MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON COMMERCE AND LABOR

Seventy-Fourth Session
April 23, 2007

The Committee on Commerce and Labor was called to order by Chair John Oceguera at 2:30 p.m., on Monday, April 23, 2007, in Room 4100 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/74th/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman John Oceguera, Chair
Assemblyman Marcus Conklin, Vice Chair
Assemblywoman Francis Allen
Assemblyman Bernie Anderson
Assemblyman Morse Arberry, Jr.
Assemblywoman Barbara E. Buckley
Assemblyman Chad Christensen
Assemblywoman Heidi S. Gansert
Assemblyman William Horne
Assemblywoman Marilyn Kirkpatrick
Assemblyman Garn Mabey
Assemblyman Mark Manendo
Assemblyman David R. Parks
Assemblyman James Settelmeyer

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Earlene Miller, Committee Secretary
Gillis Colgan, Committee Assistant

OTHERS PRESENT:

Mary Wherry, Deputy Administrator, Division of Human Resources, Department of Health Care Financing and Policy
Matthew L. Sharp, representing the Nevada Trial Lawyers Association
Kate Diehl, representing Property Casualty Insurers Association of America
Robert Ostrovsky, representing Employers Insurance
Danny Thompson, representing the Nevada State American Federation of Labor and Congress of Industrial Organizations
John E. Jeffrey, representing the Southern Nevada Building and Construction Trades Council
Barbara Gruenewald, representing the Nevada Trial Lawyers Association
Nancyann Leeder, representing Nevada Attorneys for Injured Workers
George Ross, representing Nevada Self Insured Association

[The roll was called and a quorum was present.]

Chairman Oceguera:
We will open the hearing on Senate Bill 474.

Senate Bill 474: Limits the liability of a public agency that pays for the services of a personal assistant for a person with a disability. (BDR 54-600)

Mary Wherry, Deputy Administrator, Division of Human Resources, Department of Health Care Financing and Policy:
[Submitted Prepared Testimony (Exhibit C).]
I am here on behalf of our administrator, Charles Duarte. People with physical disabilities had their original statute passed in 1995. Last session it was amended to allow for all people with disabilities as well as parents of disabled children to be able to employ a person that we consider to be unskilled in skilled services like catheterization, feedings of a specific nature and other procedures. The original statute allows for providers to be held harmless if the direct care provider performs the procedure incorrectly and the recipient is harmed in some way. Our request to amend the statute is an attempt to hold harmless any public agency that is providing payment or authorizing services.

Chairman Oceguera:
Are there any questions from the Committee?

Assemblywoman Kirkpatrick:
Who is liable then?

Mary Wherry:
The statute does not hold anybody liable for anything. Our Department was enjoined last year by a home health agency. The statute does not say whether the direct care provider would be held responsible for an injury to the recipient. There is no regulatory oversight of this type of direct care provider. The recipient identifies someone who they want to perform the service. The person designated has to be signed off by a health care provider as defined in the statute, typically a physician. The physician is held harmless if the direct care provider does not follow the competencies for which they were approved. The recipient is the one responsible for directing the care that is being given. The statute specifies that the recipient is directing care that they would be providing for themselves if they were not disabled.

Assemblywoman Kirkpatrick:
What if the recipient has someone else who makes the determinations for them? How many incidents have we had within the last two years?

Mary Wherry:
This is a self-directed model. The statute is clear that the recipient must be capable of self-directing or that their legally responsible designee is capable of directing. The people with disabilities fought hard for this because they wanted to be able to employ their own providers and have some control over the care which does not require expensive nursing services. I cannot tell you who would be held liable if an injury occurred. It would depend on each case.

Chairman Oceguera:
Are there further questions from the Committee? Are there others wishing to testify in favor of S.B. 474? Are there any to oppose the bill?

Matthew L. Sharp, representing the Nevada Trial Lawyers Association:
If a disabled person needs daily care such as bowel care which typically requires skilled care provided by a nurse, a physician may sign off on a personal care attendant after he is satisfied that the person is suitably trained and capable. The problem with this amendment is that it eliminates the accountability when the public agency knows or should know that the person performing the task is not trained or signed off by a treating physician. This bill provides absolute immunity for the public agency. Immunity for the treating physician is contingent on his making sure the unskilled person has been trained, is capable of doing the service, and is being supervised. The public agency does not want to be responsible even if the person is unqualified and they know it. I do not think that this is good public policy to be adopted. A public agency already has personal injury immunity built into the sovereign immunity cap in the amount of $50,000. There is already a significant amount of protection for a public

agency. The only other area in which a public agency would have liability for personal injury would be in civil rights cases and that would not be subject to State law. The scope of this immunity is far too broad and allows for protection even in cases where the provider is untrained and unskilled.

Assemblyman Horne:
It appears the patient or their legally responsible representative has requested that an unskilled person be permitted to perform the function. That person must be trained by a skilled person who is now immune for harm done by the unskilled provider. The public agency pays for the service and that is the total amount of their involvement. Do you think they should be liable if that unskilled person causes harm?

Matthew L. Sharp:
The problem can develop if you have a home health care agency that is contracting with and being paid by Medicaid to provide services to a disabled person. If they send an unqualified provider and there is a resulting injury, they should be held accountable. The difference in the immunity is that the provider has assured that the caregiver is trained and knowledgeable enough to provide the service. If the physician is aware that the caregiver is not qualified and there is injury, the physician has no immunity. My concern is in Section 6. It says that the public agency that provides payment for the services of a personal assistant is not liable for civil damages and there is no limitation. That is not the intent of what the Legislature previously enacted.

Assemblyman Horne:
Currently, would the home health agency be immune if they provide an untrained caregiver unless doing so is gross negligence?

Matthew L. Sharp:
They would be liable because they have not complied with the statute. The condition for immunity is that the provider of health care has complied with the statute. Due to public policy, the physician would have immunity. They do not have the time to make sure the caregiver is doing a good job.

Assemblyman Horne:
The physician scenario is easy to understand. The person who is sent by the home health agency can be an unskilled, unlicensed person and the agency has an obligation to train the caregiver. If they have done that and harm has happened, they are held harmless. If that is not the case, Medicaid knows about it, and we pass this bill, they would be held harmless. How would Medicaid know if their employee or the home health care agency complied with the statute in the first place?

Matthew L. Sharp:
Medicaid has ongoing contact with the home health care provider about the services being rendered. They meet annually with the recipient and plan the scope of care with the home health agency. Medicaid, the recipient, and the home health agency are working together to develop a plan of care. Medicaid should be knowledgeable of the kind of care being provided.

Assemblyman Horne:
The care that is being provided does not equate to the provider being appropriately trained.

Matthew L. Sharp:
If it is a skilled service, Medicaid is aware that the service cannot be provided without compliance with the statute.

Assemblywoman Buckley:
I sat on the subcommittee to review regulations and as I understood it, an individual may self-direct care and train someone they like to help them with their personal care. When an individual consumer has chosen to self-direct care and not rely on an agency to screen their providers and the public agency does not have any part in choosing the provider, the public agency wants to not be held liable for allowing the consumer to self-direct. Disabled people feel they are capable of determining their own daily needs and this is a more humane way to provide care. If that is what is intended, would you agree with this bill?

Matthew L. Sharp:
In a perfect world, we all have options, but there are a lot of people who are limited to the home health care options. The person providing the care should be trained. As long as that person is trained and signed off by a doctor, and Medicaid is aware and follows the policy, I really do not have a problem extending some of the protection in Section 5. My concern is the language in Section 6 and the payment for services of a personal assistant if they are trained or not. That is when we are going to have civil damages.

Assemblywoman Buckley:
I see your point, thank you.

Chairman Oceguera:
Are there further questions for Mr. Sharp? Are there others wishing to testify in opposition to S.B. 474? Is there anyone wishing to testify neutrally to the bill?

Mary Wherry:
As a point of clarification, "personal assistant" is defined in the statute and it is the context that is used in Section 6. This includes the language of not amounting to gross negligence.

Chairman Oceguera:
We will close the hearing on S.B. 474 and open the hearing on Senate Bill 281 (1st Reprint).

Senate Bill 281 (1st Reprint): Revises provisions governing industrial insurance. (BDR 53-1136)

Kate Diehl, representing Property Casualty Insurers Association of America:
Property Casualty Insurance is an association of property/casualty insurance companies with 276 members doing business in Nevada.

[Read from prepared testimony (Exhibit D).]

Thank you again for this opportunity to present S.B. 281(R1).

Robert Ostrovsky, representing Employers Insurance:
Historically, we traded bad faith lawsuits for the benefit penalty section of the law. This was a trade-off. Accidents are paid and individuals cannot sue for bad faith. They can take actions against insurers to recover benefit penalties. I believe it was a fair trade to make workers' compensation statutes work well in this State. There have been consequences to the way the law is written. In 2006, Employers Insurance paid fines equal to $24,350 in eighteen instances. They also paid $49,375 in benefit penalties in five cases and there are additional cases pending review. They have never had more than one violation in the same claim. This bill puts the larger companies at a disadvantage. The top seven companies of the 207 licensed companies which sell workers' compensation insurance make up 50 percent of the market. Our violations included accidentally not paying 1 out of 26 bills that we were ordered to pay. It was a $36 bill and we were assessed a penalty of $13,125, payable to an injured worker, and we were assessed a $1,500 administrative fine. In a second case we were ordered to pay an injured worker a benefit payment for $38,000. We sent the check, but omitted a second signature which is required. We issued a second check and paid a penalty of $20,000 and an administrative fine of $15,000. In the third offense, we failed to pay an $8.10 travel voucher. For that, we paid a $13,125 benefit penalty and a $1,500 administrative fee. We pled guilty in each case. My concern is when you have 7,000 claims under management and make ten or more decisions per month on each claim, for large

insurers it leads to a problem. The solution that is being proposed is that we consider the penalties for a particular claim. The first violation should be worth between $3,000 and $10,000 at the discretion of the Department of Industrial Relations. It is a significant policy change because it says, do not repeat within a claim. We are currently punished if we repeat on any claim of all those that we manage.

The last section of the bill says we do not have to pay under judicial review. Currently, when you get a decision from an appeals officer, you have to make the payment within 30 days even if you appeal it to a higher court. We believe you should be entitled to have full review of your case before you have to make the payment. These are not benefit payments, but are an additional payment made to the claimant. Waiting for final review would not be a hardship.

Assemblyman Horne:
I have a question on your appeals process. Is there an appeals process to address clerical errors?

Robert Ostrovsky:
There is an appeals process. It is a hearing at the Department of Industrial Relations. The appeal goes to the Appeals Officer at the Department of Administration. The payment is due as soon as that judge renders his final decision. We have the right to appeal to the District Court and the Supreme Court, but are required to make the payment at the completion of the appeals hearing.

Assemblyman Horne:
So what happened in the case of the omitted signature?

Robert Ostrovsky:
The Department of Industrial Relations has a regulation and the numbers are automatically generated regardless of what caused the violation. They want to cause the insurance companies pain even if legitimate mistakes are made. In that claim, I am not sure if we appealed. The law is clear and we failed to comply. I feel that the penalties are too severe.

Assemblywoman Buckley:
I have some real concern about the bill. Let us say there is a large insurance company who engages in a pattern and practice of denying claims to save money. If they do it 10,000 times, but do not do it to the same claimant twice, they do not get the increased penalties. I understand your point, but I do not think the remedy you are suggesting meets the problem you are describing.

Robert Ostrovsky:
The law states that two or more violations of $1,000 or more will lead to a referral to the Insurance Commissioner. Section 5 of the existing law applies to self insurers. Insurance companies get market conduct reviews by the Insurance Commissioner in the audit process. Philosophically, I agree with you. We need to be able to identify pattern and practice of behavior. We need to correct poor behavior or remove that person from the marketplace.

Assemblywoman Buckley:
If you want to work on a return of bad faith for pattern and practice, I would be happy to talk to you, because I think we did the wrong thing. In cases where there are just mistakes, those should be ones where the penalty should be lower, but you have to have leverage against the others.

Chairman Oceguera:
Are there other questions? Are there others to testify in favor of S.B. 281(R1)? Are there any in opposition?

Danny Thompson, representing Nevada State American Federation of Labor and Congress of Industrial Organizations:
This is a horrible bill. It is correct that we threw out bad faith for this benefit penalty in 1995, when there had never been a successful bad faith case prosecuted. The problem that was remedied by that bill was a policy of employers denying all workers' compensation claims to save 75 percent. The legislation was passed to remedy that and it has. It is unfortunate that some companies have been caught up in the fine process. This bill would open up a Pandora's Box and we are adamantly opposed to it.

John E. Jeffrey, representing the Southern Nevada Building and Construction Trades Council:
There are a few things that need to be corrected. In 1993, injured workers took some hits and lost benefits. We had a dubious audit which indicated that if all of the claims had to be paid there would be about a $2 billion deficit. You find the same thing in any insurance company. There is always an unfunded liability. The biggest problems they had were management problems such as not paying their bills on time. Labor and management got together and agreed on several reforms. In 1993, about every favorable Supreme Court decision for the injured workers was overturned by the statutes. In 1995, one bad faith lawsuit was almost won, but lost at the Supreme Court level. There has never been a successful bad faith lawsuit, but there was a concern because when people were mistreated, they threatened bad faith suits. In 1995, the Legislature took the bad faith lawsuits out of the statutes and gave us the

benefit penalty. There were many problems with that since then and the Department of Industrial Relations has not been as diligent as they should have been. That is no longer a problem, but now the benefit penalties are being assessed. Most of the penalties are pretty egregious and those are the violations that generate a benefit penalty. You will never have more than one of those on the same claim. There probably needs to be more work done here. The point system was amended in June 2006. In the cases noted, you need to consider that these were violations of an order of a hearings officer or an appeals officer. The insurer needs to diligently follow what those officers order. I think this bill opens the door for more abuse of the injured worker.

Chairman Oceguera:
Are there any questions for Mr. Jeffrey?

Barbara Gruenewald, representing the Nevada Trial Lawyers Association:
We are also opposed to this bill. I want to explain how it works now. [Submitted supportive documents (Exhibit E).] Page 2 of the bill shows violations of an existing hearing or appeals officer's decision. The insurance company does not comply with the judge's order. Only then, do the benefit penalties on page 4 begin. The claimant has to go through an appeals process and it may take six months to get the decision that says he is entitled to the benefits. In this bill they want to say that they are only penalized after they have violated three of the hearing or appeals officer's decisions. If this passes, there will be a litigation nightmare for the claimant. If the insurance company does not pay on the decision, the claimant will have to wait for the insurance company to have three violations. We are objecting to all of the provisions in this bill because we do not think it is good public policy. There is a method set up to deal with small clerical errors.

Nancyann Leeder, representing Nevada Attorneys for Injured Workers:
Nevada Attorneys for Injured Workers (NAIW) sees many of the benefit penalty cases. Many of them are deemed to be minor violations by the Department of Industrial Relations and the claimant appeals because he feels it should be a major violation and a benefit penalty should have been ordered. It is difficult to win those cases and many are negotiated. As mentioned, NAIW sees many cases where a particular insurer habitually denies the case or sends out claim closure notices to a wrong zip code and the claimant has to obtain an excuse for late filing. Many times there are hidden claim closure notices in long letters and there are problems obtaining an appeal. Some insurers offer lump sum vocational rehabilitation buyouts before the amount of the buyout can be fairly gauged. To change the existing statute would do a disservice to our claimants. We recently had a case where the insurer did not pay upon the court order and subsequently did not pay the benefit penalty even when there was no appeal. It

is usually not violations on the same claim, but the same type of behavior over and over again with different claimants. Regarding the proposed change to allow an automatic stay when there is an appeal, in our cases the injured worker has either not been getting benefits, or has been getting a small benefit and has usually been waiting with insufficient income. When he finally gets an order saying that he is entitled to a particular benefit, it is not paid. He then gets an order that a benefit penalty is to be paid and he thinks he will be able to pay the debts he has incurred, but because there is a right to appeal the insurer would not need to pay him for an additional period of time. The proposed changes would be harmful to our clients.

Chairman Oceguera:
Are there any questions? Are there others to testify in opposition? Is there anyone wishing to testify neutrally? We will close the hearing on S.B. 281 (R1).

We will open the hearing on Senate Bill 100 (1st Reprint).

Senator Carlton is not available and I will ask her to come to a work session.

Senate Bill 100 (1st Reprint): Requires an insurer or third-party administrator who pays workers' compensation to an employee or a dependent of an employee to deposit the compensation directly into the account of the employee or dependent under certain circumstances. (BDR 53-465)

David Ziegler, Committee Policy Analyst:
Senate Bill 100 (1st Reprint) was introduced by Senator Carlton and has to do with workers' compensation. The main provisions are in Section 1 of the bill. An employee or dependent, who receives compensation for permanent total disability, permanent partial disability, or death, if it was not a lump sum payment, can submit to the insurer or the third-party administrator a notice to request direct deposit. If the insurer or third-party administrator receives the notice, they must comply.

Chairman Oceguera:
Are there any questions from the Committee? Is there anyone to speak in favor of the bill?

George Ross, representing Nevada Self Insured Association:
The Nevada Self Insured Association agrees with the bill as amended in the Senate.

Assemblyman Settelmeyer:
Is there only one check that is direct deposited or can the person have it paid to multiple individuals?

Barbara Gruenewald:
It is for installment payments and not a lump sum payment. They are monthly payments. I do not know if they can make multiple payments, but I think is according to the direction of the claimant and the policy of the insurance company.

John E. Jeffrey, representing Southern Nevada Building and Construction Trades Council:
I think the only concern in the Senate was the bill also involved temporary disability awards and that was removed from the bill.

Assemblywoman Gansert:
My concern is that it may run on auto-pilot and maybe we should have a system where the cash is verified periodically.

Chairman Oceguera:
Is there anyone else to testify on the bill?
We will close the hearing on S.B. 100 (R1).

The meeting is adjourned [at 3:34 p.m.].

RESPECTFULLY SUBMITTED:

_____
Earlene Miller
Committee Secretary

APPROVED BY:

_____
Assemblyman John Oceguera, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Commerce and Labor

Date: April 23, 2007 Time of Meeting: 2:30p.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 474	C	Mary Wherry, Division of Human Resources, Department of Health Care Financing and Policy	Prepared Testimony
S.B. 281 (R1)	D	Kate Diehl, representing Property Casualty Insurers Association of America	Prepared Testimony
S.B. 281 (R1)	E	Barbara Gruenewald, representing Nevada Trial Lawyers Association	Regulations and Supportive Examples