

**MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON TRANSPORTATION**

**Seventy-Seventh Session
April 25, 2013**

The Committee on Transportation was called to order by Chairman Richard Carrillo at 3:16 p.m. on Thursday, April 25, 2013, in Room 3143 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 nelis.leg.state.nv.us/77th2013. 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 Richard Carrillo, Chairman
Assemblyman Paul Anderson
Assemblyman David P. Bobzien
Assemblywoman Maggie Carlton
Assemblywoman Lucy Flores
Assemblyman John Hambrick
Assemblyman Cresent Hardy
Assemblyman James W. Healey
Assemblywoman Ellen B. Spiegel
Assemblyman Michael Sprinkle
Assemblywoman Heidi Swank
Assemblyman Jim Wheeler
Assemblywoman Melissa Woodbury

COMMITTEE MEMBERS ABSENT:

Assemblyman Joseph M. Hogan, Vice Chairman (excused)



GUEST LEGISLATORS PRESENT:

Senator Greg Brower, Washoe County Senatorial District No. 15
Assemblyman Pat Hickey, Washoe County Assembly District No. 25
Senator James A. Settelmeyer, Senatorial District No. 17
Senator Scott Hammond, Clark County Senatorial District No. 18

STAFF MEMBERS PRESENT:

Vance Hughey, Committee Policy Analyst
Sean McCoy, Committee Policy Analyst
Scott McKenna, Committee Counsel
James Fonda, Committee Secretary
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

Paula Penrod, Private Citizen, Reno, Nevada
Andrew J. MacKay, Chair, Nevada Transportation Authority
Paul J. Enos, representing the Nevada Trucking Association
Chris Rusby, representing Great West Casualty Company
Ed Meyer, President, NevCal Trucking, Sparks, Nevada
John Sande III, representing the Western States Petroleum Association
James T. Overland, Sr., President, Nevada Chiropractic Association
Cindie Hernandez, representing the Nevada Chiropractic Association
Mendy Elliott, representing the Chiropractic Physicians Board of Nevada
Danny Thompson, representing the Nevada State AFL-CIO
Marlene Lockard, representing the Nevada Chiropractic Association
Keith Lee, representing the California Nevada Cement Association
Thomas R. Tietz, Executive Director, California Nevada Cement Association
Craig Hennings, Executive Director, Southwest Concrete Pavement Association

Chairman Carrillo:

[Roll was taken. Committee protocol and rules were explained.] I would like to open the hearing on Senate Bill 302.

Senate Bill 302: Requires taxicab motor carriers in certain counties to maintain and provide to the Nevada Transportation Authority and other taxicab motor carriers certain information. (BDR 58-846)

Senator Greg Brower, Washoe County Senatorial District No. 15:

Senate Bill 302 is a public safety measure aimed at filling a loophole in the existing laws regulating taxicabs outside of Clark County. We have two different regulatory structures in our state for the regulation of taxicabs: one that regulates cabs in Clark County, and the other that regulates those in the rest of the state. Currently, taxicab companies are required to administer pre-employment and random tests for alcohol or controlled substances to their drivers. This bill would require that a taxicab company maintain a record of the results of such tests, provide the results to the Nevada Transportation Authority (NTA), and release those results to other cab companies upon request. The goal is to prevent a situation where one company hires a driver who has tested positive while employed with another company without knowing about that previous positive test. The bill contemplates that the NTA would adopt regulations to determine the details of how this scheme would be implemented. This is a public safety measure intended to protect passengers, the public at large, and the cab companies themselves. Andrew MacKay, who is the chairman of the NTA and has been very helpful on the Senate side in explaining the details, is here today. Let me turn it over to your minority leader and I will rest.

Assemblyman Pat Hickey, Washoe County Assembly District No. 25:

Senator Brower and I have the privilege of having a constituent who is going to speak next with a very compelling reason why this bill is needed. Without further ado I would like to introduce Paula Penrod, who has done a lot of work and has a compelling story to tell you as to why she has undertaken this endeavor to make our state safer.

Paula Penrod, Private Citizen, Reno, Nevada:

I am here to speak in favor of S.B. 302 and give vital information as to why this bill needs to be passed and made into law in our state. On January 31, 2011, my youngest son, Ryan, was killed by a taxicab driver. This taxicab driver had over 260 nanograms of methamphetamine in his system, according to the Reno Police Department. This is over 2.5 times the legal threshold of methamphetamine in our state. The driver of this taxicab was caught on video failing to stop at a stop sign and traveling into the lane of traffic in which my son had the right-of-way. My son died a horrific death. He was only 30 years old and he had his whole life ahead of him. The trauma to my husband, myself, and our two other sons is indescribable and extremely difficult to bear, not to mention the affect his death has had on other family members, and Ryan's

countless friends. Over two years later, as you can see, we are still trying to cope with our grief and with our loss.

Unfortunately, there is no law or provision that mandates reporting taxicab drivers who have failed an alcohol or drug test to the NTA, or sharing this information with other taxicab companies. This lack of reporting allows a driver who tests positive for drugs and/or alcohol in a random, new-hire, or suspicion drug test to walk across town and hire-on with another taxicab company without that company knowing the driver has failed a drug or alcohol test. The taxicab driver who killed my son had been let go from a company in Nevada. If this information had been shared within our state, possibly my son would still be alive. The NTA already has the database set up for offenders of other *Nevada Revised Statutes* (NRS), and the addition of offenders who have failed drug and/or alcohol testing would be a great asset and tool for the NTA. The taxicab driver who killed my son had transported two passengers just seven minutes prior to killing my son. According to the Reno police officers who interviewed this taxicab driver after the accident, the driver admitted to them that he had consumed methamphetamine at least three consecutive days prior to the date of the accident, and he was driving a taxicab on those days.

This proposed bill is in the best interests of public safety to protect citizens and tourists in Nevada. It would also be a valuable resource for the taxicab industry as companies would be able to access this list prior to hiring a new driver; thereby, saving considerable time and money, and eliminating potential liability for their companies. I cannot imagine the taxicab industry not supporting this legislation, as it would ensure the safety, health, and welfare of the general public. I am speaking today in memory of my son, Ryan Adam Penrod. I am speaking on his behalf as he cannot, asking for your support in passing S.B. 302 into law, so that another family will not lose a son, a daughter, or another loved one because our state does not have this valuable resource that would prevent a taxicab driver who has failed a drug or alcohol test from getting behind the wheel of another taxicab in our state.

Chairman Carrillo:

Thank you, Mrs. Penrod, and I am sorry for the loss of your son. It is never easy to lose a loved one.

Assemblyman Paul Anderson:

Thank you for sharing your story, and I certainly want to extend my deepest condolences for your loss. I know it is never easy to get over something like that, no matter how much time passes.

My question is more on the regulatory side. What obstacles would we run into with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal guidelines in regard to compiling and releasing that information and sharing it with different entities?

Senator Brower:

We have been working on this with Chair Andrew MacKay of the NTA. My first thought as Mr. Hickey, Mrs. Penrod, and I started talking about putting a bill together was, will the NTA be able to implement this in accordance with HIPAA and every other law that might apply? We have worked closely from the very beginning with Chair MacKay, and I will defer to him on the details of that.

Andrew J. MacKay, Chair, Nevada Transportation Authority:

There will not be any issues with respect to that, Assemblyman Anderson. With respect to any conflicts with HIPAA, Mrs. Penrod did the research beforehand and has an extensive background in that arena. With respect to the overall implementation, quite frankly it is going to be a piece of cake. I would like to impress upon the Committee the NTA's full support of this measure. Sometimes it is awful that you learn that there is a loophole in the law when something terrible happens. In this instance, where something awful came about, I think that what is being proposed by Senator Brower and Assemblyman Hickey is commonsense legislation. It will enhance public safety, no doubt about it, and for that reason the NTA is in 100 percent support.

Assemblyman Paul Anderson:

Thank you for that. "Piece of cake" is not necessarily what I was looking for. I would agree that we have a loophole that we need to fix. I deal a lot with HIPAA compliance in the medical fields, and would we have drivers signing releases? Would this all be done through regulation, or how much is in statute versus what goes into regulation?

Andrew MacKay:

If the bill becomes law then obviously there is the enabling statutory language and the particular nuances will be fleshed out in regulation. Currently, as Mrs. Penrod stated, the NTA already keeps track of drivers that are ineligible to drive. That was adopted and codified in regulation. In some instances, a driver who has failed to appear for a citation hearing or failed to pay an administrative fine ends up on that list. Putting those individuals into the NTA database is going to be quite easy. With respect to a release, in current law, federal as well as state, drivers are aware of the fact that they are going to be subject to pre-employment random drug testing, as well as to reasonable-suspicion testing if they report to duty and the carrier has any reason to believe the driver may be under the influence of either drugs or alcohol. Additionally,

they know they are subject to immediate testing in the event they are involved in an accident. In an accident, whether there are injuries or not, taxicab drivers have to be tested pursuant to the law.

Senator Brower:

I would like to invite Mrs. Penrod to address that belief. Mrs. Penrod manages a medical office and has done some research on the HIPAA issue that might be helpful to the Committee.

Paula Penrod:

I do work in the medical field and have for over 30 years. We have incidents in medical practices, which I am sure Assemblyman Anderson will acknowledge, where we are approached because an individual has broken a law or is under suspicion of breaking a law. In those instances it is allowed for certain information to be disclosed. Drivers that are tested with the consortium for the cab companies do sign a release saying that their employers will be notified that they have failed this drug test. It would be a very simple thing, if the Committee has a concern over HIPAA, to include in the release that this information would be released to the NTA. The Health Insurance Portability and Accountability Act is to prevent someone calling in to a physician's office and obtaining medical information when they should not have access to that information. It is also so that physicians' offices do not share confidential information with other entities such as medical offices, hospitals, et cetera. But, there is also what is called a continuity of care for physicians, which allows them to share information on a patient when it is in the patient's best interest. That is a little bit different. However, this issue is a matter of public safety where the individual is breaking the law. It is against the law to drink and drive, or drive under the influence of drugs. It would be a very easy fix to have the release say that not only is the information being released to the potential employer of this taxicab driver, but also to the NTA.

Assemblywoman Swank:

How long will the data be kept? Is there a process by which a taxicab driver who had been tested positive at one point can get back to where they could be a driver again?

Andrew MacKay:

That is something that we will flesh out in regulation. We can discuss with the Committee whether that would be three years or five years. If there is a time frame that record is to be kept, five years for instance, then after that they would be removed from the database and would be eligible. Additionally, federal regulations permit that if an individual does test positive, in a random test for instance, that individual can immediately request to be retested.

They have, in essence, a built-in immediate appeal. Strange things happen. They can claim that the sample got mixed up with somebody else's. But, if someone does test positive, they do have the ability to ask for a retest.

Assemblyman Sprinkle:

Unless I am reading this wrong, this does not affect Clark County. Is there a reason for that?

Andrew MacKay:

The reason is that the Taxicab Authority permits drivers. A qualifying event to have your permit revoked is a positive drug test. If an individual tests positive and works for Yellow Checker Star, for example, they would immediately terminate him and his permit would no longer be valid. If he then applies to another taxicab operator, he has to retest. That is built into the permitting mechanism with the Taxicab Authority.

Assemblyman Sprinkle:

That gets to my second question. The very first word in section 1, subsection 1, is "if." I am wondering what exactly "if a taxicab motor carrier requires an employee" means. Is this still at the discretion of the motor carrier, whether or not they are going to test? Why would this legislation not make it mandatory to begin with?

Andrew MacKay:

That is a good question. To be frank, I never parsed the word "if." In current law, a motor carrier must subject any driver, whether of a taxicab, limousine, bus, or tow truck, to the drug testing requirements. They do not have an option to not do this, the way I read this bill. Currently, they have to drug test all their drivers on a pre-employment, random, as well as reasonable-suspicion basis. This is just a mechanism for them to then submit that information to the NTA and fellow carriers.

Senator Brower:

I think that is just a stylistic drafting use of the term "if." As Chair MacKay mentioned, the current regulatory regime requires the testing. To Assemblyman Sprinkle's point, I assume that the Committee has probably heard a fair number of taxicab bills this session, but, there are two regulatory structures. Clark County has one and the rest of the state has the other. Anytime you see NTA it does not apply to Clark County.

Assemblywoman Carlton:

The way I read this bill it is about two issues: random drug testing and safety and use of the list. Is that correct? Because, in essence, this will be random drug testing.

Senator Brower:

Random, pre-employment, and incident- or suspicion-based drug testing are already required. The point of this bill is that when a test, pursuant to one of those three types of testing, is positive, then there is really a very incomplete mechanism for making sure that everyone who should know about that positive test knows about it. But, the testing requirement itself is already in place.

Assemblywoman Carlton:

That clarifies that question and takes me to my next concern, which is the listing of a prospective employee who may not get hired. In essence, we are blacklisting someone, and I would have concerns about that. Things change and people's lives change. How do we address prescription drug levels? We cannot get doctors to agree on what level of a prescribed drug is too dangerous. And, if someone has a legal prescription, how do you hold that against them? Who actually pays for this in the long run? Is it going to be the employee, the driver? Is it going to be the Taxicab Authority, or the cab company? I understand somebody you have already hired who you have a responsibility to, but listing someone who is prospective? That was that company's choice not to hire them. Knowing what false positives are in the drug-testing world, if you do not use the right tests, you are not going to get the right results.

Senator Brower:

From the big picture perspective, what is not contemplated here is some kind of blacklist. That is a very good question and a significant concern. What is contemplated is that a prospective company, perhaps the cab company across town, has knowledge of the previous positive test. That cab company, armed with that knowledge, would be able to make its own decision depending on the circumstance of that positive test. That cab driver who has tested positive is not necessarily ineligible to be hired. The idea is to not put cab companies in a position where they do not know about the drug testing history of someone who walks in the door and applies for a job.

Assemblywoman Carlton:

I understand what you are trying to do, and I think this is a really good idea, but when that cab driver does not get the job at the first place because of a drug test and ends up on this list, financially, the second cab company is going to look at that and say, "I am not even going to test this person, I am just going to

automatically chuck them." So, in essence, he does not even have the chance to prove he is clean because they will not bother to invite him back. That is what I see happening. If it is 18 months later, or even 12, and they have cleaned up their act, I would hate to see somebody permanently listed on something like this as a prospective employee. They would be constantly turned down and never be able to succeed again.

Senator Brower:

I think from a public safety perspective the key here is that the prospective employer has that knowledge. I do not know that there is a shortage of cab driver applicants out there. This is about letting cab companies have complete and full knowledge when making hiring decisions. It does not mean they will not hire the person. If you put yourself in the position of a cab company, you would not want to make that hiring decision without full knowledge of the history.

Andrew MacKay:

That would ultimately be on a case-by-case basis when hiring any individual. That was the discussion that we had amongst ourselves, blacklisting individuals, so to speak. That is why it does not prohibit a taxicab company from hiring that individual, it can make that decision. You did ask a question in terms of who pays for the drug testing. Neither the NTA nor the Taxicab Authority pay for that. Generally, it is paid by the applicant. This is on the application. Companies sometimes pay for that. Random testing is covered by the carriers.

Assemblyman Sprinkle:

As you have said, for pre-employment everybody has to be drug tested. They are being tested when they apply for a job. Even if they had a positive somewhere else, when they apply for the current job, or the company across the street, they still have to be tested. All this bill is saying is that another company can request that information. Or is it automatically sent to them? The way I read the bill, it says that "if they request it, it can be awarded to them." Is that correct? That might get to the blacklisting as well, because if you are not looking to blacklist, why would somebody wantonly be sending out information about someone they rejected as an employee? Am I right on that?

Andrew MacKay:

The short answer to that is yes, but I want to qualify that. Every motor carrier operating in the state of Nevada is subject to a litany of federal regulations. One of those is that when you hire an individual, you have to do a pre-employment inquiry. You have to reach out to the prior employer, but the federal law does not require that you are successful. You have to prove that you called the former employer and say whether or not you were successful.

In that respect they are already contacting the prior employer. What this means is that in the event you apply to me and you fail, then I would transmit that to the company that is doing the hiring, as well as to the NTA for record keeping purposes.

Senator Brower:

Assemblyman Sprinkle makes a good point. The cab company has to do a pre-employment test. If somebody comes to your company, Assemblyman Sprinkle, or is an employee who fails and is terminated as a result, and then applies to Assemblywoman Carlton's company, under this law Assemblywoman Carlton would have the right to know about the previous failed test. But, pursuant to law, Assemblywoman Carlton's company would have to test him again, and they could say, "I know that you failed a drug test, and that is why you lost your job. I am willing to give you another chance, but you are going to have to pass my test. If you do, I am willing to overlook that previously failed test." So, there is a new test with each company.

Assemblyman Healey:

Mrs. Penrod, I want to thank you for having the courage to bring your story to us today. I think it is a very important point and your story drives it home. Certainly, when it comes to public safety, particularly in a state such as ours where tourism and cabs play such a vital role in the longevity, success, and sustainability of our state, it is critical. I am certainly in support of making sure that we have drivers that are not under the influence on the road.

I want to piggyback on a couple of the comments made by Assemblymen Carlton and Sprinkle. Being with a company that does a lot of drug testing and dealing with this and seeing the litigation we have had, I have a couple of thoughts about this pre-employment testing and the failure of it. If you are on duty, putting lives in danger and putting the company at risk for liability, and you test positive, then those results should be put in a database and made available to all companies. Although, if you are prospective employee and you fail your tests prior to starting the job, I have a concern, as do others, about those results being placed into that database. Because the requirement is that you have to be tested, if you go across the street to try and apply at another company, you are required to get tested there as well. Suppose I am an individual who has been at a party and smoked marijuana and failed the test. Then I realize that I need to clean up my act and put food on the table for my family. So, I do get my act together and six or eight months later I go and apply at the next company. Having the information about my previous failed test available, either by request or automatically, to that prospective employer, taints my potential ability to be given that job. I can tell you that if I was the owner of that company and I saw that an applicant had a failed test, whether or

not they test negative on the new test, there is no way I am going to hire that person. If they were ever to get in an accident, under the influence or not, a good lawyer is going to pull those results back up and show that you as the owner or hiring manager of the company saw that there was a positive result and you still decided to allow this person to drive for you. You have now put the public in danger and your company will be held liable. I see a big liability concern for taxicab companies over having known that information. Also, I think a prospective employee versus someone who actually works for me are two vastly different things. I would encourage us to take a look at that and make some provisions there on the pre-employment piece of it. I think that the piece about "once you have been hired and that information is shared" is greatly needed.

With database sharing, does that share the result of the levels and of which drugs, or just that it was a failed test?

Andrew MacKay:

The bill does not get that deep into the weeds. Conceivably, we could put it in regulation. The way I first saw it was that there are X number of types of narcotics and if you reach a certain level, you test positive. Just because you have a trace element of something does not necessarily mean it is viewed as a positive hit. We can clarify that in regulation, but I thought it would just say, "John Doe tested positive." Those positive tests are going to be governed by the federal regulations, which are constantly changing and evolving, especially with the synthetic drugs they are trying to capture. That is somewhat variable, but if it is a qualifying positive drug test where that individual is not hireable, that is basically what the language of the regulation would be.

Assemblyman Healey:

Does this practice go on in any other state? Is this being based upon other practices that are out there? Maybe some of these questions that may not be answered now, could be piggybacked on as we see successes in other states?

Andrew MacKay:

I do not know the answer to that. When it comes to regulation of taxicabs, to say that there are diverse approaches across the country is probably an understatement. Some municipalities do it. Some states do it. Sometimes they have an individual submit to a background investigation and transport that around. I will say that the State of Nevada and the Legislature have gotten it right with respect to motor carrier regulation, with the Taxicab Authority and the NTA. You hit the nail on the head, Assemblyman; we need tight motor carrier regulation in the state, because of the people who come here and spend their money. We need to make sure, whether they arrive

at McCarran or Reno Tahoe International Airports, drive in and decide to take a taxi or limousine to dinner, or go on a tour, that those individuals are protected. I endorse and give kudos to the Legislature because you have gotten it right. With respect to the regulation of the taxi industry, other municipalities look to Nevada, specifically our sister agency the Taxicab Authority, on how to do it.

Senator Brower:

Assemblyman Healey, you make a couple of excellent points, including the point with respect to the pre-employment testing. It is simply a policy matter for the Legislature to decide how much information a prospective employer should have. I understand the point that you are making, Assemblywoman Carlton. I would suggest for the Committee's consideration that nobody in Nevada has the right to drive a cab, and certainly nobody who has tested positive previously has the right to drive a cab. Again, the idea of someone being blacklisted is also a concern that we all have. It is a policy decision we are going to have to make. Frankly, this issue did not come up on the Senate side. I think it is a great point, and we are just going to have to sort it out.

Assemblywoman Spiegel:

Mrs. Penrod, I would also like to extend my condolences. I know how difficult this must be for you to be here today, so thank you very much for bringing this forward.

I have a technical question. In section 1, which seems to be what we are mostly focused on, on line 7 it specifies that it is positive tests. I am wondering what the thought process was for this being just positive tests and not showing a whole progression of all the drug testing that has been done for an employee over an extended period of time. For example, somebody works for a company driving a cab, has their pre-employment test, and has been driving for 10-15 years. Maybe within that time they had an incident in year two, and then they were retested and it came back fine so they were not let go. Say they are clean for the next 13 years, that person would then would have a long history, and instead of it being one negative on their record, there would be lots of positive records. Has that been contemplated at all?

Senator Brower:

That has not been much of the discussion. In this context, we are not talking about a field of employment where an employer might feel strongly that there be a drug-free workplace but public safety is not an issue. Here, as we all recognize, it is not just nice to have a drug-free workplace when it comes to motor carriers. It is a public safety issue. So, I think the general approach on

the part of the federal and state regulatory bodies is that it is not a matter of, "well, you need to pop positive several times before we take it seriously." That may not be the point you are making, Assemblywoman, but we have not debated on whether this would be a onetime or several time offense.

Assemblywoman Spiegel:

That was not quite the point. I know I once had a drug test at work where it was questionable, and it turned out that I did not know that I was not allowed to have a poppy seed bagel before having the test so they re-did it, and it was fine. Sometimes things like that just happen, and it does not necessarily mean that the driver was impaired. It means that something might have come up on a test, or there might have been a false positive. Again, as we look at the policy, we are trying to balance having a wonderfully safe taxicab experience for Nevadans and our visitors with the needs for somebody's livelihood. We are trying to figure out how we reconcile the two, when we know that there can be inaccuracies in drug tests. In my mind, there is some question about the breadth and depth of the materials that are collected. The bill also does not specify if there is a time limit for how long the records are kept, if they are disposed of after a certain amount of time, and the method by which they would be disposed of. There are other questions that have come up as well.

Andrew MacKay:

That language mirrors the expected forms of drug testing. Generally blood and urine are used for the majority of narcotics.

Assemblywoman Spiegel:

The question was more about the word positive, versus all results.

Senator Greg Brower:

The existing statutory scheme, the proposed change, and the federal scheme all contemplate a truly positive result. Not a false positive or poppy seed type situation. We are talking about only a legitimate, verified-upon-appeal positive test.

Assemblywoman Swank:

If you test positive, then you get a chance for a redo, correct? Then you test negative. What goes on your record? Does that first positive go on your record?

Andrew MacKay:

It goes away, and there is nothing there. If you are convicted in a court of law and then appeal it to a judge, and the judge reverses the decision, whoever the trier of fact was, you are innocent. There is no record of your positive test.

Assemblywoman Swank:

I do not know a lot about drug testing so you are going to have to educate me on some of this. How do we know that the positive was because of poppy seeds or something else. I do not understand how we know if something is a legitimate positive as opposed to a positive from poppy seeds. What about dealing with prescription drugs? I think that is another issue. We could have the poppy positive, the prescription positive. Can we sort all of those out?

Paula Penrod:

The NRS has a very specific level for each type of drug, including marijuana, opiates, amphetamines, and methamphetamines. It is a very extensive list of what is considered over the legal limit. When they do a drug test, and generally it is done by blood because that is the most accurate, you may have metabolites for marijuana come up because you can get metabolites from passive inhalation. For example, you are in a room where someone is smoking and you breathe it in and get those metabolites. The test is such that you have to have all components there. With the poppy seed test that we were talking about, it would not have "popped hot" for her. It would have shown that she was a little bit off and there might have been a question of a false positive. However, when someone is under the influence of either alcohol or drugs they are so far above the threshold of what statute allows that there is no question of whether the person is or is not positive. They can request a repeat drug test. Certain metabolites and drugs have half-lives that must clear our bodies. Marijuana stays in our system a little bit longer than methamphetamine, which has a half-life of about six to eight hours.

One of the other issues that comes up, which I do not think has been discussed, is our drug testing system for urine. Most of the taxicab drivers having new hire, random, or suspicion testing are having urine tests. These tests can be manipulated. A person can be higher than a kite and still test negative. The reason this can happen is that when they do their drug test by urine, their back is turned to the person observing them. There are devices that can be attached to the human anatomy that contain clean urine that will go into the cup and be taken as a true sample. It will be warm and it will be clean. This is something that the Committee has not addressed, and I thought I would bring it up, since we were talking about drug testing.

If the drug test is a true fail, it is because it has exceeded what the state statutes and the federal guidelines have said is acceptable. If it is marginal, or borderline, then it could be a false positive, such as in Assemblywoman Spiegel's case, and they repeat it.

Assemblyman Hardy:

Being really familiar with the industry of testing, I know it has changed immensely over the past ten years alone. I have been involved with this for the past 20 years in companies. The tests are almost 100 percent positive now. When an employee takes a test, they can be offered the result of the test and they can walk away based on the ramifications. Then those tests are sent to labs where they do multiple screenings. They can do 27 screens, which can take opiates and tell the difference between the drug and a poppy seed from a bun, or whether or not it is a synthetic drug. It is almost 100 percent positive and it has seldom failed in courts in the last ten years. In this day and age, I do not think the test is something where we have to worry about false positives.

Chairman Carrillo:

Is there anyone wishing to testify in support of S.B. 302?

Paul J. Enos, representing Nevada Trucking Association:

We are in support of S.B. 302. The kind of mechanism the NTA is asking to have for cab drivers is something we have advocated for the trucking industry for a number of years. In fact, in MAP-21, the last federal transportation bill that was passed, they actually established a drug clearinghouse to be developed by the Federal Motor Carrier Safety Administration by 2014. Right now, all truck drivers are required to take a pre-employment drug test and enter a drug testing consortium. So, you can pull an owner-operator out for a random drug screen. What would occur once this clearinghouse is available is that a positive test or a refusal would go on to the clearinghouse, and a potential employer would be able to see if that individual has had a positive drug test. I understand the issues as far as blacklisting goes, but from our perspective, we are talking about the safety of drivers out there on the road and how they can affect other people, so we do think that is something we should take into consideration. We are supportive of Senate Bill 302.

Chairman Carrillo:

Are there any questions from Committee members? [There were none.] Is there anyone wishing to testify in opposition of S.B. 302? [There was no one.] Is there anyone wishing to testify in neutral to S.B. 302. [There was no one.] Senator Brower, would you like to make any closing statements?

Senator Brower:

I want to thank you for hearing a very important public safety bill. Thank you for accommodating Mrs. Penrod's testimony. She has been a tireless advocate on this issue, and has been a great resource for us in trying to put the bill together. We appreciate your consideration.

Chairman Carrillo:

We will close the hearing on S.B. 302. We will open the hearing on Senate Bill 158.

Senate Bill 158: Revises provisions relating to motor carriers. (BDR 58-466)

Senator James A. Settelmeyer, Senatorial District No. 17:

When I was approached about this issue with Senate Bill 158, I had some concerns. This bill seeks to change contractual terms. Going back to my law school days, I know that you have the right to contract on just about anything. There are defenses for contracts including duress, ambiguity, mistake, fraud, oral condition precedent, illegality, or lack of consideration. That is exactly what we are discussing today, illegality. Your Committee is being asked to make contract clauses unenforceable and deemed illegal as they are against the public policy.

With that said, what we are looking at are, in my opinion, unfair clauses in trucking contracts. The clauses are set up to protect shippers, or hold them harmless, from anything that happens with a shipment. I knew an individual who was driving a forklift, and I will use some names just for an example. A private contractor trucker comes up to WalMart and a guy comes out from WalMart on a forklift. He unloads the device from the truck and he falls off the loading dock. WalMart, because of the way the contract was written and even though it was due to their own negligence, does not have to pay. They actually go after the individual trucker. I have friends who have run into that situation, and to me, that is not proper.

There are 37 other states that have passed legislation similar to this. Montana and Idaho have recently passed and adopted it. I was told that Michigan is also looking at legislation on this. This is not an uncommon thing. Throwing out this clause in contracts does not change anyone's ability to collect for damaged goods, but they will simply hold the responsible party liable. There will be some individuals in opposition, and what I tend to ask when I am talking to those individuals is, why would you think it is okay to have somebody else pay for your negligence? To me, that is what it comes down to. We are just trying to make the person who is responsible, who is guilty of the negligence, be held responsible. In that regard, I have a handout ([Exhibit C](#)), which comes

from a contracts law book and talks about negligence. That is item (k)—generally agreements exempting a person or corporation from liability for negligence, should be deemed contrary to public policy. That is exactly what I am trying to do here today.

I can walk through the handout I submitted earlier ([Exhibit D](#)). I can through each section of the law we are seeking to change and why we are seeking to make those changes.

Chairman Carrillo:

Does the Committee wish to go through the abbreviated version?

Senator Settlemeyer:

Looking at my handout ([Exhibit D](#)) in section 1 we are seeking to change *Nevada Revised Statutes* (NRS) Chapter 706, and within section 1, subsection 1, are clauses in contracts deemed as void because they are against public good. A motor carrier is defined as a trucking company. Indemnity is identified. The promisee and shipper are defined. Section 1, subsection 2, says this does not apply to interchange or the use of intermodal chassis or equipment. In subsection 3 contract is defined. The service incidental definition is applied in section 1, subsection 3, paragraph (3). Section 2 refers to section 1. Section 3 refers to the change we made in section 1. Section 4 references the change to section 1. Section 5 is referring to the change in section 1. Section 6 is important because we are only talking about contracts going forward. We are not trying to change a contract that is already in existence. This is prospective only, and that is the abbreviated version.

Chairman Carrillo:

Are there any questions for Senator Settlemeyer? [There were none.] Do you have any additional information that you would like to give, Mr. Enos?

Paul J. Enos, representing Nevada Trucking Association:

Senator Settlemeyer is right. A lot of trucking companies are on the wrong side of what amounts to "Goliath versus David" agreements where we are transferring liability, not based on the fact pattern that arose out of any damage resulting from the negligence of the shipper, their acts, or their omissions, but based on what is negotiated in a contract. We did not see a lot of these outside the railroad and oil industries until after 9/11. After 9/11, a lot of corporate attorneys started looking at ways to limit or transfer their liability, and we saw these agreements start to pop up in trucking contracts all over the country.

Many of my members are nervous about getting up here to testify on this bill, because they are afraid they are going to upset their customers, but often in negotiations and contracts, the indemnification provisions are a big sticking point. Senator Settlemeyer talked about a forklift operator. On the Senate side we had a member of the Committee tell a story about one of her constituents, an auto hauler who was dropping off cars at a car dealership. He parked the cars where he was supposed to, and then one of the employees of the dealership came around the corner and T-boned one of the cars. That liability did not rest with the auto dealership, even though they damaged the car. That liability rested with the trucker, because of the provision in an indemnification contract. Now, while a wrecked car is one thing, these can be extremely costly agreements, if somebody is hurt or you have a worse accident than that.

The opponents of this bill will tell you: "We are the deep pockets. We are just telling the trucking company that we do not want to be sued, so we are asking them to handle this for us." We are fine with taking responsibility for our own negligence. This bill will not change that; the trucking company will still be liable for any acts, omissions, or negligence that occurs on their part. However, we do think that liability should rest with the shipper if any damage occurs from their negligence, acts, or omissions. [The witness submitted supplemental information ([Exhibit E](#)), ([Exhibit F](#)), ([Exhibit G](#)).]

Assemblyman Sprinkle:

I would like you to paint a picture for me, Mr. Enos. When a trucker pulls into one of these bays and parks their truck, how often are they part of the process of loading, unloading, or doing any of the things that could potentially cause themselves harm? This is opposed to when your group came and talked to me in my office and it was described as they stand off and are not doing anything at the time of the unloading. I am trying to get to the liability aspect of this. How much do they take on themselves, versus not?

Paul Enos:

That depends, and it is on a case-by-case basis. I have a member who was shipping for a brewery and the driver was asked to get out of the truck and stand in a safe zone. That trucker was standing in a safe zone when an employee for the brewery ran over his foot with a forklift. Workers' compensation paid for his broken foot; however, he did not think that was enough, so the trucker sued the brewery. The brewery then came back on the trucking company, because they had signed an indemnification agreement, and said, "Since you signed this agreement you are responsible, not just for the workers' compensation that you paid, but also for the lawsuit that the trucker filed against us."

Sometimes you will have truckers who will do what is called "lumping," and will be unloading the freight. But really it is a case-by-case basis. In a lot of cases, shippers are going to be responsible for their load and they will be on the loading bay. It all depends. Rarely will you see a trucker on a forklift doing the unloading himself. That does not happen often. It is usually an employee of the shipper.

Assemblyman Sprinkle:

If they are actively participating in unloading the truck, this bill does not prohibit them from having a right of action brought against them if they are the one who caused the accident, is that correct?

Paul Enos:

That is correct. If it is an employee of the trucking company who is responsible for the damage, we would go back to what those patterns of fact are, as opposed to the contract. If they are responsible, they would be liable for that damage. If the shipper is responsible, they would be liable for that damage. We get away from the indemnification provision in a contract that ignores the fact pattern, and get back to what really happened.

Assemblyman Wheeler:

Is there anything in this bill that would preclude someone from suing the person who is actually at fault for the accident?

Paul Enos:

No. However, right now, when they sign the indemnification agreements, that does happen. This bill would rectify that issue.

[Assemblyman Healey assumed the Chair]

Chris Rusby, representing Great West Casualty Company:

I am a lawyer for the law firm Lemons, Grundy and Eisenberg ([Exhibit H](#)). We represent Great West in many matters, as well as their insureds, and we have seen this issue arise recently. So far, many of the cases that have arisen have not reached a point where they are actually affecting small business owners, who, I think, really need the protection. But, the potential is on the horizon, and that is the good thing about what we can do here. We have the benefit of foresight. For instance, we have a lot of these policies with limits of \$1 million or so. A lot of the cases we have seen have not reached that level, but when they do reach that level, what does that do for the small business owner?

The indemnification agreement will eat up the entire policy, and then you have small business owners who have paid their policies religiously and are now left with absolutely no coverage. What happens then? That is why we support this bill, because it is better to be proactive about these problems than reactive and have to undo the harm that has already been done. Like the others who have presented today have said, this bill is about allocating risk to the people who are actually responsible for the harm. If legislative protection is not put in place to protect these little guys, then the big guys are going to do it because they can, unless someone tells them not to. That is how the situation has played out as we have seen it.

Acting Chairman Healey:

Do we have any questions by the Committee? [There were none.] Is there anyone wishing to testify in support of S.B. 158?

Paul Enos:

I do have one of my board members here. His name is Ed Meyer and he is with NevCal Trucking company. He is here to talk about how these indemnification agreements can impact his business.

Ed Meyer, President, NevCal Trucking, Sparks, Nevada:

These contracts are common in the steamship business. We have to sign them or we cannot go to the piers. We had an instance where when they were loading a container onto a chassis, they hit the fairing of our truck instead. They did the damage and they refused to pay because of one of these clauses. It could be a lot bigger issue, somebody could have been killed or they could have crushed the truck, and we would still be liable. There was a case down there where a truck did get crushed when they were trying to load the container and the operator made the mistake. I do not know what happened in that case or whether they acknowledged responsibility, but this can happen in our business, and it happens to lots of people.

Acting Chairman Healey:

Are there any questions from Committee members? [There were none.] Is there anyone wishing to testify in opposition to S.B. 158?

John Sande III, representing Western States Petroleum Association:

I am here representing the Western States Petroleum Association, which is a nonprofit trade association that represents companies that account for the bulk of petroleum exploration, production, refining, transportation, and marketing in the six western states of Arizona, California, Hawaii, Nevada, Oregon, and Washington. There were two of us opposing it on the other side, but I guess I am by myself now. These types of contracts are in other areas

as well. As a matter of fact, I just reviewed for a client awhile back an investment advisory contract out of a big investment advisory firm in New York that said they were only responsible if they were grossly negligent. They would not be liable if they were negligent. Also, if you look at our statutes in Nevada, to get corporations here we allow directors, if the articles of incorporation or bylaws say so, to say that they are not liable as directors, unless they act in bad faith, so they are not liable for their negligence. Having said that, we believe it is just a public policy that you should allow parties to negotiate contracts. Indemnification is in other contracts; therefore, we are opposed to the bill.

Assemblyman Wheeler:

You say that the way the contract is written now, you would be liable if you were grossly negligent. Why is the contract not written that way then, instead of the way it is now?

John Sande III:

I am talking about an advisory contract that came out of New York. There are a lot of contracts out there that say, "I am only going to be liable if I act in bad faith." You can put that into a contract as well, and I have seen those types of contracts in other areas. In this case, they are just going to apply it and will throw these types of contracts out.

Assemblywoman Spiegel:

My understanding is that 37 states have laws like this one that is being proposed. I am just wondering if the Western States Petroleum Association still conducts business in these other states?

John Sande III:

Yes they do. My understanding is that the states that do business, except for Nevada, have passed this law.

Assemblywoman Spiegel:

So this law would not cause them to stop doing business here?

John Sande III:

That is correct.

Assemblyman Sprinkle:

In the contracts you were talking about that exist right now, unless a company has been grossly negligent, they can be held harmless, even though they may have been the ones responsible for the accident or injury, and this is a negotiated contract. Is that what you are telling me?

John Sande III:

I am talking about a contract I reviewed for a client from a firm in New York that limited their liability, so if they were negligent, they would not be liable for their negligence. They would only be liable if they were grossly negligent, and you see that happen. It is the same thing, for example, in Nevada law as to corporations. You can put in your bylaws that the directors of the corporation are only liable if they act in bad faith. That was to attract companies to come here, because other states, like Delaware, have similar laws, if you are a director and you are negligent, you are not liable to the shareholders or others for your negligence.

Assemblyman Sprinkle:

I am trying to understand your side of this argument. Is it that this is a negotiated contract, so both parties should have come to the table and were able to come to this agreement?

John Sande III:

Yes, that is correct. It is a matter of negotiation, and the reason they do this is primarily because in the oil industry they are always going to be a defendant, so they want to have the insurance company for the shipper take the responsibility for defending the lawsuit.

Acting Chairman Healey:

Are there any other questions from Committee members? [There were none.] Is there anyone wishing to testify in neutral to S.B. 158? [There was no one.] I will invite the bill sponsor up for closing remarks.

Senator Settlemeyer:

One of the things that was said earlier was about contracts moving on equal footing. I disagree. In these stringent economic times, I think that smaller shippers are at an unfair disadvantage when it comes to bargaining with these larger corporations, and that is what this bill is about. As for the discussion of having the ability to silence all contractual clauses because of the terms of your incorporation, I disagree. Because, if you look closely at the walk-through ([Exhibit D](#)), we are only dealing with NRS Chapter 706. We are not dealing with all chapters of law. The final question I would like to leave you with is a one: Who should be responsible for my negligence? I really do not think you want to be responsible for my negligence, and that is what this bill is doing. We just want to make sure that individuals who are responsible, are held responsible.

[Chairman Carrillo reassumed the Chair.]

Chairman Carrillo:

Thank you very much, Senator. We will close the hearing on S.B. 158. We will open the hearing on Senate Bill 335.

Senate Bill 335: Revises provisions relating to taxicabs. (BDR 58-1064)

Senator Scott Hammond, Clark County Senatorial District No. 18:

The bill seeks to improve public safety by ensuring that all taxicab drivers are physically able to carry out the duties of the job. This bill deals with allowing chiropractors to give physicals in certain circumstances. As it was explained to me, right now, in many parts of the state as well as in many parts of the nation, chiropractors are able to administer these physicals to taxicab drivers so they get their physicals out of the way every year. Without any further delay, I would like to defer to Dr. Overland and Cindie Hernandez. They can certainly speak to the bill, and if you have any questions afterwards, we can answer those.

James T. Overland, Sr., President, Nevada Chiropractic Association:

Having been a chiropractor these past 34 years and practiced in this great state for the past 19 years, it has been my privilege to provide chiropractic services to citizens of Nevada.

As a licensed chiropractic physician under *Nevada Revised Statutes* (NRS) Chapter 634 and the *Nevada Administrative Code*, our scope of practice allows for many aspects of health care, including but not limited to, physical examinations of our patients and the general public. Doctors of chiropractic undergo extensive academic training, both before and after graduation, as well as a clinical internship and postgraduate specialty training. Required courses at all chiropractic colleges include physical examination and clinical and differential diagnosis as part of the curriculum. [Dr. Overland continued to read from prepared testimony ([Exhibit I](#)).]

Notwithstanding the importance of physical examinations for patients, it is an integral part of our education, testing, and subsequent licensure in all states as well as countries around the world.

Currently, chiropractic physicians in the state of Nevada are allowed to do the following: a commercial driver's medical exam, under the auspices of the U.S. Department of Transportation, and we have been licensed to do this since 1992; a taxicab driver's examination, throughout Nevada; a limousine driver's examination throughout Nevada; a bus driver's examination throughout Nevada; student athlete examinations, under the auspices of the Nevada Interscholastic Athletic Association; and, those of us who are approved through the

Division of Industrial Relations are able to provide impairment rating examinations, which are for workers' compensation. [Dr. Overland continued to read from prepared testimony ([Exhibit I](#)).]

Chairman Carrillo:

Did you want to have Ms. Hernandez add anything before the Committee asks questions?

Senator Hammond:

I think she is here to answer any questions that might arise due to the complexity of the issue.

Assemblyman Paul Anderson:

I am curious if there is a history behind the exclusion. Is it simply a definition in NRS, or is there a reason that they have been excluded in the past?

Senator Hammond:

The Taxicab Authority in southern Nevada is looking at an old opinion. I do not know where they got it from. The Attorney General's Office says that they do not know where they got it from. They are looking at something that says it is basically a difference in terms. It has to do with the way they term the medical physician. They are looking at an old definition. What we need to do here is put it in statute, so that they understand a little bit more, and there is more clarity as to what exactly the term medical doctor, or physician, encompasses.

Cindie Hernandez, representing the Nevada Chiropractic Association:

The statute that we are talking about is located in NRS 706.8842 and it was first enacted in 1967. At that time, by and large, the term physician was certainly not defined within statute. There is no suggestion in the legislative history from then and various amendments to NRS Chapter 706 as to what truly might constitute a physician. The forms that you are looking at are identical to 49 CFR 391.41, and should be included in the packet, which is on the Nevada Electronic Legislative Information System ([Exhibit J](#)). Essentially it is a four- or five-page form, followed by a medical examiner's certificate. The Federal Motor Carrier Safety Improvement Act of 1999 [Public Law 106-159—Dec. 9, 1999] and the regulations actually use the term medical examiner as a term of art. In 49 CFR 390.5 it states that a "medical examiner means . . . a person who is licensed, certified, and/or registered in accordance with applicable State laws and regulations, to perform physical examinations. The term includes but is not limited to, doctors of medicine, doctors of osteopathy, physician assistants, advanced practice nurses, and doctors of chiropractic." So the aim of this bill is to assign a definition to "physician"

that incorporates, equally eligible and certainly competent, chiropractic physicians and bring the whole state into practice. Under the Nevada Transportation Authority, the exams for prospective taxicab applicants are routinely done by chiropractors up north. It is just limited to Clark County, and that is certainly not because of ability, it is just because of an undefined limitation by statute.

Chairman Carrillo:

Do any other Committee members have questions? Seeing none, I would like to go to support on A.B. 335.

Mendy Elliott, representing the Chiropractic Physicians' Board of Nevada:

We are in support of this bill. We think it provides consistency throughout the state for taxicab drivers and the Board looks forward to the passage.

Chairman Carrillo:

Are there any questions from Committee members? [There were none.] Is there anybody wishing to testify in opposition of S.B. 335? [There was no one.] Is there anyone wishing to testify in neutral on S.B. 335?

Danny Thompson, representing the Nevada State AFL-CIO:

We are neutral on this bill. However, because this bill deals with cab companies in southern Nevada, there is an issue that I would like to bring forward to the Committee that previously was heard here; however, the facts were not presented to me until yesterday.

If you are a cab driver in Las Vegas and you haul customers from the airport to the Mirage Hotel and Casino, it is a \$17 trip taking the city streets. But, if you haul someone from the airport to the Mirage via the tunnel, it is a \$27 trip. I know that the Committee had a hearing on long-hauls, and I know the bill did not make it out of this Committee. However, yesterday we had cab drivers in the building all day and we talked about their issues. One of the issues that came up was the long-haul and how it works. If you are a cab driver and I am cab driver, and I take a person from the airport to the Mirage, it will always be \$17. If you take a person from the airport via the tunnel to the Mirage, it will always be \$27, because of the distance. Where that gets misconstrued is when I, as a cab driver, enter what they call a low book. Your book is a high book, my book is a low book, and that is the book of business that you do that day. If my book is a \$225 book, your book is going to be at \$425. Then I am called in and disciplined for not meeting the average book of the day, meaning that I did not long-haul people. So, because I do not long-haul people, I get a disciplinary action. If you get enough of these, up to three, you are terminated for not meeting the average book.

I know that the Committee heard this issue, but I did not realize that is how it works. One problem is that there are thousands of cab drivers. If you are interested in long-hauling, instead of chasing down each individual cab driver, you should go after the companies that provide the incentive to long-haul. In fact, it is not just an incentive. The drivers told me that they are called in and asked why they did not make the average book, and that all of this is verifiable. You can look on the trip sheets from A to B, which are filled out for each trip. All of this is auditable, and the legislative audit did just that. The legislative audit of those trip sheets in Las Vegas found that some \$14.8 million in overcharges to customers were booked as a result of this long-hauling issue. I just thought it was left to the drivers, but in fact it is not. So, if I do not make the average book, I can tell them, "Look, I am driving the shortest route, and that is the best it is going to get," but I still have to meet this average, and I am told to get creative and make sure that I do.

As a result of these conversations yesterday, and I know we did not testify on that long-haul bill, we are looking to amend a bill or seek another method to introduce a bill that would require the Taxicab Authority to issue a citation to the company. The reason for that is it is the company that directs the workforce. If I go on a construction job and I am doing something that the contractor does not want done or it is illegal for him to do, I get fired because he controls what I do. Whereas this is exactly backwards. I think the results are borne out in that legislative audit, and that is that long-hauling is occurring as a result of those policies that say if you do not meet the average book, you get a reprimand. I guarantee you when I come back the next day, I am not going to come back with a low book and lose my job.

I know it is highly unusual, but this is the last cab bill that I see out there and an opportunity to discuss this issue, because I think it is occurring, as borne out by the legislative audit. It was in the paper the day before yesterday in the *Las Vegas Sun*. I read their lengthy article about the results of that audit. Having served on the audit subcommittee here, I know that these auditors are neutral in everything they look at, and therefore I would not question the results of that audit. That is the issue and we are looking for an opportunity to work with someone to address that issue and find a solution. Not just for those cab drivers, but because tourism is the lifeblood of Nevada. If that kind of thing is going on we need to put a stop to it.

Chairman Carrillo:

I did read that audit as well, and of course with all of the information around, I did meet with some drivers about this topic. We want to make sure we protect the drivers and the companies as well; but, ultimately, the person we want to protect is the tourist. We want to make sure they feel they can come

to Las Vegas and be protected from long-hauling. As you described it, we have an issue of it being more of a company requirement than an actual driver requirement. Do any members have any questions? They might be a little confused as to how this pertains to the existing verbiage of this particular bill. Seeing no questions, and because we do not have anyone down south, I would like to ask the Senator to come up and give a closing a statement.

Senator Hammond:

I am going to have Marlene Lockard speak, she has something to add.

Marlene Lockard, representing the Nevada Chiropractic Association:

I would like to be here and say that we would gladly meet with Mr. Thompson and discuss a friendly amendment, but Mr. Thompson has not approached me or my client. This was the first we have heard of his intent or desire to attach an amendment to this bill. While we understand their issue, this has nothing to with what we were attempting to do in trying to create parity for the chiropractors in the State of Nevada. We just want to put that on record. We would be happy to meet with Mr. Thompson, but I have been in the building all day every day this week, and he has not approached me.

Chairman Carrillo:

I know this is something that just recently came up on the radar for a lot of people, so I wanted to at least give Mr. Thompson the opportunity to say what he had to say.

Senator Hammond:

When we presented the bill in the Senate there was no opposition, and there was nobody neutral on this bill. The only person who had any questions was Senator Joseph P. Hardy, M.D., on behalf of many other doctors. He had some concerns, he asked us to do a lot of homework, and Marlene Lockard did a lot of homework to satisfy his needs and wants. His needs and concerns were satisfied and he was the one who actually made the motion. It passed through committee without any opposition. Everybody voted in favor of it, and it went to the floor of the Senate, where it garnered a vote of 21-0. I understand what Mr. Thompson is trying to do, but right now I do not see any opposition to the bill as written, without any amendments. It is a very well-crafted bill intended to try and create the parity mentioned before. I would appreciate it if the Committee could consider that as you are thinking about any possible attachments or amendments to it.

Chairman Carrillo:

I am sure that Mr. Thompson can meet with Ms. Lockard about any information pertaining to that. At the end of the day, we want to make sure that good

policy is put out there. If the parties involved who would like to have that discussion can do so, that would be great.

Assemblyman Hambrick:

I am wondering if the chiropractor issue that we are addressing now is in the same chapter as the issue that Mr. Thompson has brought up. Can it even be brought forth? As the two individuals talk, I want to make sure that Committee staff verifies that this information is even attachable. If it is in a different chapter, I want to make sure that nobody would lose time, effort, and patience, and that it can be done.

Chairman Carrillo:

I would like for the parties involved to work out that particular issue and see if that is something germane. While I have you here, would you like to make a closing statement?

Senator Hammond:

Time is short and there are other things, so thank you.

Chairman Carrillo:

We will close the hearing on S.B. 335. We will open the hearing on Senate Bill 12 (1st Reprint).

Senate Bill 12 (1st Reprint): Clarifies the authority of the Nevada Transportation Authority to submit fingerprints to the Federal Bureau of Investigation. (BDR 58-356)

Andrew J. MacKay, Chair, Nevada Transportation Authority:

Senate Bill 12 (1st Reprint) was the sole bill draft request from the Nevada Transportation Authority (NTA). The genesis of this bill was a routine audit of the NTA by the Department of Public Safety (DPS). Applicants to the various authorities that the NTA is responsible for regulating—including taxicabs outside of Clark County, charter limousines, charter bus operators, and tow car operators—are subjected to a criminal background investigation. Up until the audit, the fingerprints were submitted to the NTA, and we transmitted them to the Central Repository for Nevada Records of Criminal History for the Federal Bureau of Investigation (FBI) background investigation. The DPS alerted us that the FBI had issued an order, and fortunately or unfortunately we are not the only state agency that has gotten tripped up by this, that there needs to be specific enabling language that delineates that the regulatory authority has the ability to do that. In the past, the NTA relied on a statute, specifically NRS 239B.010, subsection 1, paragraph (a). The FBI sent a directive to the DPS that said that if in audits DPS discovered that a governmental entity was

doing that and it did not have specific statutory authority, it was going to have to be put into statute. That is why I am here today. This language is almost identical to the language that was in front of the Legislature last session for the State Board of Podiatry [Senate Bill No. 36 of the 76th Session].

For the Committee, I have a brief historical perspective, and for the NTA I want to emphasize that this is not trying to expand or broaden our current regulatory process. In 2005 there were two bills almost identical in nature to this, Senate Bill No. 56 of the 73rd Session and Senate Bill No. 163 of the 73rd Session, as well as in the Assembly with Assembly Bill No. 250 of the 73rd Session and Assembly Bill No. 260 of the 73rd Session. In 2003 there was Assembly Bill No. 155 of the 72nd Session, and then in the Senate two bills, Senate Bill No. 428 of the 72nd Session and Senate Bill No. 248 of the 72nd Session. I would be remiss if I did not acknowledge DPS and the assistance that they provided us in the interim. When they did the audit and discovered the problem, they went to the FBI to see if they would give us a waiver to continue our current practice. The FBI would not. The DPS then provided us with draft language to put in our bill draft request. For that I want to put on record our thanks to the Department of Public Safety. The way we have gotten through it in the interim is that with applicants for authority, once those background investigations are complete and the results are ready, they direct that the information be transmitted straight to the Nevada Transportation Authority. That works now; however, there is nothing to say that on subsequent audits the FBI might say it is not an acceptable practice. So, this is the path of least resistance—at the advice of DPS, FBI, and our own legal counsel—to put it into statute. Hence, the reason I am in front of you today.

Chairman Carrillo:

Are there any questions?

Assemblywoman Spiegel:

If this bill were enacted would this then give you parity with the process in Clark County, or are they still doing things differently?

Andrew MacKay:

Parity already exists today. In Clark County the Taxicab Authority (TA) does the criminal background investigations on applicants seeking to obtain operating authority. We already do that now. It is that we are not certain if the stopgap measure we are currently using is going to be acceptable long term with the FBI. So we followed the FBI's advice, as well as that of the DPS and said just put in an enabling statute. The TA does specifically have language

that "they may submit fingerprints to the FBI for background investigations." It does create consistency among the two regulatory boards.

Chairman Carrillo:

Are there any questions from Committee members? [There were none.] Is there anybody wishing to testify in opposition of S.B. 12 (R1)? [There was no one.] Is there anybody wishing to testify in neutral to S.B. 12 (R1)? [There was no one.] We will close the hearing on S.B. 12 (R1). We have a presentation from the California Nevada Cement Association.

Keith Lee, representing California Nevada Cement Association:

Our two presenters, Mr. Tietz and Mr. Hennings, will be brief. We have a PowerPoint ([Exhibit K](#)) that has been posted and we will not be going through it slide by slide. What we want to talk about are some concepts that blend into many things we are discussing this session. You are all aware that TRIP, a nationally recognized highway study group, has reported that more than 50 percent of the state-maintained transportation and roadway surfaces in the state are either in mediocre or poor condition, while vehicle ridership on those has increased drastically. The two concepts we would like to present to you today are life-cycle cost analysis (LCCA) and alternate design/alternate bid. As you are aware, there are two different types of transportation highway surfaces, asphalt and concrete. These two concepts that we want to talk to you about do not favor one surface over the other, but if properly used, create a matrix for the decision maker—primarily the Department of Transportation (NDOT), but on occasion the regional transportation commissions—to make the appropriate decision based upon initial cost, continuing maintenance, and other costs over the life of the surface itself, thereby giving the taxpayer the biggest bang for the buck.

Thomas R. Tietz, Executive Director, California Nevada Cement Association:

The two concepts that were mentioned are fairly simple. They are not experimental. In fact, the Federal Highway Administration encourages the use of LCCA as a program that NDOT can currently access and use. Of these policies that we are recommending, neither one requires more funding. They are simply designed to be able to do more with less, to stretch the dollars we have today further. Essentially, what LCCA does is it looks at a pavement over a period of 40 years, for example, and within that time frame it accounts for the costs, not only of the initial construction, but also for maintenance throughout the life of that project. Accounting for all those costs at the beginning of any project is something we recommend. There are other states that have done this, and select projects in Nevada have gone through this process.

The second concept that we recommend looking at is alternate design/alternate bid. A typical pavement project that goes out to bid goes through a design process and a bidding process, and then it is built. What is different about alternate design/alternate bid is that—much like the current LCCA program NDOT has, which requires both asphalt and concrete pavement to be designed—instead of making that decision before a project goes out to bid, it allows both to be bid. The reason why that is especially helpful is it spurs more competition. If you look at other states, as shown in the handout and the PowerPoint ([Exhibit K](#)), what other states have proven is that if projects go out to bid with both options available, it increases the number of contractors that get involved in these projects. In many cases the projects come in under the estimates from the engineer. For example, in West Virginia, five projects alone saved \$61 million. That is \$61 million West Virginia can use for other transportation projects that were already within their budget. There are other states and other examples, but those are generally the concepts that we are encouraging. We have had conversations with NDOT on each of these topics, and they were warmly received. Mr. Hennings can provide further insight.

Assemblywoman Spiegel:

I was looking at the slide about life-cycle pavement costs. If you are using LCCA, would that then allow people to use more expensive materials in the initial build if it would then have lower maintenance and rehab, and really look at it over the course of the life cycle. Is that what it means?

Thomas Tietz:

Yes, that is the case. This is why it is important. We have seen an example of this work with NDOT on the I-80 design-build project in Reno where two pavement systems were looked at for a period 35 years, and it was that total cost that mattered most.

Chairman Carrillo:

Since there are no more questions, would you like to proceed?

Thomas Tietz:

We have nothing more to add at this point.

Assemblyman Hardy:

This LCCA is a good thought and good idea. In the bid process when things are put together there is usually analysis of soil conditions and everything else. Asphalt works in expansive soils a lot better than concrete does typically. If you have a project where there are different soils that may not be compatible for the two to fit, where does the LCCA go to protect the paying public? We can always come up with an analysis that makes us look like we are

winning on one side or the other, and I am a concrete guy, but please explain that and how it works for the public.

Craig Hennings, Executive Director, Southwest Concrete Pavement Association:

What NDOT would still control would be the structural design. They would still look at soils, traffic, life, and the environment, and design the pavement section that would be required to meet that life. In some cases with expansive soils, more work may be necessary for concrete to be used. Over excavation, bringing in backfill, or better quality materials to use for a base material may be necessary, and thus the concrete would, in some cases, be made more expensive or uncompetitive with a simpler solution. We accept that as a possible alternative or a possible outcome. In some areas of the state, the natural economic variables or the free marketplace will dictate the best pavement type to be used for construction and available materials, and for the given soil. What we ask for is the opportunity to compete on some lower-volume roads, not just urban high-traffic areas, but other areas where the traffic is lower. We think concrete can be competitive and a viable option that could increase competition and give the state more spending power.

Assemblyman Hardy:

That is a good answer. So this is not a design-build per se. The Department of Transportation would go ahead and come up with those alternate designs based on soil studies and background, and then it would go out to a bid with those two competitive sides.

Craig Hennings:

That is correct.

Assemblywoman Spiegel:

For those of us who are not in concrete, can you quickly give a high-level overview of what alternate design/alternate bid means?

Craig Hennings:

What this means is that NDOT would just be buying a pavement. Instead of them deciding what type of pavement it is going to be—sometimes that decision is made 2-4 years before it is built, during which time economics and market prices for commodities can change—NDOT would say, "you can provide pavement A or B, and we are buying either one and consider them equal." Then NDOT asks contractors from whichever specialty and they would bid on either A or B. This bid is for whatever those contractors feel they can put the best price on. What we have seen is that there are usually more contractors bidding on those, as the slide here shows on a project in Kentucky where they

went from an average of two contractors bidding up to 4.6 ([Exhibit L](#)). That competition will lower prices for projects.

Chairman Carrillo:

My question is in regard to the AD and AB. What are those acronyms for on your PowerPoint ([Exhibit K](#))?

Craig Hennings:

Alternative design and alternative bid.

Chairman Carrillo:

If you have driven in Las Vegas, on the roads, especially near intersections, you start to get those valleys. When you have asphalt versus concrete, that seems to be the most wear and tear on a road. Someone was asking me the other day, "What is the life of an asphalt road?" I would guess two years in Las Vegas. You might have an area of town or the country where you get water infiltration and if it freezes, then you have water in the cracks that freezes and expands creating potholes. We have gullies in our Las Vegas intersections, and if you are a motorcycle rider, you are worried about uneven pavement, which is never good. Do you have the statistics as to how long the life is of asphalt versus concrete, without getting too far into the technical side of it?

Craig Hennings:

There are a lot of factors like weather and traffic conditions, but the slide ([Exhibit K](#)) on the screen shows there are standard policies, and NDOT has a policy like this to resurface asphalt roads about every ten years. Sometimes they need it at year 8, and sometimes they go for 10, 12, or 15 years, but those issues you mentioned, the rutting and the asphalt moving and making valleys, are very real. Those areas may require more frequent treatments or repair work. One thing that concrete does add is it is very stiff and rigid and it resists those deformations.

Assemblyman Hardy:

I am going to try and help sell this idea, and you tell me if I am on the right path. What happens with asphalt is typically it is a quicker, cheaper process, but it does not last as long. You may pay 20 percent to 30 more for a concrete product. With asphalt it might last 10-15 years based on the weather conditions, but with concrete it may last up to 30 years. You may pay a little more up front, but that is the bid you are talking about, correct?

Craig Hennings:

I would like to say what we are trying to encourage here is long-term thinking. One of the reasons we believe Nevada's roads are in the condition they are today is that perhaps a lower-cost, quicker answer was looked at first, but now we are paying for it with much heavier and higher loads on our freeways. What I would really recommend is looking at the long term, more than even one material over the other, look at where the long-term value is coming from. [The witness provided supplemental information ([Exhibit M](#)).]

Chairman Carrillo:

Driving on asphalt roads versus concrete, there is definitely a big difference. Over a period of time is when it starts to wear, and that is when you really see benefits of concrete versus asphalt. Are there any questions from Committee members? [There were none.] I want to thank you, gentlemen. The information you provided is well worth looking into. Is there any public comment? [There was none.]

The meeting is adjourned [at 5:25 p.m.].

RESPECTFULLY SUBMITTED:

James Fonda
Committee Secretary

APPROVED BY:

Assemblyman Richard Carrillo, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Transportation

Date: April 25, 2013

Time of Meeting: 3:16 p.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 158	C	Senator James A. Settelmeyer, Senatorial District No. 17	Agreements Contrary to Public Policy
S.B. 158	D	Senator James A. Settelmeyer, Senatorial District No. 17	S.B. 158 Indemnity-Bill walk through
S.B. 158	E	Paul J. Enos, representing the Nevada Trucking Association	Trucking, Indemnification Legislation backgrounder
S.B. 158	F	Paul J. Enos, representing the Nevada Trucking Association	Anti-Indemnification, Legislation Map
S.B. 158	G	Paul J. Enos, representing the Nevada Trucking Association	Anti-indemnification, Legislation Timeline
S.B. 158	H	Chris Rusby, representing Great West Casualty Company	Testimony
S.B. 335	I	James T. Overland, President, Nevada Chiropractic Association	Testimony
S.B. 335	J	Cindie Hernandez, representing the Nevada Chiropractic Association	Handout
	K	Thomas R. Tietz, Executive Director, California Nevada Cement Association	PowerPoint: Opportunities to Capitalize on Competition
	L	Craig Hennings, Executive Director, Southwest Concrete, Pavement Association	Alternative Design Alternative Bid:
	M	Craig Hennings, Southwest Concrete Pavement Association	Missouri DOT Pavement Design and Type Selection Process