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

Seventy-Fifth Session
February 27, 2009

The Committee on Commerce and Labor was called to order by Chairman Marcus Conklin at 12:14 p.m. on Friday, February 27, 2009, in Room 4100 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 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/75th2009/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 Marcus Conklin, Chairman
Assemblyman Kelvin Atkinson, Vice Chairman
Assemblyman Bernie Anderson
Assemblyman Morse Arberry, Jr.
Assemblywoman Barbara E. Buckley
Assemblyman Chad Christensen
Assemblywoman Heidi S. Gansert
Assemblyman Ed A. Goedhart
Assemblyman William C. Horne
Assemblywoman Marilyn K. Kirkpatrick
Assemblyman Mark A. Manendo
Assemblywoman Kathy McClain
Assemblyman James A. Settelmeyer

COMMITTEE MEMBERS ABSENT:

Assemblyman John Oceguera (excused)

GUEST LEGISLATORS PRESENT:

Assemblyman Jerry D. Claborn, Clark County Assembly District No. 19
Assemblywoman April Mastroluca, Clark County Assembly District No. 29

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Andrew Diss, Committee Manager
Earlene Miller, Committee Secretary
Sally Stoner, Committee Assistant

OTHERS PRESENT:

Raymond Badger, representing the Nevada Justice Association, Carson City, Nevada
John E. Jeffrey, representing Laborers International Union of North America No. 872, Henderson, Nevada
Danny Thompson, representing the Nevada State AFL-CIO, Henderson, Nevada
Nancyann Leeder, Nevada Attorney for Injured Workers, Office of the Nevada Attorney for Injured Workers, Department of Business and Industry
Craig Michie, Private Citizen, Henderson, Nevada
Ronald P. Dreher, Government Affairs Director, Peace Officers Research Association of Nevada, Reno, Nevada
Robert A. Ostrovsky, representing Employers Insurance Group, Las Vegas, Nevada
Samuel P. McMullen, representing Nevada Self Insurers Association, Las Vegas, Nevada
Jennifer Gomez, representing the Nevada Transportation Network Self Insured Group, the Nevada Retail Network Self Insured Group, the Nevada Auto Network Self Insured Group, the Nevada Agriculture Network Self Insured Group, and the Builders Association of Western Nevada Self Insured Group, Carson City, Nevada
Craig Coziahr, representing the Nevada Transportation Network Self Insured Group, the Nevada Retail Network Self Insured Group, the Nevada Auto Network Self Insured Group, the Nevada Agriculture Network Self Insured Group, and the Builders Association of Western Nevada Self Insured Group, Carson City, Nevada
R. J. Lapuz, Coordinator, Claims Management Services, Clark County School District, Las Vegas, Nevada
Donald E. Jayne, representing Public Agency Compensation Trust and Nevada Gaming and Hospitality Association, Gardnerville, Nevada

Wayne E. Carlson, representing the Nevada Public Agency Insurance Pool and the Public Agency Compensation Trust, Carson City, Nevada
Fred Reeder, President, Reno-Tahoe Construction, Sparks, Nevada
Bryan A. Nix, Senior Appeals Officer, Hearings Division, Department of Administration
Bjorn Selinder, Fallon, Nevada, representing Churchill County, Eureka County, and Elko County
Ron Mestre, Owner, Bi-Rite Markets, Reno, Nevada
Steve Loye, President, Meineke Car Care Center, Sparks, Nevada
Edward A. Howden, President, Ed Howden and Associates, Reno, Nevada
Jim Jeppson, Acting Risk Manager, Washoe County, Reno, Nevada
Larry Bradley, representing Nevada Self Insured Association, Las Vegas, Nevada
Rusty McAllister, representing the Professional Firefighters of Nevada, Las Vegas, Nevada
Ryan Beaman, President, Clark County Fire Fighters Local 1908, Las Vegas, Nevada
Robert L. Holley, President, Park Ranger Association of Nevada, Reno, Nevada
Stephen W. Driscoll, Assistant City Manager, The City of Sparks, Sparks, Nevada
Victoria Robinson, Manager, Insurance Services, City of Las Vegas, Las Vegas, Nevada

Chairman Conklin:
[Roll called.]
We will open the hearing on Assembly Bill 178.

Assembly Bill 178: Makes various changes to provisions relating to industrial insurance. (BDR 53-221)

Assemblyman Jerry D. Claborn, Clark County Assembly District No. 19:
Assembly Bill 178 is a lengthy Workers' Compensation bill. I would like to turn the hearing over to the proponents of this bill.

Raymond Badger, representing the Nevada Justice Association, Carson City, Nevada:
I will present the basics of this bill in chronological order. Section 1 is a companion section to section 15. Section 2 is a companion section to sections 12 and 14. Section 3 creates an account which would fund cost-of-living increases to the neediest dependents of people who died on the job. This idea arose in our group, Labor Advocates and Injured Worker Advocates, from cases in Las Vegas. Under Nevada law, if a worker dies on the job, monetary benefits are payable to only a surviving spouse or minor children. Other relatives would have to show financial dependence on the injured worker. If the worker dies

without a spouse or minor children, the claim pays for burial expenses with a limit of $5,000 and for any emergency medical costs that may have accrued. This bill says if that occurs, the insurer would be required to make a payment into this fund of $150,000. When sufficient funds accrue, the funds would be disbursed to the widows and heirs who receive the least money.

The problem with cost-of-living increases is funding them. Some people whose injury was 20 years ago could use some financial help. Our mechanism is in cases where there is a death and no heir, that insurance company would pay $150,000. The Division of Industrial Relations (DIR) would hold hearings to determine how much money would need to be accrued and what method would be used for disbursement. Page 1 of the exhibit (Exhibit C) gives an example of what the DIR did to regulate a similar distribution to needy pensioners. This is the rule that was enacted, and we think the provision has worked well.

Regarding section 4 of the bill, there is an example of a Notice of Claim Acceptance on page 2 of the exhibit. A worker receives the letter, which contains important language, when they have a claim. The letter says a claim has been accepted and that the claimant should read the notice. It states that the claimant should ask for a Workers' Compensation hearing within 70 days if they disagree with the letter. If this letter said the claim is being denied, that person would have 70 days to challenge it or would be forever barred from doing so. The letter is being used differently by insurers. On the example, the insurer lists body parts. If the claimant agrees with the listed body parts and later has other physical ailments, the insurance could state that the claimant did not challenge the original letter and is forever barred from including additional ailments because the 70 days has passed.

Our proposal is to change that, but not to eliminate the insurance company's option to argue if a condition is caused by an injury. Our proposal is to require that a person be notified of a denial before their rights are severed. Our proposal says that if the insurance company denies responsibility for a medical condition or a "part of the body," they have to list it in the letter. If it is not listed, the person should not be time-barred from bringing it up later. I have included the court decision, found on page 3 (Exhibit C), which resulted from this issue. The proposal is for insurance companies to give notice if they are going to deny liability for any medical condition.

Section 5 is a companion section to the original proposal on the fund for death claims without heirs. Section 6 has two proposals. It has a companion section in Section 10 and deals with permanent partial disability. If a worker loses an arm, at the end of medical treatment, the severity of the injury is determined by medical examination, and the claimant is offered a cash settlement for damage

to their body, medical treatment, and retraining services. These two sections involve determining how we do that under state law. This benefit is the equivalent of three different benefits in a personal injury case. A jury in Nevada can award damages for permanent physical impairment, likely loss of future wages, or the diminished capacity to earn future wages. The permanent partial disability benefit in Workers' Compensation attempts to be a substitute for all three and is a significant benefit for the permanently injured.

Our proposal deletes the requirement that permanent disabilities be for "physical impairment." We brought this issue to the Legislature before, but withdrew it. There is an example of the outcome of the present law on page 9 of the exhibit (Exhibit C). You will find a reference to a Nevada Supreme Court case where a woman who had a facial disfigurement was determined by the examining physician to have a permanent psychological impairment as a result of the disfigurement. The insurer did not allow it because the statute said it must be a physical impairment. The Supreme Court in Nevada said because the Legislature limited it to physical impairment there is no method where a worker could be compensated for select psychological impairment under any circumstances. For example if we had an employee who was assaulted at gunpoint in a convenience store or was the victim of a paralysis from an injury on the job, under present law there is no permanent disability payable in Nevada. Proposal number 1 in section 6 would change that. Because of that law, the DIR holds public hearings every time we get a new version of the American Medical Association's (AMA) *Guides to the Evaluation of Permanent Impairment (Guides),* which we use to define permanent physical disability, to determine if there are portions of the guide that we should not use in Nevada. In 2003, we changed to the fifth edition of this book, and the DIR said we could not use two chapters because of that prohibition. They put out a regulation that psychological impairment would not be considered.

There was also a chapter that could award benefits for a permanent, chronic pain condition. The Division of Industrial Relations believed that the prohibition against non-physical impairment prevented use of those chapters. A group of self-insured employers challenged an additional part of the guide that they believed violated the Nevada rule that only physical impairments can be considered. I attached two pages of the guide that we now use. It has become very controversial and is the subject of the proposed amendment.

Pages 13 and 14 of the exhibit are excerpts of the fifth edition. More than 40 states use this guide in some version for determining permanent disability. These include categorized spinal injuries. On page 13, you will find that if you have a permanent back injury that does not involve nerve damage or surgery, you are in a category of 5 to 8 percent impairment in that book. The authors of

the guide said that within that category, the examining doctor should choose the percentage between 5 and 8, and the criteria for making that decision includes impairment of activities of daily living. These activities include the ability to talk, to see, to groom oneself, to lift, to carry, and to walk for a period of time. The self-insurers told the DIR that they thought impairment of daily living is non-physical impairment. On page 16 (Exhibit C), you will find that the DIR held public hearings and concluded that impairment of daily living is a physical impairment. If a person cannot lift over 20 pounds or walk a block, then he has a physical impairment. The self-insurers initiated a court action in Las Vegas, and in June 2008, if you look on page 32 of the exhibit, the court ordered that impairment of activities of daily living was non-physical and could not be considered. Because of the decision, the percentage of impairment is limited. For instance, in the case of non-surgical spine injuries, a person is limited to only 5 percent impairment. For those who have back surgery, they are limited to 10 percent.

The case is now in the Nevada Supreme Court. The case affects Nevada because the AMA has adopted a sixth edition and under our present law, the DIR must adopt that new guide effective June 2009. The authors of that guide believe that the best medical measure of impairment is to try to quantify the effect on activities of daily living. They are going to use those criteria in every possible medical system where it applies. They are obligated to remove anything that is considered a non-physical impairment. If they remove all references to activities of daily living (ADL), what will be left? If the court decision changes it, we will not have much left to the guide.

Our proposal in sections 6 and 10 is to mandate that we stay with the fifth edition of the guide, which we are currently using, until: the Legislature sees fit, the sixth edition has been vetted, the court decision has been made, or another version has been published. The guide is controversial. Iowa and New Hampshire had laws that they would use the most recent edition, but they have changed that because of their concerns about the sixth edition. Kentucky, Vermont, and Rhode Island have enacted legislation to indefinitely delay use of the sixth edition because of their concerns of not understanding what the effect may be, and they have studies going on. The amendment I have submitted (Exhibit D) would add a new section to this bill and make sections 6 and 10 effective on passage and approval. The purpose is to advise the DIR to continue with the fifth edition before they spend time and money adopting the sixth edition.

Section 7 involves the effect of an employee's misconduct at work on their lost wage payments. If a carpenter hurts his back and the physician says he cannot do his customary work, under Nevada law that physician is required to specify if

the worker is able to work and under what conditions. The employer is able to offer a modified job. If they do not, there is a lost wage payment to the worker while he is undergoing treatment. The Legislature passed a law last session because of a burgeoning new defense that employers and insurers were using. They said that a worker could be terminated for cause and, therefore, should not get a lost wage payment. The Workers' Compensation judges had no guidance on how to rule in these cases.

Nevada Revised Statutes (NRS) 616C.232 specifies some rules about that defense. This bill tries to modify one of those. Under present law, an employer asserting this defense has to show that the reason the person is not working is not the result of their injury, but their misconduct at work. There is a loophole in the law. The change would take out the words "with the pre-injury employer." The change would provide that if an employee is unable to work in other areas of employment and a judge finds it is due to their injury and not to misconduct, they would get a lost wage payment.

Section 8 involves reopening a claim. If a person has a permanent injury, but the insurer does not schedule them for a medical examination or discuss that they may have the right of a settlement for the injury, this section allows reopening for that incident. It has criteria that the worker must meet. The amendment says that failure to schedule a permanent disability evaluation when the insurer had evidence that there was a permanent impairment is a violation of the law.

Section 9 has two amendments. Under current law the only doctor who can say that the worker is to be off work is the treating doctor. This law says that any examining physician can make the determination. The second amendment is about temporary light-duty assignments. By providing alternative light-duty assignments for the injured worker, the employer saves the insurance company from paying lost wage payments, which might raise the employer's premium. This proposal modifies the guidelines for light-duty assignments.

We had a case of an ironworker with a casted, injured leg. The employer offered him a light-duty assignment at 60 percent of his wage with no employment benefits. The existing law says the employer is to pay a substantially similar wage with the same employment benefits. We went through a Workers' Compensation dispute resolution process. The job was found to be invalid. The Workers' Compensation judge cannot order the employer to do anything, but they can order the insurance companies to make the disability payment. Our law has no remedy when an employee is working and is not receiving proper pay and benefits. To remedy this, there are two options: you allow the Workers' Compensation judges to have the power to

order employers to pay certain wages and benefits or the one our proposal suggests, order the insurer to pay a disability payment. If the insurer cannot talk the employer into following the law, they will have to make a disability payment and seek recoupment from the employer.

Sections 12 to 14 are new ideas which have support from our audience. Under existing law, an employee has the right to go to court if he believes an employer fired him in retaliation for filing a Workers' Compensation claim. I included that court case on page 42 of my handout (Exhibit C). It is bad enough to get injured on the job and it is worse to get fired. Your family loses health insurance immediately. It is difficult for anyone to believe when they are fired an hour after an injury that they were fired for any reason but that injury. It is difficult to find lawyers to take those cases. The lawyer would have to take the tort case on a contingency basis, and the process takes three or more years. Other states have administrative remedies if a worker decides to choose that option.

The bill provides that an employee would make a claim if they think they were fired in retaliation for exercising their rights under this law. If this were found to be true there would be a $300 fine for the first offense and graduated fines for additional offenses and payment of the greater of one year of lost wages or $10,000. The worker would have the burden of proof.

One of the problems in crafting this bill is where do we go? The present Workers' Compensation hearing bureau gets cases where insurance companies make a decision. In cases similar to my previous example there is no decision. As drafted, the employee would apply to the hearings bureau. The bureau has great concerns about that provision. We used models of statutes from Louisiana, California, Wisconsin, and the federal longshoreman's act in crafting this provision.

Section 15 involves benefit penalties. This is the only remedy an injured worker has for bad faith claims actions. They can make a complaint to our regulatory bureau, the DIR, who has the right to assess a monetary benefit penalty with criteria and ceilings. The Division of Industrial Relations has decided that these payments are only due if an insurer is unreasonably late in complying with a written settlement or a court decision. We think that is too limited. If they conclude an insurer intentionally and knowingly violates a statute or regulation that is enough for a benefit penalty. The purpose of this proposed amendment is to say that failure to comply with a statute or regulation without a court decision could cause the imposition of a benefit penalty. John Wiles of the DIR has offered an amendment which makes the proposal better (Exhibit E).

Chairman Conklin:
Are there any questions from the Committee?

John E. Jeffrey, representing Laborers International Union of North America No. 872, Henderson, Nevada:
We are in support of the bill. In regard to the misconduct part of the bill, I do not know how we got to this point. As far as I can remember once a person was legitimately injured on the job, the claim was accepted and it stood. We did not used to have a problem with employers who fired employees who were on light duty. We support light duty because it gets an employee back on the job sooner, which can help them recover, and is an advantage to the employer. If an employer chooses to terminate the employee, it also terminates him from light duty. The employer chooses if the employee is going to stay on the job. There have been some questionable reasons for discharging people including violations off the job. If a person commits some type of misconduct, it does not eliminate the injury and should not do away with the employer's obligation to pay lost time benefits. Using the excuse of misconduct has become more of a practice than it should be. It seems that the insurers and third-party administrators use anything they can to cut somebody off payment. Unfortunately we are fighting some of the same battles we did years ago.

Chairman Conklin:
Dean Hardy of the Nevada Justice Association is in support of the bill.

Danny Thompson, representing the Nevada State AFL-CIO, Henderson, Nevada:
We support this bill, specifically section 4. People who are unsophisticated in Workers' Compensation issues are sometimes workers who find themselves hurt on the job, who can never leave their hospital bed, and who receive a claim letter. They accept the claim and later find they have an additional body part that is not covered, and they are denied treatment for that part. This is a serious and common issue. The injured workers do not understand the process. This needs to be corrected. Every injured worker needs to get an attorney to represent them. There is widespread abuse of the system.

Chairman Conklin:
Is there anyone you want to speak, Mr. Claborn?

Assemblyman Claborn:
There was no one except Mr. Badger, who did a great job.

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

Nancyann Leeder, Nevada Attorney for Injured Workers, Office of the Nevada Attorney for Injured Workers, Department of Business and Industry:
The bill appears to assist injured workers, and therefore, we favor the bill. Section 7 addresses the same statute as section 5 of Assembly Bill 24, which is the Nevada Attorney for Injured Workers' (NAIW) bill, and does not conflict with it. We think that both sections of both bills should be passed. I asked the NAIW attorneys and paralegals about the reprisals and retaliation cause of actions in sections 12, 13, and 14. The paralegals said they have been getting about two dozen calls per month from people who suspect retaliation or reprisal. The 13 attorneys who have existing cases estimate that they have two dozen clients per attorney who testify that this is taking place.

Mr. Badger noted a case in regard to section 6 about activities of daily living. The case at the Supreme Court is ours, and NAIW participated in the hearing before the DIR where the medical providers testified. One of the experts was the medical editor for the fifth edition of the AMA *Guides*, Dr. Linda Cocchiarella, M.D. Based on her testimony, the DIR made their decision, which was challenged up to the Nevada Supreme Court.

During the investigation we found out that the AMA *Guides*, since the first edition, have used the concept of "activities of daily living." The term has become more commonly used. In Nevada we have used the first edition, the second edition, the fourth edition revised, and now the fifth edition. The concept of "activities of daily living (ADL)" has been included for the permanent impairment evaluator to assess the severity of the injury. She testified that in the fifth edition, it is defined as being important in determining the severity of an injury. The concept of ADL and the use of ADL in the evaluation of permanent impairment are discussed in the first two chapters of the AMA *Guides*' fifth edition in substantial detail. Activities of daily living are a definite medical concept. They include the ability to sleep, walk, sit, or climb stairs, which are basic components of living.

Chairman Conklin:
Are there any questions from the Committee?

Assemblywoman McClain:
Activities of daily living are physical impairments. Why did anyone consider not using them?

Nancyann Leeder:
One of the claims is that it is an additional benefit, not just the assessment of the severity of the injury. Another is that it is the result of an injury, not a part of the assessment of the severity of the injury.

Assemblywoman McClain:
It does not make sense.

Nancyann Leeder:
It does not to us either.

Chairman Conklin:
Is there anyone else to testify for the bill?

Craig Michie, Private Citizen, Henderson, Nevada:
In regard to the issue of the death benefit of $150,000, could somebody tell me what the current value of a death at today's maximum wages would be?

Chairman Conklin:
This Committee is not in the position to answer questions, but I will have staff research it for the members.

Craig Michie:
I have been watching this process for far too long, and I am concerned that we think we can come together for 4 months every 20 months and do some more patchwork quilt activity to remedy the problems. If we do not understand the size, scope, and value of some of these elements, it is just an exercise. I hope we know how many injured workers, contested claims hearings, and deaths of workers we have in Nevada. It may put some weight on how important it is that we solve this issue.

I think the issue of light duty is important. When light duty is provided to an injured worker it keeps him active. If it had been offered to me, I could have continued to earn my wage and maintain my insurance. In some circumstances, light duty is not made available. There is no obligation for the employers to rehire or keep injured workers employed, so light duty and access for the disabled and injured workers are significant issues.

I am generally in favor of issues related to A.B. 178. I would like to propose to this Committee that we take a substantive step forward in resolving this. The issues and complexities of a simple workplace injury like mine in 1999 continue to go on and on. There has been wave after wave of litigation that is not a resolution. Therefore, I recommend that instead of coming back session after session and trying to patch these laws, we come to another solution. That would be to provide employers and insurers up to 180 days to resolve contested claims. If they are unable to resolve contested claims, the injured worker could chose to take leave of the Workers' Compensation system and move into a tort litigation where he would have access to a court system and have his citizen's

rights restored so he could pursue a remedy. A worker could pursue a remedy for the full extent of his loss including wages, pension, insurance, and pain and suffering. Currently, the discounted and depressed values that are provided within Workers' Compensation provide a benefit to the employer to starve-out the injured worker. There is no remedy available to them of a sufficient nature to cause the employer to be part of the solution. They continue to be part of the problem.

If there was, however, an opportunity to go before a jury to present the facts, being the steps that employers take to misdirect such as to communicate with doctors to get favorable outcomes from the medical reporting, there would be an opportunity for justice. The result of that justice would require the employers and the insurers to rethink the abuse of injured workers. Ten years into my case, we are still trying to determine the full extent of the original injuries because the insurer has concealed the full extent of injury. It is profitable for insurers. The level of frustration injured workers face is a tool used by insurers to test the resolve of the injured worker. They wait for the worker to violate a clause or make a mistake so the insurers will win a huge economic victory. They send a message that your workplace injury is not welcome. It violates the truth, the law, and the public policy of this state.

To change the hurdles injured workers face, I recommend we find a way that within 180 days the employer is given the opportunity to participate within the benefits that Workers' Compensation provides. If they are unable to provide what the law requires—timely treatment, compensation, and benefits—the injured worker should be given another remedy for the full cost and value of that loss. I think this will stop the abuse to injured workers in the State of Nevada.

Chairman Conklin:
Are there questions for Mr. Michie from the Committee? Is there anyone wishing to testify in favor of A.B. 178?

Ronald P. Dreher, Government Affairs Director, Peace Officers Research Association of Nevada, Reno, Nevada:
I am here in support of A.B. 178 and specifically sections 13 and 14. In the past several years I have had the unfortunate experience of representing some officers. One was a 25-year police officer who injured his neck and was terminated. We went through an arbitration process. The arbitrator ruled in our favor. He wanted to remain a police officer, but received rehabilitation and took another job. Another police officer was injured and was going to be fired, but the police chief fought for him, and he was reinstated and continues to work. People get injured and cannot perform a function, and some decide to do a

different kind of work, but some want to stay in their profession. They should not lose their right to work because they were injured. We ask you to support this bill.

Chairman Conklin:
Is there anyone else wishing to testify in support of this bill? Is there anyone wishing to testify in opposition to the bill?

Robert A. Ostrovsky, representing Employers Insurance Group, Las Vegas, Nevada:
I will give you an overview of the position of the insurance industry relative to this bill. I think we have a good system, but it is not perfect. The Legislature has made changes to the Workers' Compensation system every session since I have been here. Changes are not out of the realm, but many of the suggestions in A.B. 178 go beyond minor adjustments and improvements in the system. To understand the size of the system, in 2007 there were 72,454 new claims. About 80 percent of them were medical only and 20 percent represented lost time. That ratio is fairly constant over the years. The system spends about $400 million per year in direct claims costs.

Section 1 is a technical section. Section 2 is a new section on reprisals for filing a claim. If you want to proceed with this language, does it belong in Workers' Compensation statutes, or is it some new change to our labor code? What is the appropriate methodology? The Department of Administration does not hear these kinds of cases, and there is a fiscal note to increase the number of judges that would hear them. Because the proposed language says you cannot cover it under Workers' Compensation policy, then you will have to bring in the employers' general liability policies which will be comingled with the Workers' Compensation claims. We believe this language makes the system more complicated. If there are problems relative to this and section 14, I believe we have to find better ways to resolve them.

The standard as applied in section 14 is pretty low. It says the injured worker has to "believe" that he was discriminated against in some way. "Believe" is not a very high standard and is a standard that leads to much litigation. Because they can file these claims years after the event, it becomes very hard for the employers to defend themselves. Who decided a $10,000 fine is reasonable? You may think language like that is needed, but I do not know what the penalty should be. My experience in handling grievances in the workplace is that 90 percent of the grievances are easily and simply resolved. The issues on page 16 starting on line 14 of the bill would result in thousands of grievances. It is a wide door that employers and insurers do not want to go through.

Section 3 is tied to section 11. Referring to section 3, if you want to set up a fund, why would we direct the fund to be in the State Treasury? The funds are currently in the DIR and should stay there. In section 11, if there is going to be a penalty for the insurer for a death, how many claims will there be? Last year we had 29 deaths that were investigated by the Occupational Safety and Health Administration (OSHA), but there were actually 59 total statewide workplace deaths. Some of them fall under the mines safety act and are not investigated by OSHA, and some are never investigated by OSHA such as traffic accidents. A lot of workplace deaths are due to traffic accidents and crimes committed at the workplace.

At the rate of $150,000 per death, it will take years to accumulate enough interest growth to make a substantial dent in trying to fix the problem you are trying to address—which is an automatic cost-of-living adjustment for those who do not now have one. This will not solve the problem of the cost-of-living adjustments.

In section 4, the notice of a "body part" is a duplicate. The law says we have to state a "body part" now. When we send an original claims acceptance or denial letter, we often do not have all of the medical information. Things later develop that allow us to include or deny other parts of the body. This is just a compliance issue. It says to send a better letter. Insurers will send letters with very specific disclaimers. I do not think this will solve the problem. The problem is how to handle injuries where a claimant says it has affected another body part that was not originally reported. This is just more paperwork.

Section 5 is technical. Section 6 is about the AMA *Guides*. The fifth edition was published in 2002. The AMA has spent a lot of time, effort, and energy in writing these guides to be up to date about how to rate and treat injuries. Medical practices change. The reason we have the guide we have now is that in March of 2003, the proponent of this bill, Mr. Badger, testified that the law in Nevada was inappropriate. The law did not specify that we use the latest edition. It was the trial lawyers' position at the time that employers and insurance companies were sticking to the second edition and did not want to move to the fourth edition because it might be more expensive. The solution to that was to go with the most recent guide. It is their language in the law that makes them unhappy about using the sixth edition. By the way, the sixth edition incorporates the activities of daily living into the ratings; it is not rated separately.

The most important part of this section is that they want to eliminate the language about the degree of physical impairment. If you eliminate the degree of physical impairment, you bring in pain, psychiatric problems, and activities of

daily living. We think that will raise the cost of these claims 3 to 10 percent. The current law has been a system that has worked well for the state, and we do not think it should be changed. Ten states use the sixth edition, seventeen use the fifth edition, nine use the fourth, six have their own guides, and three states are still using the third edition. Under Chapter 232 of the *Nevada Revised Statutes*, the third edition can no longer be used in Nevada, and if the state makes reference to a guide, it has to be a current publication.

Chairman Conklin:
Mr. Ostrovsky, will you please take a question?

Assemblywoman McClain:
Where did the concept that ADL cannot be used to determine any kind of physical disability originate?

Robert A. Ostrovsky:
I think that needs to be answered by the Nevada Self Insurers Association.

Samuel P. McMullen, representing Nevada Self Insurers Association, Las Vegas, Nevada:
They are fighting for the objective measurement (Exhibit F.) Objectivity focuses on the physical aspect of the injury—how the body has been damaged. There are many things that a person may or may not be able to do because of that injury. This needs to be less confusing and less difficult. Objectivity is the difficult part of that. It defines so many things and so many benefits. These are issues similar to pain in the sense that you can say or not say something. It is based on testimony. In the early days of industrial insurance, the issue was trying to get to the objectivity as opposed to the representations of a claimant. The theory is that there is an objective physical piece that you can study and make better all of the time. If you do the objective part well, you do not need the rest of it.

Assemblywoman McClain:
I do not think ADL are subjective. They are clear-cut, and I believe they are objective.

Samuel P. McMullen:
Some of them may be objective.

Assemblywoman McClain:
My point is that it is fairly easy to prove one way or the other if you cannot walk or bathe since the injury. I do not know how we got to the point that ADL are not considered an objective measure.

Samuel P. McMullen:
The point is that not all are, and you have to hold to these anchors of objectivity.

Assemblywoman McClain:
I think that those should be one of the anchors.

Robert A. Ostrovsky:
In section 9, the difference between an examining physician and a treating physician is an examining physician can take someone off employment and a treating physician can put them back. We are trying to avoid doctor "shopping." We have tried to find language that gives the injured workers an opportunity to select a treating physician and change a treating physician if necessary. Opening up doctor "shopping" is wrong.

In section 15, they take out the word "refused" and the words "intentionally failed" and use "failed" instead. There had to be some intent on the part of the insurer. We think that is the appropriate measure. In section 15, subsection (j), they have made any failure to follow any regulation or statute under Chapter 616 or 617 of NRS a felony. If the insurance company fails to file a paper properly or to pay a physician timely, it is subject to a benefit penalty. The ceiling for fines to the insurance company is $37,500 and is a substantial hit.

Chairman Conklin:
Are there any questions from the Committee? There are none.

Samuel P. McMullen:
The Nevada Self Insurers Association (NSIA) represents individual companies that are self-insured and self-insured groups. The 38 members employ more than 200,000 employees. This is a significant part of the work force and the Workers' Compensation system. The self-insured groups' members include about 2,000 small businesses with 70,000 or more employees. These employees are not just claimants, they are the self-insurers' employees and this is part of the employee-employer relationship.

Jennifer Gomez, representing the Nevada Transportation Network Self Insured Group, the Nevada Retail Network Self Insured Group, the Nevada Auto Network Self Insured Group, the Nevada Agriculture Network Self Insured Group, and the Builders Association of Western Nevada Self Insured Group, Carson City, Nevada:
The self-insured groups I represent include 2,800 employers and 70,000 employees.

Craig Coziahr, representing the Nevada Transportation Network Self Insured Group, the Nevada Retail Network Self Insured Group, the Nevada Auto Network Self Insured Group, the Nevada Agriculture Network Self Insured Group, and the Builders Association of Western Nevada Self Insured Group, Carson City, Nevada:
We oppose section 1 which refers to the benefit penalty. In section 2, we do not believe the issues of "reprisal or retaliatory action" belong in the NRS chapters for Workers' Compensation.

Jennifer Gomez:
In section 3, we believe that there is an existing remedy which could be modified to accommodate this death benefit cost-of-living increase. That is the fund which was established for the permanent total disability employees. This fund is funded by assessments. It allows the insurers to continue to make the monthly permanent total disability payments to the employees, and through the assessments, the Division of Insurance could make the 2.3 percent increase annually to them. There is room for compromise here, and we can adjust the suggested language to include funding in a way that is not a direct penalty of $150,000 to any employer.

In section 4, we believe there is room for compromise and modification of the existing process. A format for an acceptance letter, acceptance notice D-30, has been adopted by the DIR. We believe that could be modified to meet the needs of the trial lawyers and Mr. Badger's recommendations. We could add condition, diagnosis, denials, and other points. Our greatest concern is having two determinations issues. It brings up administrative and certificate of mailing issues. We believe a modification of the existing process would meet our needs.

Section 6 deals with the guides for impairments. There was a letter submitted by Victoria Robinson of the City of Las Vegas (Exhibit G), and I have permission to share her thoughts with you. The State of Nevada has adopted the AMA *Guides* on a continuum, and based on empirical data, new editions are published with new and improved, objective medical data found since the previous publication. We believe that the continuous adoption of new guides keeps us current, present, medically objective, and able to provide the most recent permanent impairment disability ratings to our injured employees.

Chairman Conklin:
Does anyone ever question the integrity of the AMA guides?

Jennifer Gomez:
I am unaware that anyone has questioned its integrity.

Samuel P. McMullen:
Do you mean the reliability or its effectiveness as a tool?

Chairman Conklin:
How do they come up with the numbers, who influences the numbers, and do the numbers increase or vary over time? There has been a lot of reference to this guide and there is an underlying question about whether or not the sixth edition has some mistakes or integrity questions.

Jennifer Gomez:
The guide lists the types of physicians, surgeons, and others involved in the creation of the guide who collaborated nationwide and indicates their methodology. We believe it accurately represents the ideas of that medical group.

Craig Coziahr:
Section 7 is confusing. It implies that the injured worker who is discharged for misconduct is precluded from employment with any employer. Who is going to determine that?

Jennifer Gomez:
We believe the language suggested in Assembly Bill 24, which allows for the approval or denial of scheduling a Permanent Partial Disability (PPD) at closure of a claim with appeal rights, is the remedy, versus the suggested language in section 8 of A.B. 178.

Vice Chairman Atkinson:
Are there any questions from the Committee for the witnesses?

Assemblywoman Kirkpatrick:
How quickly do states adopt the new editions? Is there any time to see if there are any problems? As an example, what compensation would a teenager working in a movie theater receive if he were assaulted on the job, and how does that fit into the psychological profile? I think a person would never return to that situation again.

Chairman Conklin:
Please provide those answers to Assemblywoman Kirkpatrick and Committee staff.

Jennifer Gomez:
Section 10 attempts to strike through the provision determining permanent impairment. It states that no factors other than the degree of physical

impairment of the whole man can be considered when determining a permanent impairment. It is important to remember that the reason the language was added to this statute decades ago was because impairments should be based solely on objective medical findings. The guides are not used solely for Workers' Compensation ratings. Therefore, it is inappropriate to have the references in the AMA *Guides* for impairments, which would allow for higher ratings for pain, suffering, and activities of daily living, currently considered as subjective by the statutes. Nevada has decided the ADL should not be included in the Workers' Compensation rating system due to subjectivity. There is a lot of confusion about differentiating between the different types of ADL. Because there is a pending court ruling regarding ADL, we should honor the statutes and allow the language to remain.

Chairman Conklin:
Mr. Anderson has a question.

Assemblyman Anderson:
Do you believe that while areas of the law are under judicial discussion, the Legislature does not have the prerogative to try to fix the system?

Jennifer Gomez:
I feel it is absolutely within your position to deal with these issues. However, the language in the district court is very clear, and I was hoping this Committee would agree with and adopt that language and continue with the process as it is written.

Chairman Conklin:
Courts interpret our language, and when we disagree with the court, we reserve the right to correct that.

Craig Coziahr:
Section 13 states that it is unlawful for an employer to refuse to rehire an employee who has had an industrial injury if the employee is eligible for an available job. This removes a lot of the authority of the employer to make competent hiring choices by eliminating the ability to consider other factors such as the poor economy, the suitability of a position, or similar pay. We oppose section 14.

Jennifer Gomez:
We concur with Mr. Ostrovsky's position on section 15 regarding the penalties and removing the mental element from the statute, which is "intent." We believe the word "intent" was there to prevent bad faith issues. We submitted a pie chart representing our clients' acceptance and denial rates (Exhibit H). Our

data shows that 91 percent of our claims with self-insured groups are accepted for benefits, and 9 percent are denied.

Chairman Conklin:
Is there anyone else to testify?

R. J. Lapuz, Coordinator, Claims Management Services, Clark County School District, Las Vegas, Nevada:
The Clark County School District opposes this bill. The bill will have a negative impact on Workers' Compensation costs. In section 10, expanding the Partial Permanent Disability (PPD) rating system to include subjective complaints would mean increased PPD compensation awards. Increasing a PPD award by only 1 percent to account for costs of pain could cost the School District approximately $300,000 per year. In section 15, "intentionally failed" should not be deleted. If a clerical error is made on a small percentage of claims, the School District pays hundreds of thousands of dollars in penalties. The School District is self-insured for Workers' Compensation and pays the benefits to injured workers directly. Considering the current budget crisis, passing a Workers' Compensation bill that would result in increased cost would not be prudent. The District has already made significant budget cuts, and this change would put us in the position of paying teachers, or purchasing classroom supplies, or paying increased Workers' Compensation claims. We cannot afford the cost associated with A.B. 178.

Chairman Conklin:
Are there any questions for the witness? There are none.

Donald E. Jayne, representing Public Agency Compensation Trust and Nevada Gaming and Hospitality Association, Gardnerville, Nevada:
The problems in Workers' Compensation are technically complicated in different aspects. We need to meet with the opponents and proponents of the bill to work out some of the problems. We offer our services to do that. In section 9, there are some criteria that work toward the strict exactness of a temporary assignment. A return to work approach is a good thing. It shortens the claims and benefits everybody. I would hate to see anything we do here discourage an employer from working towards that.

Chairman Conklin:
Are there any questions from the Committee? There are none.

[There is no quorum. The Committee is operating as a Subcommittee.]

Wayne E. Carlson, representing the Nevada Public Agency Insurance Pool and the Public Agency Compensation Trust, Carson City, Nevada:
We have about 130 local governments, primarily in the rural areas, from small districts to counties (Exhibit I). This bill affects both pools. The liability pool is affected by section 2 which creates the scheme of liability exposures resulting from reprisal claims. The Equal Employment Opportunity Commission Board currently handles those, and there are processes established in Chapter 613 of the NRS, and the Americans with Disabilities Act and Title VII of federal law. Our liability pool defends those cases. There is a remedy, and to put it in the Workers' Compensation law seems to be duplicative of the other remedies. We think the bill has fiscal impact. There will be more liability cases, and we believe there will be a fiscal impact to local governments on the Workers' Compensation side. We have not had time to analyze that, but we are looking into it. Another problem with the Workers' Compensation hearing process that is proposed in section 2 is that decisions made by the Hearings Division become "res judicata" or "collateral estoppel" on a tort action. Since a tort action is allowed, this would create the presumption of negligence and, therefore, be decided at the hearing level. This is a very significant change in the law that would affect the Workers' Compensation side and the liability side.

Regarding the $150,000 proposed death benefit, municipalities and counties have the heart and lung conclusive presumption benefit which applies for life. Potentially, there would be significantly more fiscal impact on our members than on other employers. We have had two death cases with no heirs. Those alone would have cost us $300,000 instead of the $5,000 burial benefit per case. The fiscal impact is hitting the local governments as well as the state, and we think this is adding an additional burden. This appears to fit within the framework of an unfunded mandate on local government.

Chairman Conklin:
Are there any questions for Mr. Carlson?

Assemblyman Anderson:
When a life is lost, everyone is not without heirs. You would have had to provide the full compensation if there were heirs. That is why the creation of the pool was proposed. Do you create your actuarial tables based on history?

Wayne E. Carlson:
Our program started in 1996, and some of the older beneficiaries with the cost-of-living issue precede us. We do not contemplate other than what is in the law at the time the claim is settled and what is due to be paid out at that time. Current law says if there are beneficiaries, they are entitled to the

benefits of the decedent. If there are no beneficiaries, there is a burial benefit. This bill creates a life insurance benefit that goes into a fund to pay for cost-of-living benefits for employees who were injured or deceased before our existence and go back to the original Nevada Industrial Commission.

Assemblyman Anderson:
We have a different understanding of that issue. Maybe we could sit down with the presenter of the bill to discuss it.

Vice Chairman Atkinson:
Are there any other questions from the Committee?

Fred Reeder, President, Reno-Tahoe Construction, Sparks, Nevada:
We are a union contractor and we operate primarily in a civil utility market. My main clients are local governments. I employ 60 employees in the field which is down from 120 two years ago. I am very concerned about the impact any increase in premiums would have on my ability to operate effectively. Last year I paid a premium of about $94,000. In 120,000 man-hours, we had two injuries and zero lost-time accidents. We have a safe record and pay a high premium, but we are in a dangerous business. I would appreciate it if you would look into the effects on businesses like mine that are already struggling to stay alive in this economy, as well as the effect on local governments. I will have to pass the additional costs onto my clients who are local governments.

Assemblyman Settelmeyer:
Would bills like this make you hire less employees?

Fred Reeder:
In the big picture, you are correct. If I have to charge the local government more, they are going to be paying for my premium, not for a new road.

Chairman Conklin:
Employers can reduce that cost by having lower lost-time injury records. Unfortunately, not all employers have great records, so the entire risk pool gets spread out.

Assemblyman Goedhart:
I think you probably operate under a modification rating. Your fees are set on an industry average, but if you are below industry norms for lost wages and work time, do you get some type of discount?

Fred Reeder:
We have a very good modification rate, but our liability package is very high.

Assemblyman Goedhart:
You can pass it on to your clients, but people in commodity based businesses have no way to recoup those costs because the commodities are only worth a certain value in the world market.

Chairman Conklin:
Are there any other questions from the Committee? Who else wants to testify in opposition to the bill?

Bryan A. Nix, Senior Appeals Officer, Hearings Division, Department of Administration:
We generally support the idea behind section 4. It would bring more clarity to the decisions that insurers render with respect to parts of the body. Our issue is if there is less clarification there is more litigation. Good lawyers tend to file appeals on every acceptance claim because they are concerned there may be a hidden denial. That impacts our Division with unnecessary appeals and litigation.

Section 14 is such a broad provision for protection against retaliation in Workers' Compensation claims. This has such a broad definition that virtually anybody who has had an injury and has a grievance against his employer can file an appeal. It is not really an appeal; it is a case of first impression with the Hearings Division. The employee can drag his employer before the appeals or hearing officers with an allegation. There should be a remedy for people with legitimate complaints. This opens a huge potential marketplace for people with grievances, and we can see a major impact on our division. If this bill progresses, we are willing to submit a fiscal note or answer any other questions for the Committee.

Chairman Conklin:
Are there any questions for Mr. Nix? There are none.

Bjorn Selinder, representing Churchill County, Eureka County, and Elko County, Fallon, Nevada:
We are members of the Public Agency Compensation Trust and the Nevada Public Agency Insurance Pool. We support Mr. Carlson's testimony and would be willing to work with the parties to find a workable solution.

Chairman Conklin:
Are there any questions for Mr. Selinder? There are none.

Ron Mestre, Owner, Bi-Rite Markets, Reno, Nevada:
Employees are the most important asset I have. We pay their medical insurance, and we offer sick leave and paid vacation. We encourage temporary light duty because employees get well faster, remain in the loop, and it keeps a good employee on my payroll. It is good for everyone's morale. There is a small percentage of employers and employees who are not good. If I have an employee who I want to put on light duty, but he would rather violate the rules and regulations of our company and I terminate him, he can collect 66 percent of his wages tax free. He is rewarded for misconduct, and if I do not terminate him, the other employees wonder why they have to follow the rules.

I pay Workers' Compensation so my employees are covered. Section 14 should not take the ability from the employer to reprimand employees. I would like the Committee to consider these issues.

[There is a quorum.]

Steve Loye, President, Meineke Car Care Center, Sparks, Nevada:
I am a member of a small self-insured group. I have a disability so I have sympathy for injured workers. I believe Workers' Compensation is a system that works and should be a model for many of the failed systems in surrounding states. I was one of the first employers to join a self-insured group after the former state-administered insurance agency denied a legitimate claim, in which I supported the employee, and then the agency approved a blatantly fraudulent claim. This bill appears to not be a workman's injury bill, but a massive social legislation masquerading as workman's insurance. If you intend to reward the trial lawyers, bankrupt Workers' Compensation insurers, cripple small businesses while providing no incremental benefits to legitimately injured workers, pass this legislation. If you intend to do anything to the contrary, defeat this legislation in its entirety.

I do not know where I can buy a death benefit with a cost-of-living increase in the market. In response to Assemblywoman McClain's questions about ADL, when you lose a leg it is a tragedy, and Workers' Compensation should cover it and pay for the lost ability to earn money. The fact that you cannot skip down the steps should not be an additional covered expense of a claim. If the Legislature wants to add those types of social benefits, it should be included in the tax system. However, I am not sure those issues have higher priority than the schools and public safety that are in such urgent need. I want you to consider that the road paved with good intentions may not lead to where we want to go.

Chairman Conklin:
This bill is not a piece of social legislation; it is a cry for help, because the system does not seem to help everyone fairly and equally. The trial lawyers have been at the table because they are the ones people go to when they feel injustices have occurred. We are all trying to be respectful when we make comments before this Committee. We want people like you, who live in the real world and have to operate under the laws we make, to testify. It would be in everyone's best interest if the Workers' Compensation system never went to court and you never had a claim. It would be the best of all worlds. All it requires is for people to have safe environments. It is intended to be a no-fault system to give people help quickly. There have been bad actors on both sides. Most of the reason we are here is because we have a few bad actors on one side or the other and it causes pain for everyone else. It is a management and a personnel issue and they all point fingers at each other. When someone is served an injustice, and the system fails them, it brings forth a piece of legislation like this. I appreciate people like Mr. Loye being part of the process, and hopefully he will take an understanding of what we are trying to grapple with here to others.

Steve Loye:
The concern I have is based on the numbers from my self-insured group; 8 percent of the claims were denied and as many as 1 percent of the claims wrongfully denied. I would caution this Committee to not punish the remainder of the people who are doing right by putting onerous requirements on them to protect the 1 percent.

Edward A. Howden, President, Ed Howden and Associates, Reno, Nevada:
I am a rehabilitation counselor and consultant. My job is to work with injured workers and return them to gainful employment. Nobody has done this longer than me in Nevada. Section 9, subsection 9, specifically limits the autonomy of an employer and employees. If we eliminate the autonomy to develop a modified, alternate return-to-work plan for injured workers by making strong orders to employers, we are going to lose employees rather than gain them.

Assemblyman Anderson:
I appreciate Mr. Howden's involvement.

Chairman Conklin:
Are there any other questions?

Jim Jeppson, Acting Risk Manager, Washoe County, Reno, Nevada:
We support the comments of Wayne Carlson and specifically want to reinforce the concern about section 11, subsection 14, and the $150,000 death benefit

payable to the fund. We believe it will have a disproportionate impact on public safety and the cities and counties as employers. I am willing to work with anyone on the Committee to address these concerns.

Chairman Conklin:
Is there anyone else to speak in opposition?

Larry Bradley, representing Nevada Self Insured Association, Las Vegas, Nevada:
I want to support the statements made on behalf of the Nevada Self Insurers Association (NSIA) especially section 6. In 1998 we moved from the third to the fourth edition of the AMA *Guides,* and that was the first time the NSIA moved for litigation. There was a determination that in the State of Nevada we did not rate pain. When we moved from the fourth to the fifth edition, we again filed suit, and that is currently going through the court system. Nevada has consistently not rated pain and parts of the ADL are pain complaints. Historically, the Legislature has tried to take out the subjective nature of pain rating.

Chairman Conklin:
Is there anyone else wishing to get on the record at this time in opposition to A.B. 178? Is there anybody in the neutral position who needs to get on the record? I will close the hearing on A.B. 178 and I will hold this bill because there are some more Workers' Compensation bills to come forward. I request that the bill's sponsor start working with some of the opposition to see if there is some compromise. This is not the view of the Committee, but the view of the Chairman, let us keep in mind that it is easy to get tied up in the process and what is lower in cost versus what is right for justice. Please remember that we are talking about people who get injured. Sometimes the processes that are right for the people who administer are not necessarily right for the injured worker.

[Robert L. Compan submitted a letter to the Committee (Exhibit J).]

[Tom Marshall submitted a letter for the record (Exhibit K).]

[Ray Bacon submitted comments for the record (Exhibit L).]

I will open the hearing on Assembly Bill 173.

Assembly Bill 173: Makes various changes relating to occupational diseases. (BDR 53-898)

Assemblywoman April Mastroluca, Clark County Assembly District No. 29:
I am here to present Assembly Bill 173. Firefighters have shared concerns they have about their fellow firefighters and issues surrounding their health. Police and firefighters are covered under *Nevada Revised Statutes* (NRS) 617.455 and NRS 617.457. This bill would add arson investigators and allow them to be protected under the same provisions. The second part of the bill addresses a problem of third-party administrators denying claims of firefighters under NRS 617.440, and this issue has not been resolved.

Rusty McAllister, representing the Professional Firefighters of Nevada, Las Vegas, Nevada:
This bill is a compilation of two different bill draft requests and has two issues. Part of the bill adds fire arson investigators into the current statutes with regard to heart and lung protections for public safety employees. The law currently states that if you are a firefighter or a police officer for five years and you follow all of the guidelines set forth in the law, you will have a conclusive presumption that any heart or lung disease will be borne out of your employment.

The fire arson investigators are in a no-man's-land. Some departments in the State of Nevada hire or promote fire arson investigators from the ranks of firefighters, so they already have the coverage. Other departments bring them in without being firefighters, but they still have the duties and responsibilities to go into burned-out structures that contain the same chemicals and things that firefighters are exposed to. They are also faced with law enforcement responsibilities, and many of these people are Category II peace officers.

Fire arson investigators are not included in the statute unless they had been firefighters or police officers for five years. We would like to add them in so they have the same protections and coverage as the people they work with. As an example, one of the departments in southern Nevada has two fire arson investigators. One was previously a law enforcement officer for more than five years and he has protection; the other investigator with the same responsibilities does not have the same protection.

Assemblyman Settelmeyer:
Are there any other groups we need to include in the heart and lung bill? I would like to see some finality to this because it seems to be brought up every session.

Rusty McAllister:
It is my understanding that the Peace Officers Research Association of Nevada has a bill that is to be heard in this Committee next week that includes state

park rangers. You approved it last session, but the bill died in the Senate. To my knowledge, that is the last of the Category I peace officers that are not included in this bill.

Assemblyman Anderson:
Do you think it is one individual or are there others in this category?

Rusty McAllister:
A lot of it depends on the size of the department. The City of Las Vegas and Clark County are the largest fire departments in the state, and those fire investigators are former firefighters and are covered under the statute. There are others in the state who worked in fire prevention. The City of Sparks has three fire prevention officers who are also fire investigators. In many smaller locations, they use them in multiple positions and they are more likely to have people that fall into this category. I believe Incline Village has two, Tahoe-Douglas has one, Gardnerville-Minden has one, Carson City has two, and Sparks has two or three.

Assemblyman Horne:
Do we have a total number in the state that we would be giving this benefit?

Rusty McAllister:
I do not have an exact number, but I will get that for you.

Assemblyman Horne:
The reason I am asking is because if there is any opposition to this, they will want to know how large the group is.

Chairman Conklin:
Are there any other questions from the Committee?

Assemblyman Goedhart:
How much would the heart and lung benefit cost per employee?

Rusty McAllister:
The cost of the benefit would be dependent on how many people are in the group. Many of these employers are self-insured.

Assemblyman Goedhart:
Would you come up with a range for what you think that benefit would cost?

Chairman Conklin:
I think that would be a better question for the cities and counties. There are a good number of employees who are already covered.

Rusty McAllister:
One of the difficult parts of determining the cost is that a small percentage of employees will need this benefit, yet actuarial evaluations paint the worst case scenario.

Assemblywoman Kirkpatrick:
Are there requirements to be an arson investigator?

Rusty McAllister:
Yes, there are requirements and standards that have to be met to be a fire arson investigator. They have to have law enforcement and investigative training through the fire service.

Assemblywoman Kirkpatrick:
Is one of them being a fireman?

Rusty McAllister:
Because rural departments cannot afford a full-time investigator, a large portion of the fire investigative responsibilities of rural local departments are met by using the Nevada State Fire Marshall's Office to do the investigations. The Fire Marshall's Office employees are already covered so that adds no additional cost. I do not know why there is a fiscal note on this bill.

Chairman Conklin:
We could get that information from other sources, but we are considering policy, not fiscal issues. Are there any other questions from the Committee?

Ryan Beaman, President, Clark County Fire Fighters Local 1908, Las Vegas, Nevada:
Assembly Bill 173 is about giving fundamental rights to certain employees in the State of Nevada, including police officers and firefighters, through legislative action (Exhibit M). These employees have the potential to have certain injuries and occupational diseases deemed as occupationally related. The law provides that the illnesses and injuries are conclusively presumed under NRS 617.453, NRS 617.455, NRS 617.457, and NRS 617.485 to have arisen from the course of duty of a firefighter or policeman.

As part of Chapter 617 of NRS, there are certain guidelines to be followed when denying a claim. Most notably is the language, "notwithstanding any provision of this chapter" in NRS 617.453, NRS 617.455, NRS 617.457, and NRS 617.485. This partial phrase is noted in the presumptive statutes and is clearly understood to mean that no other sections within Chapter 617 of NRS are to be used to determine the status of a claim filed under those presumptive statutes. Unfortunately, we found that prior to the last legislative session, Clark County, through their third-party administrator, routinely denied claims filed under the presumptive statutes in Chapter 617 of NRS by utilizing other sections of that chapter on which to base their denial. During that session, legislation was passed to address this situation. During the last two years, Clark County, through Sierra Nevada Administrators, has continually denied presumptive claims in violation of this statute. As a practice, the Appeals Office and Hearings Division of the Department of Administration has also disagreed with the legislative intent of the presumptive statutes.

The first opportunity for the affected employee to have his case reviewed is usually at the district court level, at a great cost to the employee where the legislative intent is observed and the previous administrative decisions are overturned. I have tried to address the issues of claim denials for those cases dealing with presumptive benefits by meeting with staff from Clark County, specifically Sabra Smith-Newby, who facilitated a meeting with Ed Finger, the county comptroller who also oversees risk management for Clark County, to identify the reason for the presumptive claims. Mr. Finger informed me, Brett Fields, Vice President of Local 9280, and Clark County Commissioner Chris Giunchigliani that those claims dealing with heart and lung would be accepted as intended by the Legislature.

The opposition to the bill may say they accept claims under NRS 617.453, NRS 617.455, NRS 617.457 and NRS 617.485, which is true some of the time. We always see claims accepted with no questions asked for the line-of-duty deaths and retirees. This is due to a previous Supreme Court decision. You may also hear from those in opposition that they are winning these claims under the provisions of NRS 617.358 and NRS 671.440. This is correct. The hearings officer and appeals officers are cutting and pasting the same decision as a third-party administrator. At that time, the union and the employee must make the decision to pay the outstanding medical bill, usually about $1,500, or pay an attorney to represent the member in district court at a cost of about $10,000.

The County seems to have no problem denying these claims as they do not use in-house counsel for representation. They have entered into a contract with outside counsel to defend the decisions made by their third party administrator.

For the calendar year 2008, Clark County spent $48,000 to fight these claims. Clark County and Sierra Nevada Administrators still fail to follow the direction of this Legislature and this Committee. Last session, Chairman Conklin stated that this Legislature has tried to make it clear that denying claims that should be undeniable is not an acceptable practice. This bill is a small step to again try to address those issues, and passage of this bill would further this mission.

Chairman Conklin:
It does not seem right that we have some taxpayer-funded employers, who should be following the letter of the law, who continue to turn a blind eye to the wishes of the Legislature. Are there any questions for Mr. Beaman? There are none. Is there anyone to testify in support of A.B. 173?

Ronald P. Dreher, Government Affairs Director, Peace Officers Research Association of Nevada, Reno, Nevada:
We are greatly in debt to Ms. Mastroluca for bringing this legislation forward, and we are requesting your support and passage of A.B. 173. One of our objectives is to allow all of our professional peace officers the same benefits. We will have accomplished this when Assembly Bill 214 is heard; it provides for our state park rangers and Department of Public Safety employees who were left out of the bill. Assembly Bill 173 provides the industrial injury occupational disease coverage for arson investigators (Exhibit N).

Robert L. Holley, President, Park Ranger Association of Nevada, Reno, Nevada:
The Park Ranger Association of Nevada encourages you to support and pass this bill (Exhibit O).

Chairman Conklin:
Are there any questions from the Committee? There are none. Is there anyone else wishing to testify in support of this bill? Is there anyone to testify in opposition?

Stephen W. Driscoll, Assistant City Manager, The City of Sparks, Sparks, Nevada:
This bill is intended to help the City of Sparks and is long overdue for our arson investigators. The only opposition we have is that we continue to be unable to screen for genetic preconditions that may become the catalyst that causes an employee to have a heart or lung condition (Exhibit P). The second thing is that there is no responsibility for a retiree to maintain cardiac or respiratory wellness to maintain this benefit. We would like some of the responsibility put on the employees for either the genetic preconditions or some heart and lung wellness

because this is a fabulous benefit. We embrace presumptive behaviors, we work with that, and deny very few claims.

Chairman Conklin:
So, you are in support of this bill and want amendments to heart and lung in general, but not the provisions of this bill?

Stephen W. Driscoll:
That is correct.

Assemblyman Settelmeyer:
Could you do that as part of your physical examination? Why does it need to be through the State Legislature and not your department?

Stephen W. Driscoll:
It is my understanding that is not something that we are able to do through negotiation processes or administrative processes.

Chairman Conklin:
I believe that under the heart and lung statute the only way a heart and lung case can be denied is if there is a preexisting condition. I imagine that is something that can be tested for because the Ways and Means Committee can tell us exactly how many people have a predisposition who they are working with to correct. Those numbers are specific to people who are covered by the heart and lung statute.

Assemblyman Anderson:
Arson investigators are not part of the heart and lung provisions because they are not former firefighters, but I presume they have to meet specific hiring qualifications.

Stephen W. Driscoll:
You are correct. In the current job description, which the City of Sparks has had for more than 15 years, there is a progression and a job description that has certain requirements including Peace Officers' Standards and Training Level II certification and certain skills in fire investigation. The description does not require that they are former law enforcement personnel or firefighters. Our current arson investigators have come to us through other means and have received proper training.

Assemblyman Anderson:
Do you include the fire arson investigators in your actuarial studies?

Stephen W. Driscoll:
They have not been included. If this bill passes, they would be included.

Assemblyman Anderson:
Would that add to your and their compensation levels?

Stephen W. Driscoll:
Yes, sir.

Chairman Conklin:
Are there any other questions for Mr. Driscoll? There are none. Is there anyone else wishing to testify in opposition to the bill?

Victoria Robinson, Manager, Insurance Services, City of Las Vegas, Las Vegas, Nevada:
The City of Las Vegas cannot support this bill. We have the utmost respect and admiration for our firefighters. We have always endeavored to provide them with excellent salary and benefits. We believe this reflects our appreciation for the vital service they provide to our citizens. However, we cannot in good conscience support this bill. We feel it is important that you understand why. Under these presumptive statutes, heart disease, lung disease, and cancer are all considered compensable. The City currently pays over $1 million per year under presumptive benefits which is 35 percent of everything we pay out for all Workers' Compensation. The reserves that we have to set aside for these claims represent 90 percent of our total reserves. For each permanent total claim under these statutes we now reserve $1.4 million. We are accepting claims and have approximately 40 permanent total disabilities and another 100 or so claims that have been filed for "not total" disability benefits.

Proponents of this bill have indicated to our staff they believe that this legislation has no effect on the City because our fire investigators are required to have at least five years in the fire services, and by default, they are covered by this statute. We would like to point out that job descriptions change and needs of governments change. What is required now may not always be required. Even though we are not immediately affected, other government entities like the City of Sparks may be. It is no secret that the

City of Las Vegas, like many other cities in Nevada, is facing multi-million dollar shortfalls over the next several years. It does not make sense to expand these benefits arbitrarily to yet another classification of employees, adding new liabilities and new financial obligations when there appears to be no scientific evidence that arson investigators have a higher incidence of communicable diseases, heart disease, lung disease, or cancer than the general population. It would not be fiscally responsible to do so.

We are very concerned about the new language in section 4, subsection 3. Our concern is that it erodes the employers' ability to rebut the presumption of benefits when an employee fails to meet the statutory criteria for coverage. A genetic condition such as a congenital heart defect does not overcome the requirements under the presumptive statutes. These benefits represent millions of dollars to cities and counties. In the last few years, insurers have been increasingly reluctant to provide coverage, which leaves the entities to fund them, to the best of their ability, out of revenues and reserves. If an employee does not meet the statutory criteria for coverage, the employer should be legally able to ask that employee to provide evidence that he is entitled to the benefits.

We value all of our employees; however, we believe that expansion of the classification of employees covered under the presumptive benefits would be expensive and not based on scientific evidence.

Chairman Conklin:
Are there any questions from the Committee?

Assemblywoman Kirkpatrick:
Is there a staffing ratio?

Victoria Robinson:
We have fire investigators, and they are already covered under existing statutes.

Assemblywoman Kirkpatrick:
Why are you opposing it?

Victoria Robinson:
I will email you that information.

Samuel P. McMullen, representing Nevada Self Insurers Association, Las Vegas, Nevada:
We represent a lot of the public employers so we want to go on record that we share the concerns about this bill.

Chairman Conklin:
Are there any questions? There are none. Is there anyone else to testify in opposition? There are none. We will close the hearing on A.B. 173. It is my intention to move this bill next week. We will have a work session next week, so if Committee members have concerns, please get them to me as soon as possible. We will open the meeting for public comment.

Craig Michie, Private Citizen, Henderson, Nevada:
Regarding A.B. 173, I believe that it is very important that the Committee and the employers keep in mind that there are risks with the operations they have. The entitlement of benefits should be the subject of a question: Was there exposure? Exposure is the issue. These thresholds that continue to be raised and seem to be artificial suggest that an individual can have exposure, yet we are not going to provide them with the entitlement to the benefits. This is very problematic. I raise this issue because of the workers at the 9/11 site who were placed in harm's way as the result of exposure who are being denied benefits. As we craft language, entitlement of benefits should be as it relates to exposure.

In regards to A.B. 178, the employers seem to repeat their concern about cost. These employers have been living under a false economy for a long time. Now they are taking advantage of the current economic circumstances, complaining of "poor times," but they have never been held accountable for the full cost of production. A work place injury is a component of the cost of production. It is part of the cost that they are obligated to take. It is part of the risk that employers take in order to obtain the benefit of the profit. They seem to want to dismiss this obligation.

There is a small group responsible for this, so it is important for the Committee to look at what transparency can be brought into this system. Where are the contested claims coming from? Let us identify these employers, specifically self-insured employers who are using the money they would use for premiums to pay for litigation and creating a hostile work environment for filing legitimate injury claims. We need to see the names of employers who continue to bring claims to the Department of Administration. We need to look at the employers who continue to get benefit penalties and administrative fines.

Knowing who they are may be a deterrent. Counties and municipalities need to look at these employers and determine whether or not the employer is going to have the right to continue to expand their presence in a community. Employers who starve out workers are not the kind we need in our communities. This information is not readily available.

The last time the DIR appeared here, they were pleased to talk about their recent enforcement activities in regard to benefit penalties. They talked about how they had assessed over 169 benefit penalties and administrative fines over the last fiscal period, which resulted in $1.3 million of benefit penalties. They failed to say that 85 percent of the benefit penalties and administrative fines were being appealed. We need to get some metrics that are available to all. Hundreds of injured workers in this state have no idea that the Legislature is responsible for what takes place in their injury claim. They do not get representation, they do not know what to do, and their circumstances are intolerable. They flee the environment and make bad choices that cause them to be found incredible or to be denied if they file a Workers' Compensation claim. It all comes about because of a hostile workplace environment. This is not what we want to create for injured workers.

Chair Conklin:
Is there anyone else who wants to provide public testimony at this time? We have a regular meeting on Monday that will last until 4:00 p.m., and we will have a 4:00 p.m. joint hearing on energy stimulus issues. On Wednesday, we will have three bills, and on Friday we will have two bills and a work session.

Meeting adjourned [at 3:24 p.m.].

RESPECTFULLY SUBMITTED:

_____
Earlene Miller
Committee Secretary

APPROVED BY:

_____
Assemblyman Marcus Conklin, Chairman

DATE:_____

EXHIBITS

Committee Name: Committee on Commerce and Labor

Date: February 27, 2009 Time of Meeting: 12:14 p.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 178	C	Raymond Badger	Supporting documents
A.B. 178	D	Raymond Badger	Proposed Amendment
A.B. 178	E	John F. Wiles	Proposed Amendment
A.B. 178	F	Samuel McMullen	Informational Statement
A.B. 178	G	Victoria Robinson	Letter to the Committee
A.B. 178	H	Jennifer Gomez	Pie chart
A.B. 178	I	Wayne Carlson	Commentary
A.B. 178	J	Robert L. Compan	Letter of opposition
A.B. 178	K	Tom Marshall	Letter of opposition
A.B. 178	L	Ray Bacon	Memorandum of opposition
A.B. 173	M	Ryan Beaman	Case Examples
A.B. 173	N	Ronald Dreher	Statement
A.B. 173	O	Robert L. Holley	Statement
A.B. 173	P	Stephen W. Driscoll	Statement