Division Counsel, Division of Industrial Relations, Department of Business and Industry
Nancyann Leeder, Nevada Attorney for Injured Workers, Department of Business and Industry
Don Jayne, Nevada Self Insurers Association
James Jackson
Laura Fitzsimmons
Tami Campa Close
Collins Butler
Gail J. Anderson, Administrator, Real Estate Division, Department of Business and Industry
Ruedy Edgington, Assistant Director, Engineering Division, Nevada Department of Transportation
Madelyn Shipman, Nevada District Attorney's Association
A. Stanyan Peck, Chief Legal Counsel, Regional Transportation Commission of Washoe County
Fred L. Hillerby, Appraisal Institute
Reese Perkins
Michael Cheshire
Steve G. Holloway, Associated General Contractors, Las Vegas Chapter
Gary Cooper, Chief Insurance Examiner, Division of Insurance, Department of Business and Industry
John P. Sande III, AON Risk Services

CHAIR TOWNSEND:
We will now hear discussions on Assembly Bill (A.B.) 254.

ASSEMBLY BILL 254 (1st Reprint): Revises provisions governing industrial insurance. (BDR 53-1080)

ASSEMBLYMAN JERRY D. CLABORN (Assembly District No. 19):
This bill was requested by Danny Thompson, Director of the American Federation of Labor-Congress of Industrial Organizations. It is an act relating to industrial insurance. It increases the maximum amount of certain fines and benefits penalties and expands the list of prohibited acts for which a benefit penalty may be imposed.

JOHN (JACK) E. JEFFREY (Southern Nevada Building and Construction Trades):
We have reached an agreement on this bill. It does increase the penalties by 50 percent, but I feel that A.B. 58, which was passed yesterday along with this provision, will help get a handle on third-party administrators.

ASSEMBLY BILL 58 (1st Reprint): Enacts various provisions relating to industrial insurance. (BDR 53-250)

SENATOR HARDY:
With regard to *Nevada Revised Statutes* (NRS) 616D.120, subsection 1, paragraph (h) and section 2, subsection 1, paragraph (h) of A.B. 254 where it reads, "Intentionally failed to comply with any provision of, or regulation adopted pursuant to, this chapter ... ," does it imply a major penalty will be imposed?

MR. JEFFREY:
No, it does not. The way the law is currently structured, if someone gets three fines, they lose their right to be self-insured. That provision was included so that violators would stand to lose their right to be self-insured. It might be an advantage to both parties to change the provision to a benefit penalty rather than a fine.

ROBERT A. OSTROVSKY (Employers Insurance Company of Nevada, A Mutual Company):
When the bill was originally drafted, it was divided into major and minor violations, and there were different penalties. One of the penalties is the ability to withdraw a person's certificate. The intentional violations that are noted in the aforementioned paragraph (h) are considered a minor violation if it did not apply to the regulation adopted pursuant to the chapter or the chapters. It was decided in the Assembly, and we agreed to change it to a major violation. We believe intentional acts should be punishable.

SENATOR HARDY:
What does, "intentionally failed to comply" mean?

JOHN F. WILES (Division Counsel, Division of Industrial Relations, Department of Business and Industry):
An intentional act would be something that was done knowingly.

SENATOR HARDY:
Is there a better term that can be used instead of "intentional"?

MR. WILES:
It would be more difficult in proving an ordinary violation, but it would be less difficult, than say, proving a willful Occupational Safety and Health Administration (OSHA) violation, which requires conscious disregard.

SENATOR HARDY:
I do not disagree with the intent, but maybe using a different term, such as "willfully" may be clearer to understand.

MR. OSTROVSKY:
There is a definition which I believe the Division of Industrial Relations (DIR) has adopted into regulation, and perhaps they could provide that to the Committee on what their interpretation of "intentional" means.

With regard to fines, there have been some arguments regarding the issue of increasing the fines as just a way to keep up with inflation. We tend to agree with the DIR that some strengthening of the bill would help get the violators out of the business.

SENATOR TIFFANY:
Could you explain the specific need for this bill?

ASSEMBLYMAN CLABORN:
We know of instances where a third-party administrator (TPA) is telling others in their industry that the way to handle these cases is to deny everything, because only half the people will appeal and only half will win, so they will only have to pay probably 25 percent of the claims filed. Those are the types of individuals we are after.

SENATOR TIFFANY:
Is it the intent of the DIR to go after individuals who are dragging their feet in accepting or paying a claim? Mr. Ostrovsky mentioned that the Legislature has traditionally taken the path of fining an individual. Was that what you meant, Mr. Ostrovsky?

MR. OSTROVSKY:
Yes. Bad-faith penalties were made permissible either in the 1993 or 1995 Legislative Session. The language was put into the bill to eliminate that issue from the courts which would allow a claimant to sue for bad faith. As far as which individuals will receive the fines or how they are issued, the DIR could probably best answer that question. Part of what Mr. Jeffrey said was that part of the reporting requirements that was passed in A.B. 58 will permit the next Legislative Session to get a better handle on what is really happening in the marketplace and what the market conduct is of the various insurers and self-insurers.

SENATOR TIFFANY:
What about putting in a provision for a license?

ASSEMBLYMAN CLABORN:
That was part of A.B. 58 that was passed. The bill was originally intended for licensing certain insurance adjusters.

SENATOR TIFFANY:
Just increasing fines does not seem to be helping the issue.

ASSEMBLYMAN CLABORN:
If the insurers have to pay those fines, those individuals who are responsible for the fines are not going to be with that insurer for very long.

SENATOR TIFFANY:
Where does the money collected for administrative fines and benefit penalties go?

ASSEMBLYMAN CLABORN:
The benefit penalty goes to the injured worker.

SENATOR TIFFANY:
Is that in addition to an administrative fine?

ASSEMBLYMAN CLABORN:
The DIR would have to answer that question.

SENATOR CARLTON:
Will this apply to all TPAs, whether or not they are employed by an independent group or a self-insured group?

MR. OSTROVSKY:
The provisions of the NRS 616D.120 allow fines to be imposed upon insurers, organizations for managed care, health-care providers, third-party administrators or employers. A TPA is defined somewhere else in the statute; they do receive a license from the Division of Insurance. Yes, all individuals, whether or not they are fully insured or self-insured, are subject to the provisions of that section of the law.

SENATOR CARLTON:
Most of the work I do as a shop steward either deals with health-care benefits or workers' compensation, and there are a number of claims that get denied. The fines may work as an incentive.

CHAIR TOWNSEND:
The Committee should be aware that Mr. Jeffrey, Mr. Thompson, Mr. Ostrovsky and I worked on an issue back in the 1991 or 1993 Legislative Session. We developed the concept of a benefit penalty; its purpose was to benefit the individual who was injured due to an insurer not abiding by the provisions of the law. Mr. Wiles, we have a number of questions regarding the DIR.

MR. WILES:
I have a handout on the proposed language regarding intentional violations (Exhibit C) that I will provide to the Committee for review.

SENATOR TIFFANY:
Can you clarify where the administrative or benefit fines go?

MR. WILES:
The fines go into the assessment pool that the DIR monitors. We are funded by a workers' compensation assessment, which you will find in the NRS 616A as the Fund for Workers' Compensation and Safety. All of the fines go back into that pool of money, which is a zero-fund balance. The money is returned to the insurers who pay that assessment after there is a true-up; then we assess for ongoing operations. It goes to reduce the assessment.

SENATOR TIFFANY:
Does it go the DIR's administrative overhead?

MR. WILES:
We are funded through assessments on workers' compensation insurers, so the answer is yes.

SENATOR TIFFANY:
In the bill, it states the money goes back to the claimant.

MR. WILES:
I would like to clarify. The benefit penalty is a separate mechanism that goes directly to the injured worker, which is in essence a bad-faith remedy substitute. It is the amount of money payable directly to the claimant.

SENATOR TIFFANY:
How does the DIR prove a TPA is intentionally holding up a claim?

MR. WILES:
The DIR does not necessarily have to prove that. What they have to prove is that a violation has occurred. If there is benefit-penalty, the DIR has to prove it on the condition precedent in the NRS 616C benefit-penalty statute regarding claim acceptance. There is also a remedy in that statute stipulating the insurer is supposed to accept and commence the payment of benefits or deny the claim within 30 days. The penalty in that particular situation is three times the normal penalty; so that is another enforcement mechanism.

SENATOR TIFFANY:
Does the DIR have to follow a process and the letter of the law in the form of a statute as opposed to what we have heard in this meeting about known TPAs and the company strategy which is to drag their feet when it comes to handling a claim?

MR. WILES:
With all due respect, Senator Tiffany, you are asking me a political question.

SENATOR TIFFANY:
No, the question was not of a political nature. What has been said in this meeting today is why we are all here. I think Assemblyman Claborn has a

legitimate concern that there are parties who chronically deny claims. I would like to know if that is true. If this bill is trying to address this issue, how does the DIR handle that type of problem?

MR. WILES:
That type of problem would be difficult to prove. There is a bill relating to a study on gathering data by the Appeals office through the Hearings Division of the Department of Administration and the DIR, which I think will give a clearer picture of the type of conduct we are dealing with, the number of claims that are denied and how many of those claims are overturned.

SENATOR TIFFANY:
So, the process is currently anecdotal, because there are no statistics. Is that correct?

MR. WILES:
There are no statistics right now. An anecdotal fix is the correct way to describe the issue.

CHAIR TOWNSEND:
The Committee needs to understand the behavior of the different types of groups. There are government self-insured programs, self-insured groups and individual-policy groups. Is there a trend in any of those groups that shows a tendency to deny claims more than any other group? Senator Tiffany's point is that we do not want to make policy based on anecdotal information. We need to find out if there are trends occurring and address those issues.

MR. JEFFREY:
This problem is not only in group situations; it can also be an individual insurer. The way to save money on workers' compensation is to treat the injured worker and get them back on the job. If a claim was denied and an injured worker wins the case through appeal, it will have cost the insurer more money in the long run.

MR. OSTROVSKY:
Section 2, subsection 6 of A.B. 254 reads, "Two or more fines of $1,000 or more imposed in 1 year ... ." The system is somewhat split. The DIR oversees the workers' compensation claims, but the Division of Insurance (DOI) oversees the right to have a certificate to provide self-insurance or to be an insurer. In the

case of self-insured employers or third-party administrators, their license is at risk if they continue to violate the sections of the existing law. Insurers are subject to market-conduct audits by the DOI and are subject to penalties and loss of the right to insure in the State of Nevada. The insurance commissioner has ways of further punishing violators under the current law. I do not have the statistics to provide to the Committee, but this provision has been in law since 1995.

CHAIR TOWNSEND:
Mr. Wiles, have you had any communication with the DOI concerning any of these issues? Senator Tiffany's question with regard to revoking a license as a penalty was a point that needs to be addressed.

MR. WILES:
I would first like to apologize to Senator Tiffany for characterizing her question as political. The more appropriate response should have been that the question was a policy-type question which the Committee should address in terms of those issues, the rationale and the kind of evidence the Committee is looking for to support a significant policy change.

To answer your question, the DIR receives information regarding our benefit penalties. I cannot tell you today exactly what they do with the penalties or how they handle them, but there is always room for improvement regarding our communications. I will talk with Mr. Bremmer, our administrator, and the DOI commissioner to make sure things are working smoothly and appropriately.

CHAIR TOWNSEND:
The question was posed because sometimes government agencies are so busy writing policies and a procedure that they sometimes forget the public is seeking their assistance. The regulatory agencies that have dual jurisdictions should keep in touch with each other for better communication. The easiest way to curtail workers' compensation claims is to provide a safe workplace. But, if an accident should occur, the second most important step is to provide medical treatment as soon as possible so the individual can get back to work. Mr. Jeffrey or Mr. Ostrovsky, correct me if I am wrong, but I believe that the cutoff point to get any injured worker back to work is approximately six weeks. After that time period, there were far less returning to work because of the injury they sustained. That is why the communications between the agencies is

important. If someone could check into the communication issue between the two agencies, it might be helpful.

NANCYANN LEEDER (Nevada Attorney for Injured Workers, Department of Business and Industry):
I would like to clarify what the provisions in A.B. 254 are trying to accomplish. The Nevada Self Insurers Association was getting a lot of cases where there was an argument by the TPA that the claim was not appealed in a timely manner. The Association questioned why this was happening more often with this particular TPA. We noticed that regular letters would be sent out to the correct zip code, but "determination letters," that is, letters that needed to be appealed, would not be sent out to correct the zip code. Therefore, the person would not get the letter in time, and the appeal would not be done in a timely manner. Increasing the fines of the benefit penalty helps the individual. Increasing the fine possibly will get somebody's attention.

CHAIR TOWNSEND:
Did you ever turn that matter over to the DIR when you discovered that pattern?

MS. LEEDER:
I sent a letter to DIR, and DIR did bring an in individual for discussion.

DON JAYNE (Nevada Self Insurers Association):
The Committee has already covered a majority of points that I would have raised. Our association testified in the Assembly that the simple increase in fines would not solve the problem and that there should be the threat of revocation of an individual's license in a progressive way. As Mr. Ostrovsky pointed out, the way to do that is already in existing law in section 2, subsection 6 of A.B. 254. What is unknown is whether or not we really execute those tasks. After repeat violators are identified and brought through the processes, are we taking them through to the insurance commissioner for possible revocation of their licenses or getting them out of the market. We are supportive of those types of actions. I am still not sure that a simple increase of fines is going to correct the problem.

CHAIR TOWNSEND:
The proponents have brought up excellent points. We need to pick a time in the near future to have the DOI join in the discussions and explain what their process is for handling this type of situation. The Committee has no intention of

holding the bill, but we want to make sure there is protection out there. Mr. Wiles, we will notify you when we have the next meeting regarding these issues and the DOI will also be included. The point was made by Mr. Jayne regarding current language in section 2, subsection 6, that we are not sure what it means. The language reads as follows: "Two or more fines of $1,000 or more imposed in 1 year for acts enumerated in subsection 1 must be considered by the Commissioner as evidence for the withdrawal of: (a) A certificate ... ." That is strong language and gives the commissioner of the DOI the ability to get someone's attention. It does not require the commissioner to withdraw a certificate, but it does require the commissioner to use the information regarding fines as evidence.

SENATOR CARLTON:
I would like to review the market-conduct survey to include any pertinent information in discussions on this issue.

CHAIR TOWNSEND:
Mr. Wiles, can we get copies of the survey before we meet again?

MR. WILES:
Mr. Chairman, the market-conduct survey is a DOI function, but I will relay the message to that division.

CHAIR TOWNSEND:
Please let the commissioner of the DOI know that we would like to see the survey that they use. Are there any other questions on A.B. 254? For the record: Committee, we have received a handout (Exhibit D) via e-mail from Paul Cornett regarding this bill. Mr. Cornett was in the Las Vegas, Grant Sawyer State Office Building but was unable to testify at the time. The hearing is now closed on discussions of A.B. 254.

Discussions are now open on A.B. 341. There are a couple of issues in this bill relating to licensure and scope of practice. The change to the current bill which adds subsection 6 to section 1 of NRS 37 does not interfere with the scope of practice of appraisers. Also, it does not interfere with disciplinary actions of those individuals, nor does it interfere with any of the rights and responsibilities of those who remain as licensees.

ASSEMBLY BILL 341: Exempts persons who assess property in connection with eminent domain proceeding from provisions governing real estate appraisers. (BDR 54-1261)

ASSEMBLYMAN DAVID R. PARKS (Assembly District No. 41):
Assembly Bill 341 addresses the area of condemnation appraisals. This bill is needed to protect landowners when their property is taken by government entity and to ensure their expert witnesses will not be subjected to intimidation or retribution. As you had indicated, A.B. 341 adds a person who makes an assessment on the value of property in condemnation cases to a list of five other categories of real property valuators who are exempt from the state licensing and disciplinary provisions of NRS 645C.

JAMES JACKSON:
As a litigation attorney, I can tell you that one thing this bill allows is that litigants from both sides can present witnesses who can be properly vetted and qualified as expert witnesses. That is currently not the case. You may hear testimony that if this bill is allowed to pass, it will allow anybody to offer any kind of testimony they want. That is simply not the case. The Rules of Civil Procedure in the State of Nevada are very clear, and the requirements for the qualification of an expert are also just as clear. A person must come before the court with knowledge and expertise in an area in order to be qualified as an expert. In the 18 or 19 years of my practice, I cannot remember a time when I had a litigated case that if the other side either did not like or did not think my expert was experienced or knowledgeable, they did not challenge that expert's qualifications. The judge in a court setting is the one who can vet the qualifications of that expert and let the other side make whatever challenge they decide. If the challenge is successful, that expert will never be presented in front of a judge. I think we have to place the appropriate confidence in our judicial system to allow that to happen. I believe this bill will allow that to happen.

LAURA FITZSIMMONS:
For the last 10 years, I have specialized in property-rights cases. I have gone throughout the State of Nevada representing landowners when their property has been taken by the government. These are constitutional proceedings. The *U.S. Constitution* requires and guarantees that landowners receive just compensation from the government when their land is taken. Problems have occurred when state licensing affects condemnation appraisals, because the

judges and the *U.S. Constitution* govern the methodology in those cases. This bill does not affect the appraisal, qualifications and the discipline contained in NRS 645C for any appraiser who does any kind of valuation for banks, lending purposes, estate purposes, bankruptcy, divorce or sales negotiations. This bill does not allow anyone, even if they are an expert witness in a condemnation case, to claim they have appraised property unless they comply with state standards. Condemnation appraisals are less than 1 percent of all of the appraisals that are done in this State. The Nevada Department of Transportation (NDOT) may have a road-widening project and there are only 10 to 15 appraisers who actually do that type of work. Most of the appraisals performed under the NDOT's contracts will not be affected by this bill, because once the appraisals are done and presented to the landowner, there is a negotiation period. Similar to insurance claims, most of the cases are settled or a landowner will back down because they are not going to fight city hall. During a negotiation phase, a landowner and the NDOT use only state-licensed and regulated appraisers. This bill is only applicable once the court system has taken over. The bill is very clear on this issue in section 1, subsection 6, where it reads, "A person who makes an assessment of the value of property in connection with a judicial proceeding for eminent domain brought pursuant to chapter 37 of NRS." That is after a condemnation complaint is filed. At that point, it goes through the court system, and that is when this bill becomes applicable. These types of cases are the only cases in which expert witnesses are required to be licensed. The requirement comes from NRS 645C which makes it a misdemeanor for anyone to give an opinion of value or other certain opinions if they are not a state-licensed appraiser.

The opponents of the bill overlook the fact that there are three levels of protection in the court system. First, an expert witness has to be qualified with a judge. Second, the opposing lawyer has the opportunity to point out any inconsistencies. Third, the juries are instructed that they can disregard the testimony of any expert witness. The jury system works because of a sense of justice, and that will be assured if this bill passes.

There have been suggestions that if this bill passes, expert witnesses would be paid contingency fees. That suggestion was probably made by individuals who are not involved in litigation cases, because the first question an opposing lawyer would ask an expert witness would be, "how are you being paid?" That witness would say, "I am getting a piece of the action," and that would be the end of the witness' testimony.

MS. FITZSIMMONS:
The troubling component of this bill is that the State is always the adverse party in these cases; and the State holds the professional license of the only witnesses who are allowed to testify on behalf of landowners. In the materials I have given to the Committee (Exhibit E), it is recognized by the leading authorities in this area of law that it is a conflict for the State to hold a license of an expert witness. Of the 10 to 15 appraisers who work for landowners, 3 of them have been through a state-disciplinary process. That has not only impacted those appraisers, but it has also intimidated the other landowner appraisers. The Commission of Appraisers of Real Estate which conducts these disciplinary cases has voted to oppose this bill. I do believe that the Commission is composed of well-intentioned, professional and qualified appraisers, but to my knowledge there is not a single member of that Commission who has testified before a jury in a condemnation case. Also, to my knowledge, trying to fit the "just compensation" valuation into these state rules does not work.

Finally, the opponents on behalf of the NDOT testified in the Assembly on this bill. In that testimony, they made a suggestion that, perhaps if this bill passed, the federal funding for the state highway projects could be in jeopardy. Assemblywoman Barbara Buckley, who was the Chair on the Assembly Committee for Commerce and Labor for that particular hearing, was concerned. Assemblywoman Buckley asked the testifier where they obtained their sources. The testifier stated that it came from a conversation with someone from the Federal Highway Administration (FHWA). Assemblywoman Buckley asked for a specific letter regarding this matter. The letter that I am referring to is included in Exhibit E that I provided to the Committee. The letter shows why the FHWA may not agree with this bill; it is a state issue. The code of federal regulation shows that federal funding will not be implicated if the bill is passed. I did speak to someone at the FHWA regarding this matter. I was told that the NDOT had persisted in attempting to get something in writing from the FHWA indicating that there could be related federal-funding problems. The FHWA could not provide that information because it was not true.

SENATOR MARK E. AMODEI (Capital Senatorial District):
Assembly Bill 341 is before this Committee relating to NRS 645C, which relates to the licensing of real estate appraisers. Nothing I say should be interpreted as being critical of agencies that are doing their job. In a situation where there is a dispute that may go to court, the discussion is normally not about whether or not it involves public purposes but how much the property is worth. Once an

issue like this goes to court, in basic constitutional notions, nothing that allows the Commission of Appraisers of Real Estate to sit as the appeals body for factual determinations of value are made in a courtroom pursuant to rules which are the exclusive province of the judiciary. There is nothing in the *Nevada Constitution*, Article 5 of the *United States Constitution*, or in the NRS 645C, which allows the Commission to revisit a factual determination made in court under rules made by the government.

The practical effect is that a licensing board is involving itself with a disgruntled party of litigation in a licensing matter. In review of the *Nevada Constitution*, it does not indicate that the Commission of Appraisers of Real Estate is a constitutional entity. In situations where someone's property is at stake, it is specifically addressed in the *U.S. Constitution* relating to safeguards for people whose property is taken by the state, federal government, et cetera, for public purposes. With all due respect, it is not considered an appraisal for a bank in a financing situation. It is a fully adversarial process with records, opposing experts, et cetera. To think at the end of that process, which is entirely judicial in nature, that somebody then decides to pull back the issue into an Executive Branch context in this particular instance, licensing and rehash factual findings or testimony is a troubling thought. Please, be aware that nothing should be interpreted to say that when fighting about that value, the government is not entitled to fight every bit as hard as the landowner. If someone lies in a court of law, there are provisions where that person can be prosecuted criminally. I suspect there is a provision in the NRS 645C relating to licensing suitability and renewal suitability that suggests something to the effect of, "have you had any disciplinary actions in other states?" The thank you for coming to this State to license holders within Nevada who hold licenses in other states or people who come to this State is, if someone is upset with the fact that you were effective in a fully contested judicial proceeding, you may have disciplinary proceeding that you now have to report to all the other states in which you hold a license. For the purposes of the NRS 645C, when looking at the appropriate jurisdiction of these boards, this Committee and its predecessors created them. We passed the statutes. Even it we wanted to give the Nevada Commission of Appraisers of Real Estate appeal authority over the judicial branch, we could not. This is the practical effect of what has happened here. The words "just compensation" are things that require evidence in a court of law. Anything that restricts the discussion of just compensation is something very harmful to what the *Nevada Constitution* has specifically mentioned.

Specifically, if someone is taking a person's property away, that property owner needs to be compensated justly.

Finally, in relation to the NRS 37, I reviewed the language in the NRS 199, "Crimes Against Public Justice." Specifically, NRS 199.300 reads as follows, "A person directly or indirectly, addresses any threat or intimidation to a public officer, public employee, juror, referee, arbitrator, appraiser, ..." I have not had a chance to look at the legislative history, but it would be interesting to see what the testimony was in the Legislative Session in 1967 or thereafter where the word "appraiser" was put into law regarding crimes against public justice. Are there any questions?

SENATOR LEE:
Are you trying to say there needs to be a fire wall built between the appraiser and the Real Estate Division regarding licensing? Based upon your testimony, you have identified there is a problem, but I do not know whether section 1, subsection 6, will solve that problem. My question to you, Senator Amodei, is what happens if we continue to have the same challenges between the Real Estate Division and the appraisers?

SENATOR AMODEI:
The bill attempts to establish that there cannot be a disciplinary proceeding initiated against an individual, as a result of work they do under the NRS 37, once an action has been filed. An individual is subject to those provisions under the negotiation process, but once the decision is made to go to court, that individual cannot be subject to a civil action for any statement they may make. The practical effect is that once this goes to court, the board does not have disciplinary authority over an individual who is licensed. The reason is that we do not want to have a board sitting as an appeal authority over factual determinations made in court. What if someone who is licensed goes to court and lies to the court? They would probably lose their case and at that point perjury action could be brought against them. If they were convicted of perjury, is that a legitimate cause for concern for a licensing board? Yes, but understand that the licensing board did not act as the Legislature, the prosecutor and a judge for purposes of an action that was fully public and contested. Hopefully, what the bill seeks to do or this Committee seeks to accomplish is when an individual is in a highly public adversarial venue, that it would be enough of a safeguard for your actions. A licensing board should not be placed in charge of

discipline in that context. An individual's license should not be in jeopardy for advocating on behalf of their client within the bounds of a judicial context.

CHAIR TOWNSEND:
The Committee should focus their attention on an exemption from licensing as opposed to the details of eminent domain. The Senate Committee on Judiciary deals in the area of eminent domain. In a medical malpractice case where a disciplinary case is brought before the board consisting of three attorneys and three doctors, I do not think it is a requirement for an expert in that arena to be a licensed medical professional in the State of Nevada. In the district court, for instance, if a person is not a licensed medical doctor in the State of Nevada, but they have a Ph.D., the court would make the determination as to whether or not that individual is an expert witness. The opposing side on the case can then question the witness. Again, the Committee needs to be aware that we should be focused on the licensing procedure, not eminent domain.

MS. FITZSIMMONS:
In light of your comments, Mr. Chair and Senator Amodei, I would like to bring Tami Campa Close and Collins Butler forward to answer any questions the Committee may have. Both individuals are licensed certified general appraisers in the State of Nevada. Both are members of the Appraisal Institute. They are among a tiny group of appraisers who do condemnation work.

CHAIR TOWNSEND:
My question is directed to the two licensees Ms. Fitzsimmons just mentioned. When you are participating in a condemnation case, what is your experience in dealing with unlicensed individuals? Do you participate out of this state where you may or may not be licensed in that other state?

TAMI CAMPA CLOSE:
I do not practice out of the State of Nevada. I have been in the real estate industry in Nevada for 27 years. I have been a real estate appraiser for the last 17 years. The Committee has a handout (Exhibit F) that I obtained from the federal Financial Institutions' Web site. It is a list of states that shows whether or not licensing is mandatory, voluntary or mandatory only for federal-related lending transactions. It also shows less than half of all states require that appraisers be licensed to testify in judicial proceedings. Some states have an exemption similar to the exemption in A.B. 341. The yellow-highlighted column in my handout lists which states have a mandatory licensing requirement; that is

where anyone offering an opinion of value has to be licensed. Even among those states, there are exemptions for judicial proceedings. Under the pink-highlighted, column it lists which states have voluntary licensing. The blue-highlighted column shows states where licensing is only mandatory for federally related lending transactions. For any other purpose, licensing is not required and you could testify as an expert witness.

SENATOR HECK:
In reference to the testimony made earlier about the three licensed appraisers who were put through a disciplinary process; did any one of those three appraisers ultimately lose their license? Are any of those three appraisers present today to testify?

MS. CLOSE:
The first individual who went through the process did have their license suspended. The individual then went to court and the judge determined that it was entirely unconstitutional. The Real Estate Division appealed. While the appeal was pending, the individual passed away. The second individual reached an agreement for a voluntary suspension. The third individual is currently going through a hearing process. There are very few licensed appraisers in Nevada that specialize in condemnation cases.

Collins Butler:
I am a licensed appraiser in Nevada. I have represented both the landowner and the government in condemnation cases. I have defended two of the four cases which the Commission of Appraisers of Real Estate or the Appraisal Institute have dealt with in regard to discipline hearing. The process is expensive, time consuming and emotional. There needs to be a separation of powers in issues like these. Senator Lee's description of a fire wall is actually what needs to be implemented. The review process shows that good work is being performed; however, there are complaints filed by disgruntled parties and it is becoming a problem. What A.B. 341 attempts to do is identify the problem and address it. Therefore, I am in favor of the bill.

There are a diminishing number of appraisers who are willing to argue their cases with the federal government. There are even smaller numbers of appraisers who want to argue their cases with their local state government, because the state can take their license. Not only is the landowner compensation at stake, it is also the licensing of the appraiser. The opposition

has said, "If there was a problem, there would be large groups of people expressing their concerns, and the opposition has never come across that situation." The reason there are no large groups of people expressing their concerns is there are only a few individuals who appraise condemnation cases. There are very few who are willing to go against the government entities, but more importantly, not even 1 percent of all appraisals are for condemnation cases. So, there are no large numbers of individuals. I am in favor of this bill.

CHAIR TOWNSEND:
Once again, I would like to remind everyone that the discussions are not about eminent domain. The discussion is exemption to a licensing procedure and whether or not it is in the public's interest.

GAIL J. ANDERSON (Administrator, Real Estate Division, Department of Business and Industry):
I am here today to speak in opposition of A.B. 341. The exemption in this bill for appraisers of real estate would create an unregulated and unaccountable class of appraisers working in the State of Nevada. I would like to bring your attention to the first exemption in the bill, under NRS 645C.150, which is the section that this bill seeks to amend. The Committee should have my handout (Exhibit G). In the State of Nevada, the job classification for review appraisers requires an appraisal certification through the Real Estate Division. In subsection 2 of my handout, the exemption addresses a land surveyor and reads as follows; "... who describes property to be partitioned ... ; of note, however, "... a sale of such property must not be made until after its actual market value is appraised by one or more disinterested competent real estate appraisers ... . Therein, is the basis of eminent domain appraising ... ." I will not go into the issues of eminent domain, except that is it an unbiased, disinterested, competent real estate appraiser who is necessary to perform appraisals.

CHAIR TOWNSEND:
In an example where a wealthy land developer sees the value in a high-rise building, is it fair to assume that a judge might qualify that land developer as an expert in high-rise buildings? My guess is that the judge would consider him qualified as an expert, but he could not appraise the property because he is not licensed in the State of Nevada. I believe the provision in this bill is that in a case of the jurisdiction of a judge, the developer would be considered qualified. The developer would not be appraising the property for bank purposes or for

any other purposes. He is simply being brought before a judge as an expert. He can be cross-examined, and his credentials can be challenged by the government. Am I reading the bill the wrong?

MS. ANDERSON:
The Real Estate Division is not concerned about what a judge would ask for or allow in a courtroom. The Division is only concerned with what a licensed and certified appraiser is required to do in terms of methodology.

CHAIR TOWNSEND:
I just want to make sure the general public understands this bill. I understand what you stated. I am just not sure I understand your concern. Are you stating that instead of a licensing board being the filter to protect the public, that it is the judge who does the filtering to protect the public?

MS. ANDERSON:
That is correct.

CHAIR TOWNSEND:
I do not understand why it is not acceptable for a licensing board to handle that process.

MS. ANDERSON:
The Division does not disagree that a judge may have whomever they wish as an expert witness. The point I was trying to make is that Nevada licensees will be held accountable to Nevada law in the uniform standards of professional appraisal practice.

A complaint is not brought forward before the Commission of Appraisers of Real Estate based on an evaluation or a just-compensation issue. It is always based on methods that may be flawed or a report not prepared in compliance with Uniform Standards of Professional Appraisal Practice (USPAP), not valuation and not just compensation.

CHAIR TOWNSEND:
I will try to be specific. I want to fully disclose that I, along with two partners, own a business-advisory company. We are not in the appraisal business, but we are considered experts, and we are certified by most of the courts in Nevada. Our people are highly qualified but they still have to answer to a judge. They

have to testify under oath. They also have to be accepted by the opponents as qualified to be an expert. If the issue goes to litigation, they are required to sit on the witness stand. Since these individuals are not licensed in the State of Nevada, how is that different than in the context we are discussing?

MS. ANDERSON:
An appraisal is prepared for that testimony. It is to be used as the basis for a testimony. The Real Estate Division's main concern is that anyone preparing an appraisal would do so under the USPAP guidelines and methodology.

CHAIR TOWNSEND:
I have seen those standards, with regard to expert witnesses, absolutely shredded by the opposing side in court because they did not follow them. We are talking about an argument over value which will probably be litigated. I am trying to understand your point.

MS. ANDERSON:
Perhaps, if there was language that clarified when an appraiser was performing as an expert witness in a condemnation trail, it would help clarify that portion of the bill.

SENATOR CARLTON:
When I read in section 1, subsection 6, of A.B. 341 " ... proceeding for eminent domain brought pursuant to chapter 37 ... ." This is what we are talking about. That is the venue in which the appraiser will operate. I do not know how it could be made clearer.

MS. ANDERSON:
To clarify, there are eminent-domain valuations made that never go to court.

SENATOR CARLTON:
Is there a possibility it would go to court?

MS. ANDERSON:
Yes, there is always a possibility.

SENATOR CARLTON:
You always have to be prepared. All the work that had been done before they went to court would not be useable, and in turn would slow down the process,

which would hurt both sides trying to get their voices heard in court. I think the language in the bill is very narrow.

RUEDY EDGINGTON (Assistant Director, Engineering Division, Nevada Department of Transportation):
I have supplied the Committee with a handout (Exhibit H). The Nevada Department of Transportation is required by law to give just compensation to a property owner, and that is what we try to do. This bill removes licensing oversight on appraisers. Licensing is there to protect the public. It assures a certain level of professional conduct, both ethical and technical. Why would you exempt just one licensing aspect of a license, in this instance, for appraisers? If you remove the licensing, what part would the board then play? If this legislation were to pass, prices may be driven upward artificially, because there would be no way to control the conduct of an appraiser. It may cause more litigation; negotiations could be harder to accomplish.

Very few condemnation cases actually go to court because the NDOT has been able to settle them outside of court. Our Department does have checks and balances in place. The legislation is similar to single-incident legislation which should not be happening. I would like to clarify that the NDOT has made only 2 complaints against one person in the last 15 years. Of that one complaint that was heard, the individual was found in violation. It was not about just compensation or the money; it was about the individual's process that they used. I would like to respond to the comment regarding federal funds being withheld. The FHWA is not going to withhold federal funding if this bill passes, but they do have the right to withhold their participation in a settlement case.

SENATOR CARLTON:
I just want to clarify what you just stated. The FHWA would have that authority in any case where there was a problem, not just if the FHWA feels the property prices are too high. Is that correct?

MR. EDGINGTON:
Yes, that is correct. The concern is that if prices were driven up artificially, the FHWA would be more compelled to use that authority.

SENATOR CARLTON:
This Legislature has dealt in the past with the issue of artificial prices being driven up, and we do understand. Has the FHWA always had the authority to act on the issue of artificial prices?

MR. EDGINGTON:
Yes.

MADELYN SHIPMAN (Nevada District Attorney's Association):
I have provided the Committee with a handout (Exhibit I). The Nevada District Attorney's Association does handle condemnation issues on occasion, and the Association does have a concern with this bill. In the past Legislature, it was decided that appraisers would not be exempt. To testify in court, an appraiser had to be licensed in this State.

I would also like to respond to the Chair's example of the wealthy developer. The current law would not disqualify a witness such as a developer from testifying in court on a condemnation action. The Court would not be limited or prohibited from bringing them forward as a person with extensive knowledge of high-rise value, not as an appraiser. However, that individual would not be able to testify about value, because they are not an appraiser who is subject to the requirements of practice.

CHAIR TOWNSEND:
Why would you have them as a witness if they could not testify as to the value?

MS. SHIPMAN
Currently, regarding condemnation cases, anyone is allowed to come to court and speak to the issue of value. I think discussions here have been ignoring the practicality of "takings" cases. Of these cases, 80 to 90 percent of them are settled. An appraiser is not hired going through negotiations. Negotiations begin after the appraisal is done. Eminent domain is not invoked until the participants have been unable to negotiate a settlement.

CHAIR TOWNSEND:
Did you testify in the Assembly to this issue?

MS. SHIPMAN:
Yes, I signed in on behalf of our Association as opposing the bill.

CHAIR TOWNSEND:
Did Ms. Anderson or Mr. Peck testify in the Assembly on this bill?

MS. ANDERSON:
Yes.

A. STANYAN PECK (Chief Legal Counsel, Regional Transportation Commission of Washoe County):
Yes, I did.

MS. SHIPMAN:
My understanding is that A.B. 143, which deals with "takings" cases and redevelopment, will be brought forward to the Senate for discussions. The discussion in the Assembly was that the government use licensed appraisers in order to initiate the negotiations. There may be a policy conflict as well.

ASSEMBLY BILL 143 (1st Reprint): Makes various changes concerning community redevelopment and eminent domain proceedings. (BDR 22-44)

CHAIR TOWNSEND:
Part of this Committee sits on the Senate Committee on Government Affairs where A.B. 143 is likely to be heard. Our Committee will be as consistent in the discussion process as possible.

MR. PECK:
For the past 25 years, I have represented state and county agencies in the acquisition of private property for public purposes, primarily roadway purposes. I have prepared written remarks for the Committee's review (Exhibit J). I am here today because I do not think A.B. 341 is in the best interest of the public.

The testimony from Ms. Fitzsimmons seeks to project that the landowners are at a great disadvantage in a condemnation case against the state or local governments. In handling these types of cases, I do not agree. Landowners have an advantage in a condemnation case because jurors are frequently the ones who make the decisions on what the "just compensation" should be, that is being awarded. The jurors may also be landowners themselves and are much

more likely to identify with the position of a landowner than that of a government. Under the current law, condemnation cases are decided based on the testimony of two expert witnesses. These expert witnesses are licensed real estate appraisers. The plain language of this bill is that it does not just apply to disciplinary matters. It exempts anyone who testifies in the proceeding from all of the aspects in the NRS 645C. This would not only be licensing, training and ethical considerations, but whatever else is included within the parameters of that chapter. It seems to me that the issue here is to address how a particular proceeding is taking place.

There has been a lot of emphasis on the possibility of working out the issues through the civil process. These could be issues such as the qualification of an expert, cross examination of the lawyer, et cetera. Frankly, I think too much credence has been given to the qualification of an expert by the judge, generally a qualification related to a review of an individual's training, education and experience. There is very little done in determining whether the "process" was correct. With respect to condemnation cases, the judges will customarily consider opinions, because appraisals are not an exact science, and they will consider the weight of the hearing as opposed to the admissibility. Under the current law, there is an ability of others to render an opinion concerning the issues in the case and not be restricted simply to licensed real estate appraisers. Also, under the current law, we all should expect that those who testify in a case regarding "value" and "just compensation" to be awarded, to have the proper training and experience and to be subject to the standards that have been imposed by the Real Estate Division. I am not sure this bill can provide that. If an individual is exempted from those standards, then it becomes difficult to determine how someone arrives at a particular property value. Tax money is paid for the acquisition of land, and I believe a taxpayer is entitled to know that the opinions regarding these matters are based on everyone using the same standards.

FRED L. HILLERBY (Appraisal Institute):
I have to admit to being confused. I heard the proponents of A.B. 341 testify that a licensed appraiser would be used early in the process; it was only at the time of court involvement when the determination of an "expert witness" would be made by the courts. Then there was concern by Senator Amodei, Chairman of the Senate Committee on Judiciary, that a licensing board serve as an appellate body to a court decision. I believe the concern is eminent domain.

Most of the public, over 80 percent of the time when eminent domain is involved, have reached an agreement before they ever go court.

CHAIR TOWNSEND:
What is always of concern to me is that in eminent domain, regardless of whether is it a negotiated settlement or a "taking," is the fact that there is not a lot of private property left.

REESE PERKINS:
I am a certified general appraiser and I am here on behalf of the Appraisal Institute. I have provided a handout for the Committee (Exhibit K). Our concern is that the language in this bill is all-encompassing. As a result, appraisers who prepare appraisal reports in eminent-domain proceedings would no longer be required to prepare those appraisals in compliance with the USPAP. I will read from my handout, "If this legislation is adopted as it is written today, appraisers preparing those reports for eminent domain would no longer be under the uniform standards ... ." We are not just talking about the NDOT or the regional transportation commission (RTC); we are also talking about cities, counties and school districts, et cetera, all of which have power of eminent domain.

Further, I think the language is vague as to when a proceeding might begin. I take the view that if an agency has retained an appraiser to prepare an appraisal for eminent domain or acquisition, that is when the proceeding begins. The landowner at that point has an understanding that litigation or legal proceedings will happen. I do not understand why a property owner's appraiser would be allowed to prepare an appraisal under those circumstances and not comply with the guidelines of the USPAP. Another significant consequence of this bill would be if a property owner received an improperly prepared appraisal and as a result did not obtain the best possible judgment or just compensation in the court proceedings. In my interpretation of this bill, they would have no recourse before the Commission of Appraisers of Real Estate because the landowner has been exempted. I do not feel the public interest would be best protected by allowing individuals who do not comply with those standards to be allowed to proceed with those appraisals.

CHAIR TOWNSEND:
What has been brought up by the proponents of A.B. 341 is that there is a narrow band of individuals who handle eminent-domain cases. Is that your understanding?

MR. PERKINS:
I am not sure of the exact number. My practice is limited to northern Nevada, but I am aware of at least 5 to possibly 15 appraisers who are qualified and have participated in the litigation arena.

MICHAEL CHESHIRE:
I am a certified general appraiser. I am also the director of the Las Vegas chapter of the Appraisal Institute. I have handled condemnation cases and because they are specialized, the cases demand a higher degree of competency than typical appraisal work. The Appraisal Institute opposes A.B. 341 based on the fact that it takes the public's protection away. I have provided the Committee with a handout (Exhibit L)

MR. PARKS:
I would like to reiterate that the wording we are referring to in connection with a "proceeding" sums up the fact that we are talking of a formal proceeding.

CHAIR TOWNSEND:
I believe that the licensees before the Committee have made substantial points. An eminent-domain proceeding can be intimidating for the homeowner. The hearing is now closed on A.B. 341. We will now recess at 11:02 a.m.

I now reconvene this meeting at 12:45 p.m. Discussions are now open on A.B. 363.

ASSEMBLY BILL 363 (1st Reprint): Makes various changes relating to consolidated insurance programs. (BDR 53-252)

STEVE G. HOLLOWAY (Associated General Contractors, Las Vegas Chapter):
The bill provides the means and the methods for insuring an employee by either the owner or principal contractor of insurance to comply with the statute which requires them to have a certified safety specialist on the job site whenever construction is ongoing. The bill requires either the owner or the insurance provider to provide the Administrator of the Occupational Safety and Health administration (OSHA) with an affidavit every three months. The affidavit must attest to the fact that there is a safety specialist at the site when construction is ongoing. If the OSHA determines that there is not a safety specialist on the job site, the OSHA can either fine or temporarily close down the site until a

safety specialist is put on the job site to maintain safety. The bill also provides due process.

SENATOR CARLTON:
Do I understand correctly that if an affidavit is not filed, the job site can be closed, or is it just if a safety specialist is not actually on the job site?

MR. HOLLOWAY:
The administrator from the OSHA would have a choice between fining a person if there was no affidavit or temporarily closing the job site to ensure that there is a safety specialist on-site.

SENATOR CARLTON:
I understand closing down a site if a safety specialist is not on a job site, but I have some concerns about closing down a site because there is no affidavit.

MR. HOLLOWAY:
We want to be able to provide the OSHA a means of ensuring that there is a safety specialist on-site any time construction is ongoing as required by statute. The best way of doing that, according to the DIR, would be to have the owner or the provider of insurance provide an affidavit showing that a safety specialist is on-site at all times. I do not believe having to submit an affidavit every three months would be a hardship on anyone. Nearly three-quarters of all construction-related deaths in Nevada occur on projects covered by an Owner Controlled Insurance Program (OCIP). This is why this legislation was enacted. Owner Controlled Insurance Programs are used because they save the owner a lot of money. They also make a lot of money for the insurance providers. Normally, there is a safety specialist on the job site who is employed by the general or primary contractor.

CHAIR TOWNSEND:
Why do you think the quarterly affidavit would provide more assurance that the project is going to be safe?

MR. HOLLOWAY:
There are two issues here. In the case where an employee was killed on the job, there was no safety specialist on the job site at the time the death occurred. In fact, the certified safety specialist who was employed by the OSHA was on another job site at the time. Also during the hearing on this matter, neither the

DOI nor the DIR felt that they had the authority or the manpower to enforce the requirement that the owner or the provider of insurance provide a certified safety specialist. I was asked by the interim committee to work with the DOI and the DIR to prepare a bill draft request (BDR) to rectify the problem.

CHAIR TOWNSEND:
Are you saying that you cannot go randomly to a job site to find out if the state-required safety issue is being met?

MR. WILES:
No, I would not say that. There are two ways a general OSHA inspection is done. One way is that we receive a complaint of a possible safety problem on the job site. The second way is an inspection initiated through our program that was developed through federal cooperation standards.

CHAIR TOWNSEND:
Did the DIR know that construction was going on when the accident occurred?

MR. WILES:
We are aware when construction is going on by having a pre-conference meeting with any large construction projects.

CHAIR TOWNSEND:
Did the DIR do that with this particular construction project?

MR. WILES:
I believe we did because it was such a large project.

CHAIR TOWNSEND:
So they were made constructively aware that they had to have a safety specialist on the job site.

MR. WILES:
The DIR had approved a safety specialist as well as an alternate. I do believe the affidavit provision came about because of what happened in this situation.

SENATOR HECK:
I would assume that an OSHA inspector can walk onto the job site at anytime.

MR. WILES:
We can walk onto a site but we cannot do any inspections unless we are granted entry. There has to be some sort of probable cause to believe a violation exists before we can enter a site and get a search warrant. If entry to the site has been refused, we try to negotiate, or ultimately go to court to get a search warrant.

SENATOR HECK:
If you were to show up at a job site and ask to speak to the primary or alternate safety specialist, could they refuse?

MR. WILES:
Yes, I believe that is correct under the OSHA program.

CHAIR TOWNSEND:
But the OSHA is a federal issue, or are you talking about the state OSHA?

MR. WILES:
We have a state program that is fully approved by the federal government. We enforce the same standards and requirements, such as providing for an open-end conference, providing for a notice and explanation of rights and advising them that they do have a right to deny entry.

CHAIR TOWNSEND:
Did you just say the United States Supreme Court ruled that they have a right to deny entry?

MR. WILES:
Yes, that case came out of the state of Idaho approximately 20 years ago. Basically, due process applies.

SENATOR HECK:
It is confusing that the OSHA is barred from going to the workplace for the protection of the public. I also have concerns about the signed affidavit; if the OSHA is not on the job site to enforce and protect the public, what good is an affidavit? How do we get the state OSHA to go on a job site to make sure a safety specialist is present?

MR. WILES:
In the development of this bill, the DIR felt the affidavit may have some deterrent effect. Maybe there is a better way to accomplish this, such as in the OSHA guidelines, under, I believe, the NRS 616D. There are other tools available.

CHAIR TOWNSEND:
The Committee takes it very seriously when someone has been injured. What tools does the DIR have to penalize the insurance carrier who, according to the testimony earlier, did not have a safety specialist on the job site?

MR. WILES:
The statutes that were adopted years ago did not provide for any penalties, we chose an existing penalty under the NRS 616D.120. Under the NRS 618 relating to the OSHA, it really does not apply here unless we are able to declare that the absence of one safety specialist constitutes an imminent danger. Looking at the fact, we did not believe that was the appropriate regulatory response.

CHAIR TOWNSEND:
Section 1, subsection 3 of A.B. 363, lines 32 and 33 states, "... the Administrator shall notify the Commissioner of his determination." What role did the DOI play regarding the licensing of the insurance provider and the project where the accident occurred?

GARY COOPER (Chief Insurance Examiner, Division of Insurance, Department of Business and Industry):
We can remove the insurance provider's certificate of authority to operate in the State of Nevada.

CHAIR TOWNSEND:
The language in section 1, subsection 6, reads as follows: "Upon request by the Administrator, any law enforcement agency in this State shall render any assistance necessary to carry out the requirements of subsection 5, including, but not limited to, preventing any employee or other person from remaining at the construction site." That language seems to be a bit vague.

MR. WILES:
The language in that section was drawn from a previous statutory scheme, under the NRS 616D.110, which provides a mechanism to shut down a business due to the absence of workers' compensation insurance.

CHAIR TOWNSEND:
I do think that the intent of this bill is an important policy issue. I am just not sure what the affidavit will accomplish.

SENATOR HECK:
In the NRS 618.325, under subsection 2, paragraphs (a) and (b) and subsection 3 that states, "… the Administrator or his representative may," and in this case the DIR, "Enter without delay and at reasonable times any place of employment; and Inspect and investigate …" and "The Division shall not notify the employer of any randomly scheduled or customary regulatory inspection to be performed by the Division." So are you saying that in spite of what is in the statutes, the Division can show up at the job site and be denied entry?

MR. WILES:
Yes. The U.S. Supreme Court has ruled that the identical provision that exists in the federal scheme, enter without delay, does not give the DIR the authority to violate the "due process" clause of the *U.S. Constitution*. The language was part of the original OSHA act of 1972. I believe the Nevada Occupational Safety and Health Act was adopted in 1973, following the adoption of the federal Occupational Safety and Health Act.

CHAIR TOWNSEND:
The DIR and the OSHA have separate components with regard to safety issues, is that correct?

MR. WILES:
Yes.

CHAIR TOWNSEND:
I do not know why, if someone from the OSHA drops by a job site and states they believe a violation may have occurred and asks to see the safety specialist, they are not allowed to talk with the safety specialist. In a case where the safety specialist is not there, that would be considered in violation.

SENATOR CARLTON:
My understanding is that these are owner-controlled projects. They have the privilege of being allowed to do this. If they want to keep that privilege, it seems they would want to comply. Did I understand you correctly that you have to have a warrant?

MR. WILES:
If entry is denied, then we have to get a warrant because it is private property.

SENATOR CARLTON:
Who has the authority to pull their OCIP if they are not complying?

MR. WILES:
That would be the DOI.

SENATOR CARLTON:
That would probably be a good incentive.

CHAIR TOWNSEND:
It does not sound like the information is getting from the DIR to the DOI. The communication between the departments should take only one phone call to handle a complaint on these types of issues.

ASSEMBLYMAN JOHN OCEGUERA (Assembly District No. 16):
I am here to introduce A.B. 363 and I will let the experts speak on behalf of the bill. I will be happy to work with the Committee on any issues that may arise

SENATOR LEE:
Maybe the bigger question is if the OCIPs should be allowed to be used anymore. Mr. Wiles, what is your experience with the OCIPs in the work arena?

MR. WILES:
I do not have the answer; I am not an inspector. Each construction site is different. Unfortunately, there was an accident that prompted the DIR to look at the issue and propose some changes that the DIR deemed necessary. I can look into whether or not there is any data on the number of citations that have been issued through both the OSHA and the OCIPs and provide those to the Committee.

SENATOR LEE:
There are obligations and responsibilities that the OCIPs have to follow and without any regulation they can become lax in safety situations. Is this something that has earned the right to be in practice in Nevada?

JOHN P. SANDE III (AON Risk Services):
I am here today representing AON Risk Services, which does arrange for the OCIP projects. First, I would like to correct some errors. Under NRS 616B.720, subsection 1, it states: "Provisions that require compliance with each of the requirements relating to safety and the administration of claims for industrial insurance ... ." Subsection 5 states:

> A provision setting forth the penalties to which the owner, principal contractor, construction manager, contractors and subcontractors of the construction project may be subject if such persons or entities fail to comply with the provisions relating to safety and the administration of claims for industrial insurance that are required pursuant to NRS 616B.725 and 616B.727.

The language in this subsection relates to claims processing and also safety provisions. The Nevada law specifically states that there should be penalties as determined by the DIR. The OCIP has regulatory agency inspections listed in their guidelines that have been approved by the DOI. If there is a U.S. Supreme Court case regarding due process, it is contrary to my understanding of a regulatory law in the State of Nevada. The safety administrators are approved by the DIR and the DOI. I would like the Committee to refer to NRS 616A.400; subsection 7 says the DIR Administrator shall, not may, shall: "Conduct such investigations and examinations of insurers as he deems reasonable to determine whether any person has violated the provisions of ... ," the Nevada insurance law, "... or to obtain information useful to enforce or administer these chapters." If an administrator of the DIR determines that there is a violation, NRS 616A.410, subsection 1 specifically states, "The Administrator may prosecute ... ." Basically, the administrator already had the power to get any type of a writ. To my knowledge, no other state has a law like this. Finally, with regard to an affidavit, a person is already required to sign a document stating that they recognize a safety specialist and an alternate is required to be on a job site.

SENATOR LEE:
I agree, but maybe the contractor should subcontract out to someone else to handle the safety issues.

MR. SANDE:
The DOI and the DIR review the safety specialist, and they are individual consultants in this type of situation. The NRS specifically states in 616B.725, subsection 4, "The primary and alternate coordinators for safety ... ," have total responsibility, not the owner or anyone else.

CHAIR TOWNSEND:
Are there any other questions? The hearing of the Senate Committee on Commerce and Labor is now adjourned at 1:44 p.m.

RESPECTFULLY SUBMITTED:

_____
Jane Tetherton,
Committee Secretary

APPROVED BY:

_____
Senator Randolph J. Townsend, Chair

DATE:_____