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

Seventy-Eighth Session
May 6, 2015

The Committee on Commerce and Labor was called to order by Chairman Randy Kirner at 1:33 p.m. on Wednesday, May 6, 2015, in Room 4100 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website: www.leg.state.nv.us/App/NELIS/REL/78th2015. In addition, copies of the audio or video of the meeting may be purchased, for personal use only, through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Randy Kirner, Chairman
Assemblywoman Victoria Seaman, Vice Chair
Assemblyman Paul Anderson
Assemblywoman Irene Bustamante Adams
Assemblywoman Maggie Carlton
Assemblywoman Olivia Diaz
Assemblyman John Ellison
Assemblywoman Michele Fiore
Assemblyman Ira Hansen
Assemblywoman Marilyn K. Kirkpatrick
Assemblywoman Dina Neal
Assemblyman Erven T. Nelson
Assemblyman James Ohrenschall
Assemblyman P.K. O'Neill
Assemblyman Stephen H. Silberkraus

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Senator James A. Settelmeyer, Senate District No. 17

STAFF MEMBERS PRESENT:

Kelly Richard, Committee Policy Analyst
Matt Mundy, Committee Counsel
Leslie Danihel, Committee Manager
Janel Davis, Committee Secretary
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

Rusty McAllister, President, Professional Fire Fighters of Nevada
Michael Rebaleati, representing Public Agency Compensation Trust
Wayne Carlson, Executive Director, Public Agency Compensation Trust
Richard McCann, Executive Director and Labor Representative, Nevada Association of Public Safety Officers
Mary Walker, representing Carson City, Douglas County, Lyon County, and Storey County
Victor Joecks, Executive Vice President, Nevada Policy Research Institute
Scott A. Edwards, Vice President, Las Vegas Peace Officers Association
Tim Ross, President, Washoe County Sheriff Deputies Association, and representing Peace Officers Research Association of Nevada
Mike Ramirez, Director of Governmental Affairs, Las Vegas Police Protective Association Metro, Inc.
Robert Ostrovsky, representing City of Las Vegas and Employers Insurance Company of Nevada
Jeff Fontaine, Executive Director, Nevada Association of Counties
James L. Wadhams, representing Alliant Insurance Services
Robert Vogel, Vice President, Pro Group Management
Paul Enos, Chief Executive Officer, Nevada Trucking Association
Bryan Wachter, Senior Vice President, Retail Association of Nevada
Jessica Ferrato, representing Builders Alliance of Western Nevada
Jack Mallory, representing Southern Nevada Building and Construction Trades Council
Robert List, The List Company, representing Kolesar & Leatham, Las Vegas, Nevada
Zev E. Kaplan, Kolesar & Leatham, Las Vegas, Nevada
Justin Harrison, Director, Government Affairs, Las Vegas Metro Chamber of Commerce

Randi Thompson, State Director, National Federation of Independent Business
Jenny Reese, representing the Nevada Association of Realtors
Donald Jayne, representing Nevada Self-Insurers Association
Jason Mills, representing Nevada Justice Association
Elizabeth MacMenamin, Vice President, Government Affairs, Retail Association of Nevada
Jeanette Belz, representing Property Casualty Insurers Association of America
Terry Graves, representing Nevada Trucking Association
Kathleen Conaboy, representing Automated HealthCare Solutions
Gregory L. McDermott, representing Automated HealthCare Solutions
Michael Hillerby, representing State Board of Pharmacy

Chairman Kirner:
[Roll was called. Rules and protocol were stated.] I will open the hearing on Senate Bill 153 (1st Reprint).

Senate Bill 153 (1st Reprint): Revises provisions relating to occupational diseases. (BDR 53-635)

Senator James A. Settelmeyer, Senate District No. 17:
For every legislative session I have been here, we have had numerous discussions on the issue of lungs and heart. As the bill was written, there were not enough votes to get it out of the Senate Committee on Commerce, Labor and Energy. I sat down with Rusty McAllister of the Professional Fire Fighters of Nevada to try to find a compromise that would address some of the problems we have routinely seen with the issue of heart and lungs.

The primary problem that is always stated is that currently, an individual, upon five years of working, has to ability to become fully vested into the heart and lung program. These individuals could then potentially work—and have worked somewhere else for ten years—but the state has the liability. However, it was agreed that we in no way, shape, or form want to make changes for those people who have done their full time. Those who have put in their 20 years should not have changes. In essence, what we have indicated in the documents in front of you is that if you work 20 years, you will retain the presumption [of compensability] of the heart and lung program for life. If you have not put in 20 years, we have taken the vesting from five years down to two years. However, your presumption [of compensability] will be equal to the time frame you work. If you only work two years, you will only have two years of presumption. Also, if a doctor tells you that you need to do something, you have to follow the course of the doctor's orders. Otherwise, it would negate

your presumption if it was found that you did not stick to the course of the doctor's orders.

Additionally, it was felt that the utilization of tobacco products should also negate your presumption. You will still be able to prove if it came from the job, and if you can do that, it will be covered; however, the automatic presumption goes away if you do not stick to the course of the doctor's rules or you have utilized tobacco. One of the amendments that was proffered at the end of the Senate Committee on Commerce, Labor and Energy was that it is not always that easy to quit smoking. With that being said, the police officers asked that we change the effective date on that aspect to give them an extra year to try to kick their bad habits. I was agreeable to that. The effective date change on that portion is within the bill.

It does not do as much as some people wished. One of the things we are doing is putting into statute the heart and lung presumption created by a court ruling. There was another Nevada Supreme Court action that stated that the benefits of *Nevada Revised Statutes* (NRS) 617.455 and 617.457 will be limited only to medical benefits. Mr. McAllister agrees with me on that amendment. Since we are codifying a Nevada Supreme Court case, we should codify the other ones that are out there. That is the gist of the bill.

We have agreement from numerous individuals, and I would not be surprised if some of the original individuals were unhappy. Heart and lung presumption is only to be for those people working in the state of Nevada. For example, if you are in California and work for 20 years but then come to Nevada and do 2 years, you only get 2 years' presumption. It goes the other way as well. If you do 5 years here in Nevada and then do 20 years in Yakima, Washington, you only get the 5 years. That is what this bill is meant to do: reduce the liability of the state of Nevada, but also take the vesting from five years to two years. The hope is to finally put this subject to rest. Assemblywoman Kirkpatrick has dealt with this issue for far more years than I have, and I hope we finally have a solution.

Rusty McAllister, President, Professional Fire Fighters of Nevada:
This bill is the result of many meetings with Senator Settelmeyer and with the people whom I represent. When this process began, the rest of the fire group along with law enforcement representatives suggested I work on this bill with Senator Settelmeyer. I did, and I have taken it back to my firefighters and the law enforcement groups, and they have agreed to it. I believe someone will confirm that. This bill probably does not address as much as some people

would like, but it certainly addresses some of the concerns that have been brought up over the years. That is, if a firefighter or police officer works for five years, gets vested, and leaves to pound nails in California, but still has lifetime presumption, this bill fixes that. By lowering the vesting period to two years, if somebody only spends two years and goes to work somewhere else, he now has two years coverage, period, and that liability is gone for the employer from that point forward.

There is a concern about people who are not taking care of themselves once they leave the job with regard to following physician-prescribed orders of care or the use of tobacco. This bill addresses that. If there is evidence of that, the conclusive presumption is gone, and they will have to fight for their claim. We think these are reasonable solutions. I would like to thank Senator Settelmeyer for listening to us and working with us to come up with a viable option to address some of these concerns.

Chairman Kirner:
I commend you for doing the yeoman's work of working together. Are there any questions from the Committee?

Assemblyman Ellison:
If I work five years and I want to quit to go work in the coal mines of Kentucky, and in ten years I get black lung, what happens? I thought you could come back to Nevada and tell the company you previously worked for that you have black lung and then they pay for it. Is that not true?

Senator Settelmeyer:
Under current Nevada law, based upon the Supreme Court ruling, the state of Nevada is currently on the hook. If this bill passes, it helps address that issue by assuring that your length of conclusive presumption is equal to your tenure of work that you did in Nevada. This means that if you only did five years, you are only going to have the ability to come back on the state of Nevada for five years while working in that coal mine. If your problem manifests itself after that time frame, you would no longer be able to come back on the state of Nevada with a conclusive presumption. If your doctor can prove that it was from the job, you will be able to come back to the state of Nevada.

Assemblyman Nelson:
Does a conclusive presumption mean that it is not rebuttable ever?

Senator Settelmeyer:
It is pretty difficult to rebut the presumption in the past. It is pretty much conclusively presumed. If you have extenuating circumstances, you could rebut that presumption in a court of law, but it is difficult in my opinion.

Rusty McAllister:
One thing that is already in statute is that every year a law enforcement officer or firefighter must get a physical. If there are predisposing conditions to heart or lung disease that are identified during your annual physical, and the physician makes note of that and lets you know that the predisposing conditions are within your ability to make a good faith effort to correct, then you can rebut. An example would be if someone is smoking, chewing tobacco, and has high cholesterol, and the doctor identifies those and gives him a course to repair that, but he chooses not to follow that advice. Later, if there is a claim, the insurer has the right to rebut that based on the fact that he did not correct his predisposing condition or make a good faith effort to do so.

Senator Settelmeyer:
However, that is only true if they are employed. Some of the situations we were running into related to people working for five years, and once they leave employment or leave the state of Nevada, we have no ability to do physicals on them, and there is no requirement to do so.

Assemblywoman Carlton:
I know employees have to get their yearly physicals. They are told to do certain things and then get referred to their private doctors to deal with cholesterol or blood pressure. You can take a course of treatment for years and still not lower your cholesterol. You can go to the gym four days a week and still end up at the same weight, but with a better body mass index. Is this just complying with the orders of the physician? Which physician, and does the success of the treatment actually count? Some things you can try to treat, but they are not going to be successful.

Senator Settelmeyer:
Current law already has the concept of following a course prescription, and this would mirror that. This means that you would have good faith that you are trying to follow the course prescription. If you are doing what the doctor says, you are going to be okay. If the doctor ever indicates that you are not following the course prescription, the doctor has the ability to say that you are not completely following his orders in good faith. It is my opinion, under existing law, that that is generally dealt with on the other aspect that way. That is, if you were complying in good faith, it is okay, but it is upon the determination of

whether or not you are ignoring the doctor. We are extending that provision to the other aspect.

Assemblywoman Carlton:
I understand it calls for two years of vesting rather than five years. I want to understand. When I leave employment, I will have to be diagnosed within the two years? Or would it be in the amount of years of service?

Senator Settelmeyer:
It mirrors existing law on the other aspect. Right now, according to the rules, you need to have an incident that says you have a problem. If you have an incident during the course of your employment that says you had an elevated heart rate, an arrhythmia, or ran into a fire that had carcinogenic compounds, then you have an incident that creates it. With regard to the vesting period, if you did not do the full 20 years, this is indicating that you need to have something else occur in that other time frame before it is counted.

Assemblywoman Carlton:
I am still confused because I am hearing two things: what we have now and what you are doing. For example, let us say I am a police officer and I put in 15 years. Two years and one month after I depart from service, I have a heart attack. Will I be covered or not?

Senator Settelmeyer:
In my interpretation, yes.

Assemblywoman Carlton:
Would it be the whole 15 years after departure that I would be covered for? When I read the two years portion in the bill, it is not as clear. It looks like that is solely the vesting language, not the coverage language.

Senator Settelmeyer:
The intent is that your coverage would be equal to the time frame that you work.

Assemblywoman Neal:
What was the rationale for the two years that is now in the bill? What if it is latent? On page 3, line 8, it says, "if the disease is diagnosed and causes the disablement." What if it is cancer? What if it is not readily on the surface and it does not cause the disablement? What if you are diagnosed but not disabled? What if the diagnosis comes later? I am trying to figure out what the research-based reason was behind the two years. When my mother got cancer, it was not readily on the surface. It is something that arises and the

disablement occurs over a period of time. It is not something that is prescriptive to a two-year cycle. I am wondering where the information came from and how you arrived at the two years as the prescriptive means.

Senator Settelmeyer:
When the bill first came up after discussions with Mr. McAllister, I went through every state on the International Association of Fire Fighters' (IAFF's) website and looked at how those states dealt with the issue. I only found three irregularities in their website compared to actual laws from those states, but I am sure they are corrected by now. Currently, in Nevada we are five years. Many states went down to two years. I thought it was appropriate to talk with Mr. McAllister about the concept of give and take and compromise. The two years was very much related to what other states had decided to do. Also, we wanted to give something more to those individuals out there—firefighters and police—doing things for us.

In the same respect, admittedly, Mr. McAllister beat me to the vesting concept of year for year; the most I have ever seen is four to five months. If you do two years and you get six months for each year, it cuts it in half. In going from five years to two years, our conclusions were based upon the consensus of looking at what other states did and trying to give firefighters and police officers something beneficial for what they do for us.

Chairman Kirner:
I will invite those in support of the bill to come forward.

Michael Rebaleati, representing Public Agency Compensation Trust:
The Public Agency Compensation Trust worked with Carole Vilardo of the Nevada Taxpayers Association to bring S.B. 153 (R1) forward. We are in support of this bill with some conceptual amendments, which we encourage this Committee to consider. We also want to share that we respect the efforts of Senator Settelmeyer and Rusty McAllister to revise S.B. 153 (R1) as it reads today.

I have served as a volunteer firefighter for Eureka County for over 30 years. I have served as the chief for eight years. As a volunteer firefighter, I do everything I can to protect myself with personal protective equipment (PPE) and training. Regardless of how much effort we, as firefighters, take to protect our health, it is inevitable that I have inhaled a wide variety of fire-caused fumes. I am only stating this because I understand and respect the reasoning behind the language of S.B. 153 (R1); however, we want to ensure that the taxpayers do not get saddled with expenses that are not work-related. This is a workers'

compensation law, and we strive to produce very transparent and legally clear workers' compensation laws.

Our proposed amendments address issues that either have risen out of the legal litigation of past claims or pose questionable liability to the taxpayers. We believe that our proposed amendments have merit to get the proper language into the bill so this particular issue will not have to be addressed by future legislatures. I would like to thank Senator Settelmeyer for already addressing three of the items that we have on our conceptual amendments: item number one, which was for in-state; number two, correcting actions for both employment and postemployment for the health of the covered individuals; and number five, limiting the postemployment benefits to medical benefits only.

Chairman Kirner:
I have reviewed these conceptual amendments with the bill sponsor, and he is content to go with item number five. Besides those, we do not consider these to be friendly amendments, so I am not going to entertain them. The amendments came in too late, and we can talk about them off the record.

Wayne Carlson, Executive Director, Public Agency Compensation Trust:
I echo the comments from my colleague Michael Rebaleati. One of the conceptual amendments we were seeing as a trade for the reduction to only two years for eligibility on the front end was that, on the back end, when the employee leaves and goes to another state to continue working as a firefighter, that he gets two years on that end so that it is fair both ways. We are picking up potential risks developed elsewhere two years after he becomes an employee. Likewise, when he terminates, we think it is a fairness issue to be limited to two years when he goes to another state in the same occupation.

We think congenital conditions belong in the health care system, not in the workers' compensation system, because those are not caused by work. Workers' compensation is a system where if the conditions of employment cause the conditions of the employee to manifest, that exposure results in a claim. For heart and lung disease, there should be coverage under workers' compensation, but not if it is from other sources like congenital conditions.

The last change we were seeking was to have a physical examination upon termination. They get them every year once they are at the five-year mark. We think there should be an exit physical, so when they go out on postemployment, there are benchmarks and doctors' orders, as of that time, that would apply to the postemployment.

Richard McCann, Executive Director and Labor Representative, Nevada Association of Public Safety Officers:
The Nevada Association of Public Safety Officers represents over 1,400 law enforcement professionals throughout Nevada. On behalf of our membership, we wholeheartedly support S.B. 153 (R1) as presented by Senator Settelmeyer and the currently amended portion that came to you as a result of all the hard work of our colleague, Rusty McAllister.

Mary Walker, representing Carson City, Douglas County, Lyon County, and Storey County:
We support S.B. 153 (R1). We thank Senator Settelmeyer and Rusty McAllister for all of their hard work. We believe that this is a commonsense bill that addresses some of the worst problems that we have with the system.

Chairman Kirner:
Are there others in support of this bill?

Victor Joecks, Executive Vice President, Nevada Policy Research Institute:
We support S.B. 153 (R1) the way it is written now, but we also support the original bill. Nevada is the only state with a lifetime presumption of heart and lung disease. In 2008, that presumption was estimated to have a liability for Henderson, North Las Vegas, Las Vegas, Reno, Sparks, and the Las Vegas Metropolitan Police Department of $2.4 billion. This bill would simply bring Nevada's heart and lung benefit closer to what exists in other states. It would also help cap that liability.

Scott A. Edwards, Vice President, Las Vegas Peace Officers Association:
I am here representing 200 correctional officers in the City of Las Vegas. We also support this bill with the amendments.

Tim Ross, President, Washoe County Sheriff Deputies Association, and representing Peace Officers Research Association of Nevada:
We want to say thank you to those who worked so hard on this. We feel that it is a reasonable bill, and we are in support of it.

Mike Ramirez, Director of Governmental Affairs, Las Vegas Police Protective Association Metro, Inc.:
We would like to thank Senator Settelmeyer and Rusty McAllister for their hard work. We are also in support of the bill.

Assemblywoman Kirkpatrick:
I had a question for Mr. Joecks. I am curious as to where you got that number. I do not want there to be a misrepresentation of presumed liability. In all of the

years that I have watched local governments—and I am on the same side as you when it comes to looking at local governments or budgets—I have never seen that number in the reportable amount of their potential liability.

Victor Joecks:
I do not have the study memorized, but I will give it to you after the hearing because it is saved on my computer.

Assemblywoman Kirkpatrick:
That would be perfect. I like real numbers to be out there, and I would like to understand where that came from.

Chairman Kirner:
Is there anyone in opposition to this bill?

Robert Ostrovsky, representing the City of Las Vegas:
We would like to thank Senator Settelmeyer for trying to address this issue. It is one that we have talked about for a long time, and we know it is a big-dollar issue for local governments and the state. Anyone who has firefighters and police officers on their payroll understands that. We did not get a chance to testify on this amendment in the Senate. It showed up on work session, and we did not participate in the discussion surrounding it.

This may be a very good bill and it may not be. We know the actuarial values of the current law and what it means to the City of Las Vegas. What we do not know is the true meaning of this bill. For example, changing it from five to two years—what does that actuarially mean? How many more or how many less claims will we get because of the trade-off of the 20-year rule? We do not know. Our suggestion is that this bill not be processed. We are suggesting someone do a study or look at what is the best way to solve this problem. We know it is expensive. We also know that we have a group of employees who do very highly specialized work and put themselves at risk, both policemen and firemen, and they deserve a heart and lung benefit.

What the end result of this bill would be, we do not know. We have looked at it. We have varying opinions about whether this is more costly or less costly. It is hard for us to support a bill that we cannot get our arms around. We appreciate all the work that has been done, but we would just as soon live with the current law and spend some time and effort over the next legislative cycle looking at the best way to provide a good benefit to those people who are working in these jobs, and at the same time, do something about putting some limits or controls on the expenditures that governmental agencies have to invest in these benefits.

Assemblywoman Carlton:
We heard from Senator Settelmeyer that this has been done in a couple of other states. Is there a way to look at the other states to see the impact it has had on workers' compensation rates in those states? Is there a model out there we might be able to work off of? We have debated heart and lung since 1999. I have some concerns on whether this will actually lower the costs.

Bob Ostrovsky:
I do not know, but I think that is exactly what we would like to do. We would like to look at the impact in the other states, and if they have changed their laws, what the result is. Within the City of Las Vegas, they debated this bill between their Department of Human Resources and the Department of Finance; people could not wrap their heads around it. I do not know an immediate site we can go to to do an analysis, but I heard testimony earlier that perhaps there are sites that have historical records. Again, we have not had the chance to do that, and we think it would take a considerable amount of time, effort, and expense, which would probably be worth it at this point in trying to analyze this. I do not have an answer at this point.

Chairman Kirner:
What is your estimated current outstanding liability for the City of Las Vegas on this?

Bob Ostrovsky:
I do not know, but I will get that information for you. I know they have done an actuarial study. I will ask them to forward that to you and the Committee.

Chairman Kirner:
Thank you. Are there any other questions?

Assemblyman Nelson:
You do not dispute the fact that the firefighters and policemen are exposed to carcinogenic chemicals in the line of their work, regardless of the precautions they may take. Is that correct? Is your dispute solely on the fiscal effect this would have on the City of Las Vegas?

Bob Ostrovsky:
Yes, that is correct. We do not dispute that these people in these job classifications ought to have special rules for heart and lung conditions. It is a question of how this bill impacts those rules that we do not understand.

Chairman Kirner:
I do not see anyone else in opposition. Is there anyone who would like to testify as neutral?

Jeff Fontaine, Executive Director, Nevada Association of Counties:
I would like to thank Senator Settelmeyer and the others who have worked on this bill, trying to tackle an issue that has been before this body for many sessions and one that is a great concern to the counties. I am here in the neutral position because I think eliminating lifetime presumptive eligibility for those who are vested at five years and reducing that to a year-for-year eligibility is a reduction of the overall liability. However, I share the concerns that were raised by Mr. Ostrovsky. Without doing the actuarial study—and there are a number of assumptions that go into this—it is difficult to say that we can quantify what that reduction would actually be.

Chairman Kirner:
Are there any questions?

Assemblywoman Carlton:
I have the same question. Your organization can reach out to other associations of counties across the country. Can you possibly reach out and find out if there is another group that has a similar situation and see what might be happening in that particular state? I think if we have something out there that is close, it might give us an indicator of what we are trying to do.

Jeff Fontaine:
I would be happy to do that and get as much information as I possibly can from other states.

Chairman Kirner:
Seeing no one else testifying as neutral, I will invite the bill's sponsor to give closing comments.

Senator Settelmeyer:
Assemblywoman Carlton, I sent you a link to the IAFF website, where there is a link to all state laws. One of the compelling things to me was the concept that if a person has a problem, we as a state need to address that. I was looking for a trade-off. It was said that this reduces the scope of liability. What this bill is trying to do is get the liability for only what the state is on the hook for. I had no problem working with Mr. McAllister in lowering the vesting from five years to two years to try to address problems that exist; however, we would be the only state that does it year-for-year. In the link that I sent you, the biggest one is four or five months per year of work, so I thought this

was a decent compromise for all those aspects. Additionally, it is somewhat rare for police officers and firefighters to do two years. Many of them decide to quit doing the job. You can look at statistics out there. Many are life timers, but many, after seven to ten years, decide they would like to go elsewhere. It did not seem appropriate to me that those individuals would work for us for 7 to 10 years, then go to Elko and work in a mine with diesel fumes for 20 years, and the state is still on the hook.

Chairman Kirner:
One of the objections raised has to do with whether this bill would actually lower or increase liabilities. I know you are not an actuary, but I know you have worked with Mr. McAllister and others, I presume. What is your sense on this?

Senator Settelmeyer:
I think the state is responsible for what the state needs to be responsible for. If there is an injury or if there is something that was caused by work these people did for us, I think we should pay, regardless of what the actuary says. In that respect, if one person leaves employment of the state or county to do a different profession for numerous years, I think it is appropriate to say that there is limitation. I do not agree with the current system where you do five years and you get lifetime vesting. My overall gut feeling is that this is fair. I tend to look at how many people truly do two to five years. It is rare. Most people wash out of the police or fire department within the first year or so. I do not think that you are necessarily increasing the exposure of those individuals to two years to five years versus the reality of making sure those individuals get year-for-year when they are out. That way there is an end to the state's liabilities. I do not think it is fair to our constituents. I am not an actuary and I have done no analysis, but looking at what other states have done, I thought this was reasonable.

Chairman Kirner:
There were some conceptual amendments that were discussed. Apparently, you had picked up a number of these paragraphs. These were not uploaded to the Nevada Electronic Legislative Information System (NELIS), and the reason for that is because they were unfriendly amendments, from your perspective, to your bill. Would you care to comment on those?

Senator Settelmeyer:
Since we are currently codifying, I looked at the codification of the Supreme Court case ruling and that seemed appropriate. I forwarded that to your Committee Counsel, Matt Mundy. That is language that Mr. McAllister and I agreed upon. I understand that when you leave the state of Nevada, you should no longer have coverage; however, current law does not work that way.

It was my opinion that we should not be trying to make that large of a departure. I did not feel that those aspects were acceptable. The concept that you need to get the vesting time in Nevada is current law. You cannot do seven years in California, then start work in Nevada and think you are vested; the work has to be done in Nevada because that it is law.

We are trying to take care of the workers in the state of Nevada for the time frame they have worked in the state of Nevada. I do not agree with anything else on that aspect. I felt that the amendments were too far of a departure from the agreement that I had with Mr. McAllister. This is your committee, however, and you are free to decide.

Chairman Kirner:
I will close the hearing on Senate Bill 153 (1st Reprint). I will open the hearing on Senate Bill 194 (1st Reprint).

Senate Bill 194 (1st Reprint): Revises provisions relating to industrial insurance. (BDR 53-991)

James L. Wadhams, representing Alliant Insurance Services:
This is a fairly simple bill. I think it is helpful if I give you some background on the words you may have heard dealing with this bill. We are not just talking about workers' compensation insurance, although that is exactly what *Nevada Revised Statutes* (NRS) Chapter 616B deals with. Some of you may recall that we used to have a monopolistic state fund. Assemblywoman Neal's father [former Senator Joe Neal] and I had these discussions many years ago. There was a state fund that controlled all of the workers' compensation insurance. There were no city self-insured programs, no hotels, and no insurance companies. It was all a state program. That began to change in 1979, when the Nevada State Legislature allowed major employers, typically the utility companies and major hotels, to opt out and prove up their financial net worth and handle their insurance themselves.

In 1993, the Legislature, having seen the relative success of that process, decided to allow groups of employers to come together in associations of self-insured employers. Today we call them self-insured groups (SIGs). In 1995, some of you may recall, the state fund found itself $2.2 billion insolvent. Under Governor Miller's administration, changes began to take place including, ultimately, the authorization of allowing commercial insurance companies to come in and offer workers' compensation insurance. That took place in 1999. The statute that we are amending came into effect in 1999. One of the reasons the statute exists in the first place is because this body had some concerns that the insurance companies were an unproven activity in the

workers' compensation area. Larger projects wanted to make sure that there was no particular disruption.

The original law in 1999 said that the Commissioner of Insurance has an obligation to establish an amount based upon a construction cost index, beginning at $150 million. "Consolidated insurance program" (CIP) means consolidating the individual insurance contracts that subcontractors and contractors might have to bring to a major project. Some of you who sit on the Assembly Committee on Judiciary have heard the discussions on construction defects and that even on residential subdivisions there may be, in addition to the general contractor, as many as 10 or 15 subcontractors. If you expand that context to include a project in southern Nevada such as Terminal 3 at the McCarran International Airport, CityCenter, the Encore Hotel Las Vegas, or The Venetian, you know these are very large projects. They found that if they consolidate those insurance programs, they get the efficiency in the economy of essentially having one-stop shopping.

The other element is the relationship between the general contractor and the subcontractor. The indemnities and cross-claims that occur in that process can become very complex. If you have a single insurance policy that covers the entire project, you can manage the project better. You will have more streamlined efficiency of the administration of the insurance programs, and the relationship between the parties becomes subsumed into that one insurance company. This way you do not end up with the cross-claims that become so common under residential construction defects. The phrase "Consolidated Insurance Programs" simply means consolidating all of the various insurance contracts that the subcontractors might have into a simple policy. The primary phrase in that listing is either owner-controlled or contractor-controlled. The owner-controlled is what you might hear referred to as an owner-controlled insurance plan (OCIP) and the contractor-controlled is a contractor-controlled insurance program (CCIP).

The OCIP is created when the owner of a major project decides he is going to build a project of some magnitude and wants to do it as efficiently and economically as he can. He will send out a request for bids for subcontractors to bid without insurance, because he will go to a major insurance broker and ask him to find a major company that will do an OCIP for the entire project. The subcontractors will submit their bids for their work without including the cost of their insurance.

On major projects like the ones I have described, it is estimated that this can save several percentage points. As an example, there has been discussion with our state Department of Transportation about using such a program on

Project NEON, the public-private project on Interstate 15 in the Las Vegas area. It could save the state somewhere between $10 million and $15 million. Those of you who sit on money committees know that $10 million or $15 million is not inconsequential. The opportunity to make those savings on larger projects is significant.

Why is this bill here? The original level for permission to do this was a project of at least $150 million. The Commissioner of Insurance was required to use the construction cost index and to adjust that annually. I am reading Bulletin 14-006 of the Insurance Commissioner, issued June 30, 2014. It reads, "Effective July 1, 2014, to be eligible for a consolidated insurance program, the estimated total cost of a construction project must be at least $240 million." We are talking about a very large project at which you can begin to consider these savings.

Experience has taught us that commercial insurance companies seem to operate reasonably well. They are fairly competitive, but the opportunity to save money should be afforded not just on public projects, but on private projects as well. Certainly, private hotel owners should be able to do this, and the state should be able to consider it after an analysis on whether it is going to make economic sense.

The point of this bill is basically to reduce that threshold that has not been adjusted since 1999. We think there should be the opportunity for public or private projects to consider this—it does not mean that they automatically will do it—if they have a total project cost of $50 million. This allows both public and private owners, or contractors coming on to do a public or private project, to at least explore the potential cost savings of doing a CIP. Much below that number of $50 million, it begins to make relatively little sense or dollars.

We tried to strike a balance in the Senate and come up with a number that seemed to make sense and yet allow local governments, state governments, and private developers to be able to consider these programs at that level. I have focused on workers' compensation because that was the genesis of the law, but these projects will incorporate not only the workers' compensation, but the general liability. This again reflects back to how the construction defect world works. These are a single policy of consolidated insurance programs. I hope that begins to address the questions of why we are here.

[James Wadhams submitted a proposed amendment (Exhibit C).]

Chairman Kirner:
Mr. Wadhams, the Committee has questions.

Assemblywoman Kirkpatrick:
In section 1, the bill talks about a "series of projects." I understand there is a definition in section 1, subsection 3, paragraph (b), but if the Insurance Commissioner is saying $240 million, you want to go down to $50 million; that is not even cutting it in half. Today, $50 million in the bigger projects is a very small amount. It would appear to me that a whole bunch of $15 million projects could get together and do this. What is the benefit? Is it supposed to save on the job or the contractor? I got so lost on the construction defect portion, please remind me what the benefit is.

Chairman Kirner:
I think one of the amendments (Exhibit C) Mr. Wadhams submitted would give a slightly different definition to the series of projects, if you want to check that. I do not, however, think it changes your question.

Jim Wadhams:
I apologize for referencing a bill that has already moved through this house. This Committee may not be generally familiar with what happens when you have a collection of competing insurance policies. They are required to defend their insured, which may mean they are defending their insured against another insured, and it becomes a very complex process and creates a lot of issues. My reference was only to establish that having one insurance policy for the project eliminates a lot of the struggle that goes on among individual subcontractors.

We can look at the language that is in the bill because both the amendment (Exhibit C) and the language in the bill will address your question. For example, a school district wants to build or remodel several schools. That might be a series of projects in Clark County or Washoe County, for example. Any one of those projects might not be $50 million, but it is highly likely that in the aggregate they will be. If they say they are looking at six schools and it is going to be $60 million, they would put out a request for proposal (RFP) for a consultant who comes in and does the analysis. They ask if there will be efficiencies and economies and how much they will be. Then the school district will have to decide if it is worthwhile to save $1,000 on six schools or whether they can save $6 million on a $60 million project; spreading that over the sequential construction of six schools may be worthwhile. This bill does not require anybody to do anything; it simply enables that process to be considered.

The reason we put the amendment in is because that school district may realize they are going to try to do 6 out of their 24 schools, but they have not identified precisely which 6 are going to be in the first priority. If you look at the language on page 3, line 26, it has the phrase "specifically identifiable."

We wanted to modify that definition slightly so the overall project has to be identified but the individual pieces could be adjusted. They might decide that the school in the northwest part of the county is okay, but they should get the roof fixed on the school in the northeast part of the county. Meanwhile, they know they are going to do a series of six.

I appreciate the question because it gets me back to the bill. On page 2, line 10, we set the new limit for consideration at $50 million. It becomes a fixed number, which is a change in the existing law from this ever-increasing number that puts it further and further out of reach for projects. The next change is on page 3 on the series of projects. On page 4, lines 32 and 33, the purpose of that language is to identify the managers who are responsible for making sure that the liability risks are limited and the safety of the workers is protected. They have to meet certain standards. We are modifying those designations because over the course of time, those institutes have changed their names.

We had opponents in the Senate, and they raised some productive suggestions for improvement. You will find those on page 5, lines 14 through 23. When the program is consolidated, those subcontractors may have risk managers they are comfortable with. This makes it clear that if an OCIP is created, the owner or general contractor has to allow the subcontractors' safety managers to come in and make sure everything is okay. It was said that did not happen in the past. We think that is an excellent enhancement to the bill and have agreed with them. I believe those people plan to testify today.

The final change of substance is at the bottom of page 5. In order to make sure that we do not end up with a fly-by-night or small insurance company that does not have the proper capacity, working with the bill drafters we found this reference that can be used, which is stated in the bill as "an insurer who is rated A- or better by A.M. Best with a Financial Size Category of Class VII or larger." We could probably find this in some of the bonding laws elsewhere in statute. These are larger insurance companies. They are not small operations. Starting on line 41 of page 5 it states, "or the equivalent as determined by the Commissioner." All of this is basically under the jurisdiction of the Commissioner of Insurance. He has some standards to measure by. There is a starting point you have to exceed to consider it.

Chairman Kirner:
Are there any questions?

Assemblywoman Neal:
In section 1, on page 2, line 10, you strike out the threshold. How does removing the flexibility and no longer using the construction cost index as a baseline for the price of the project help in terms of the project? My understanding of OCIP is that it covers workers' compensation, general liability, and excess liability. The whole point of having it is that you could have potential issues arise in relation to the project, and you want coverage for that. How would the $50 million meet those needs if that is the base? I do not understand how that covers everything.

I sent this bill to somebody who does construction, and he said it seemed like the employee loses. They said it is employer-focused and that the safety of the employee would be at risk with that dollar amount. Also, when you referenced page 5, about having your safety person show up on the site, is that some sort of new privilege they are gaining?

Jim Wadhams:
The threshold amount, which is currently $240 million, means the total value of the project has to be in excess of $240 million before that owner—whether it be the state, county, or private individual—can have permission by the Legislature to consider finding a cheaper way to get the adequate insurance on that project. The threshold is a project cost. It is not an insurance price or amount; it is the construction value of that project. The reason we suggest that change is because with $240 million, you virtually have to be building a megacasino or some other project of significant magnitude.

Around the country, we have found that the efficiencies and economies can benefit smaller projects—and $50 million is still a good-sized project. I cannot imagine what a house would be like at $50 million, so you are building perhaps office buildings, smaller hotels, high schools, grade schools, or hospitals, but at a smaller amount. That $50 million, formerly $240 million, is the value of the construction. It does not have to do directly with the insurance; it is just the size of the project.

Chairman Kirner:
It seemed to me that Assemblywoman Neal was implying how it might affect employees. As I am looking at this, you have lowered the threshold for organizations to do this kind of thing, to provide a less expensive, better product. Employees are not affected one way or the other, are they?

Jim Wadhams:
Our workers' compensation laws are otherwise untouched. It is an obligation of every employer to have workers' compensation coverage for their employees.

Those benefits are addressed routinely in this Committee. I believe you just heard a bill addressing those benefits, which are set by state law. The workers' compensation benefits are not affected.

Assemblywoman Neal:
I know I am new to this Committee and there are certain subjects I am still getting familiar with. Last night I was reading the bulletins from the Commissioner of Insurance. When he posted the $240 million, he had put the threshold at $150 million for a project that was going to cost $240 million. I was going through all the bulletins wondering why he put the threshold at $150 million for a project that was going to cost $240 million. Why would he pick that? Why would you go to $50 million? I feel as if this question is unanswered for me. To me it was like saying that the Commissioner of Insurance was somehow overestimating the threshold—which he had consistently done—using the construction cost index in order to figure out what the threshold should be.

Jim Wadhams:
I apologize if I went through the history too quickly. In 1999, the Legislature set the threshold at $150 million and later amended the bill to put in this construction cost index. If you look at page 3, lines 7 through 9, they wanted the Commissioner to update that threshold. The Commissioner of Insurance has not overestimated; his people have run the construction cost index based upon the *Engineering News Record*. Periodically, the Commissioner would issue a bulletin, and it would progressively increase that threshold from the original $150 million set by the Legislature to $240 million now.

The question we have before us is the size of the project. You now have to have a $240 million project before you, as the owner or public body, have the right to consider more economic ways to procure the necessary insurance. It has precluded private parties and local governments from saving money on the insurance cost of a project because the value to hit $240 million is high. I think an average high school is about $35 million. We see this all the time in Clark County. Four high schools or a combination of ten schools in two years' time might not get to $240 million, which means the school district has lost the opportunity to save money that could have been used to do further construction.

Assemblywoman Carlton:
I remember those conversations vividly in 1999. I had to learn about OCIPs and CCIPs, so I can feel how my colleague at the other end of the dais feels about it because 1999 was a baptism by fire for me on a number of different things in workers' compensation. The most important thing I remember from the

discussions of the numbers was that by picking a large project, we were making sure that the people who were building the project had the financial wherewithal to stand behind any mistake that might happen. By lowering that amount and allowing groups to aggregate together to do this, there may not be one pillar amongst that insurance group who would be strong enough to bear a financial hit if, for example, six guys get buried in a slab of concrete; now there are six deaths on-site. If we allow a county or city to do this and something drastic happens, we will be putting the taxpayer at risk for whatever accident might happen on that job site. I remember why we picked this large number, and I have concerns with lowering that number and putting people at risk for that amount. How do we address that?

Matt Mundy, Committee Counsel:
I thought it would be worth pointing out the definition of consolidated insurance program, since that is the type of program they would be operating under. These types of programs include industrial insurance coverage, which is the same coverage required for industrial insurance chapters. It also includes the comprehensive program for safety and for the administration of claims for industrial insurance for each employee that the contractor or subcontractor engaged in the project.

Chairman Kirner:
My reading of that would be that there is nothing lost or changed in terms of covering workers.

Assemblywoman Carlton:
It is not just the consolidated insurance impacted by this bill. I believe OCIP is impacted by this bill. Is that correct? Please correct me if I misunderstand.

Jim Wadhams:
This threshold is on the value of the construction cost of that project. It is not an insurance limit. Currently a project has to cost the owner $240 million before they can explore the opportunity of purchasing insurance in a more efficient manner.

Assemblywoman Carlton:
I understand that. I remember the discussion being that the larger the project, the more financial responsibility that stands behind the larger contractors. With this being something new, people were apprehensive of allowing smaller contractors to be involved. We wanted to keep it large to protect everyone involved, so if one group went under, they did not take everybody with them.

Jim Wadhams:
It is not about the strength of the contractor; it is about the strength of the insurance company standing behind the contractor. Without getting back into too much history, the anxiety that Assemblywoman Carlton expressed was about the newness of bringing in commercial insurance companies. There was some uncertainty because we were shifting out of a totally self-contained workers' compensation fund. We are now 15 years down the road, and many of the major projects, and all of the minor projects, are not done out of that state fund; it does not exist. They are done with licensed, regulated insurance companies where those standards of solvency are set in this Committee.

I am not suggesting that this has anything to do with the obligation to provide workers' compensation insurance or general liability. I apologize that I did not answer Assemblywoman Neal's question This is not in lieu of or adding some privilege that any safety inspector can come on the property. That section was merely that the subcontractor who has a private risk manager can have their safety person come on the property. The purpose of this bill, because this has worked very efficiently on public projects, is to give the opportunity to lower the limit for the consideration of seeking less expensive insurance. It does not substitute the quality of the insurance company or the obligation to insure the workers or the satisfaction of the payment requirements under statute.

Assemblyman Ohrenschall:
My question is on the amendment (Exhibit C) that you are presenting in regard to section 1, subsection 3, paragraph (b). If I am reading it correctly, the existing language in the bill talks about "series of projects" which "means two or more projects of which the same private company, public entity or utility is the owner or principal contractor and which are specifically identifiable." The new proposed language takes out the reference to the same companies, utility, or local government and the "specifically identifiable." Is the goal that different contractors could have different projects and still take part in the consolidating of insurance? Is that a departure from existing law?

Chairman Kirner:
Mr. Wadhams, can you give the Committee a better description of your change in the amendment?

Jim Wadhams:
To do that, I think we need to start with the definition in the bill. It is itself a change to the existing law. The existing law does not allow a series of projects. I will use the current threshold as an example. I have to be planning on spending at least $240 million on one project in order to seek to consolidate my insurance and gain some efficiency and economy.

By adding the series of projects just to the existing law and threshold means that the Clark County School District (CCSD) could consider ten $30 million high schools. This is the program they have decided to do. It is $300 million, so it is a series of smaller projects done under a single insurance contract with a major insurance company. They can explore that option to see if they can save more money by doing it that way than by having each project separately insured by each subcontractor who participates. The reason we went to "series" in the first place was to accommodate the idea that no one school is big enough, but collectively, in an identified scheme of doing a program, they could.

Let us say the school district may not be able to identify all ten of those schools. They know they are committed, they bonded, they raised the money, they issued the bonds, and they are going to build them, but they have not necessarily determined where the numbers go. The schools have not been specifically identified, but they would have to be generally identified in the program. That is a change to the existing law, and it allows governments to use that to their advantage to save money for use elsewhere.

Assemblyman Ohrenschall:
Perhaps I am misreading the amendment, but I understand it to allow CCSD to have three schools it is proposing to work on at $30 million each and then to join up with Ely Conservation District on a pipeline and try to reach that threshold, which would be lower. Am I understanding that correctly? The requirement that it would be the same private company or public utility would be lifted? You could now have an amalgam of different private companies?

Jim Wadhams:
No, that is not the intention. The purpose of our language was to allow CCSD a commitment, for example, to build ten schools, but they may not have identified all ten; that would be the type of project. This was not intended to put together CCSD and the Las Vegas Water Authority, a combination of entities that are disparate. It would be a program by a single owner for contract.

Chairman Kirner:
Looking through the bill, I had the same question Assemblyman Ohrenschall did in terms of the nexus of the projects. I think that will be an area to work with Mr. Mundy to square away.

Jim Wadhams:
I am happy to do so.

Chairman Kirner:
Is there anyone in support of S.B. 194 (R1)?

Robert Vogel, Vice President, Pro Group Management, Carson City, Nevada:
I am with Pro Group Management, and we manage five self-insured groups. We are here in support of the bill as amended. Mr. Wadhams very carefully explained the history and the creation of this bill. We agree with the threshold limitation at $50 million as a project cost for the establishment of an OCIP. As Mr. Wadhams explained, it is a threshold and helps ensure that those who are going to set up an OCIP have the wherewithal to put together the program and run it properly. We felt that anything smaller than $50 million was not a good idea. We also like the language of putting in the rating for the insurance carrier who is going to back it. It really sets the threshold, or value, of supporting that program. That A- or better rated insurance carrier also ensures that a program is going to be backed by a credible insurance carrier.

We support the bill as amended. We also supplied one brief amendment (Exhibit D) to bring back the words "private company" to the discussion as the original bill was written.

Chairman Kirner:
From my understanding, your amendment is a friendly amendment. There is no objection, correct?

Robert Vogel:
Yes.

Paul Enos, Chief Executive Officer, Nevada Trucking Association:
We are here to support S.B. 194 (R1). Originally we opposed this bill on the Senate side. I would like to thank the proponents, Mr. Wadhams and Mr. Sande, for working on this bill. We have had issues with these CIPs in the past where we have members working on these projects, and we are not allowed to have our safety officers there to make sure working conditions are safe and there are no hazards. We feel that the insertion in section 2.5, subsection 7, is an improvement. It allows us to have our safety officer on the work site making sure it is safe. We think that is an improvement to our current system of OCIPs. In the past, when a worker was injured, we have not always been able to get the documentation. When that worker is injured on an OCIP, that is not necessarily covered by our workers' compensation, but as the

employer, we are responsible for all of the light duty. We are responsible for bringing that worker back to work and finding him a place to go.

We think this is a good bill, especially with those provisions in the bill. We think it addresses some of the concerns we have had with OCIPs over the years.

Bryan Wachter, Senior Vice President, Retail Association of Nevada:
I will echo the comments of Mr. Vogel and Mr. Enos. I will add that it is our goal to get employees back to work and compensated. This bill helps us do that.

Jessica Ferrato, representing Builders Alliance of Western Nevada:
I would like to echo the comments of the gentlemen at the table.

Assemblywoman Bustamante Adams:
Can you give me an example of how this would benefit the entities that you represent?

Jessica Ferrato:
We originally had concerns with the bill about our employees being on a project this large. Our biggest concern is the safety of our employees. When they were on a project, we were not originally able to have our safety people on the project. We have very little control about how the safety is done. When our subcontractors are on a project, we would like to be able to have some input on their safety.

Assemblywoman Bustamante Adams:
From the insurance perspective, do you have any concerns in regard to lowering the threshold?

Jessica Ferrato:
Originally, I think we had some concerns, but we have been working with the involved parties and have agreed to the bill as currently written.

Chairman Kirner:
Is there anyone else to speak in support of S.B. 194 (R1)? [There was no one.] Is there anyone in opposition to this bill? [There was no one.] Are there any who wish to testify as neutral? [There were none.] Mr. Wadhams, would you like to make a closing comment?

Jim Wadhams:
I appreciate the questions. Obviously, we have some homework to do to bring some more information to the Committee, and we look forward to doing so.

Chairman Kirner:
Please make sure that you are comfortable with the Pro Group Management amendment (Exhibit D). I will close the hearing on S.B. 194 (R1). I will open the hearing on Senate Bill 224 (1st Reprint).

Senate Bill 224 (1st Reprint): Revises provisions relating to employment. (BDR 53-985)

Senator James A. Settelmeyer, Senate District No. 17:
We have talked about many subjects in the Commerce and Labor Committees ad nauseam. This is one of those ad nauseam discussions—the concept of the definition of an independent contractor. Originally, there were many problems with this bill and much disagreement. I continually asked the parties to get together to try to find resolution. They always came back to me with the answer that they were about an inch apart. After two and a half weeks of being an inch apart, I had had enough. I called them into my office, and they both had different versions of the language. I threw both of those versions in the trash, put my language on the table, and said "Let's start from here." Proposed Amendment 6994 (Exhibit E) to Senate Bill 224 (1st Reprint) is the result of that discussion.

Since the bill left the Senate, there were discussions to add more clarity. The amendment is a work from numerous individuals on both sides, from corporations, businesses, and unions, to try to get to a definition of an independent contractor that we felt was correct.

I would like to go through the amendment mock-up. The ways a person is presumed to be an independent contractor are outlined in section 1. We have set up a test where you have to meet the first two categories and then three of the next five categories. I came to this formulation upon looking at the language other states utilized. Section 1, subsection 1, paragraphs (a) and (b) have to be met in order to get a conclusive presumption that you are an independent contractor. In paragraph (a) it was rather apparent that you needed to at least be paying taxes within the United States of America. You have to have your own social security number and personal tax identification number filed with the Internal Revenue Service (IRS), unless you are a foreign national. The reasoning behind this aspect is because we have a fair number of individuals from other countries who come to entertain in Nevada. We want to make sure that they are following the law. As long as they are following the requirements of the law, they are okay. Being the state of Nevada, we found it important to use that language.

In paragraph (b), we made a slight change. It reads, "The person is required by the contract with the principal to hold any necessary state or local business license and to maintain any necessary occupational license, insurance or bonding." The word "necessary" is the change that allowed us to delete the rest of the original wording. It was felt by my legal counsel that by doing this it made it clearer so there was less room for interpretation. As we all know, if we leave too much room for interpretation, somehow lawyers get involved. We wanted to leave as little room for interpretation on that aspect as possible. That is the reason for the change there. It is not a substantive change; it is one that helps clear up the wording.

In order to be a conclusively presumed independent contractor, you must meet those criteria no matter what. In paragraph (c), you have to meet three or more of the following criteria in order obtain the conclusive presumption. Subparagraph (1) reads, "Notwithstanding the exercise of any control necessary to comply with any statutory, regulatory or contractual obligations, the person has control and discretion over the means and manner of the performance of any work and the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the principal in the contract." That is very similar to other things we have had in the law before. This information came from Jack Mallory.

Subparagraph (2) reads, "Except for an agreement with the principal relating to the completion schedule, range of work hours or, if the work contracted for is entertainment, the time such entertainment is to be presented, the person has control over the time the work is performed."

Subparagraph (3) states, "The person is not required to work exclusively for one principal unless: (I) A law, regulation or ordinance prohibits the person from providing services to more than one principal; or (II) The person has entered into a written contract to provide services to only one principal for a limited period." Some of this stemmed from discussions with real estate people. There are national laws on subjects similar to this section, so we tried to make sure we were not violating that.

Subparagraph (4) is important. It reads, "The person is free to hire employees to assist with the work." We had long discussions on this aspect. They are free to hire employees to assist the person. For example, a hairdresser is free to hire an employee who can schedule appointments, clean up, and get information for the person. My wife is a hairdresser, and occasionally she has somebody who gets coffee for everybody and tries to make it a pleasant environment. It does not have to be limited just to the primary work.

Subparagraph (5) states, "The person contributes a substantial investment of capital in the business of the person, including, without limitation . . . ." This is where one of the amendments came about. There was some discussion, after the bill left the Senate, that we did not adequately include the concept of licensing of a space. Most businesses that I had dealt with were about the concept of renting or leasing a space. I was unfamiliar with the concept of a license of a space. For example, an athletic facility has an athletic trainer, but the trainer is not leasing or renting the space; he or she just has a license to operate in said space. That is where some of this information came from regarding this change.

Subparagraph (5) of the proposed amendment continues, "(I) The purchase or lease of ordinary tools, material and equipment regardless of source; (II) The obtaining of a license from the principal to access any work space of the principal to perform the work for which the person was engaged; and (III) The lease of any work space from the principal required to perform the work for which the person was engaged. The determination of whether an investment of capital is substantial for the purpose of this subparagraph must be made on the basis of the amount of income the person receives and the equipment commonly used in the trade or profession in which the person engages."

Paragraph 2 states, "The fact that a person is not conclusively presumed to be an independent contractor for failure to satisfy three or more of the criteria set forth in paragraph (c) of subsection 1 does not automatically create a presumption that the person is an employee." It just means they failed to obtain the conclusive presumption of an independent contractor.

In subsection 3, the definition a "foreign national" is in NRS 294A.325.

This concept of the bill was to try to deal with many examples, from painters to cosmetologists. I work as an agriculturalist. If I go out and pick up hay at my neighbor's place, I don't want to be considered an independent contractor. The last thing I want to do is have them try to pay my worker's comp, because just so you know, in agriculture, there is no worker's comp. These were the things we were trying to deal with.

Chairman Kirner:
We appreciate you walking us through the bill. Are there any questions?

Assemblywoman Kirkpatrick:
It says in the bill that you cannot have a real work schedule. In my district, I have some people who work at a fitness club. I find out that they are

independent contractors, and they get paid with a prepaid credit card. Because they are expected to be at work from 10 a.m. to 4 p.m. and have clients, would these provisions address this example? I think that this would now say that you are definitely an employee.

Senator Settelmeyer:
I believe you are correct. I think it establishes the parameters. For example, my wife has a shop. She tells people who rent space from her not to show up prior to 9 a.m., which is the time frame she drops our daughter off at school, and she does not want them there past 10 p.m. She has established that parameter, and they are free to do anything they want within that time period. It would allow a person to put restrictions on particular hours they do not want you there in regard to a particular job. But to completely dictate their work schedule—I believe that fails one of the factors of the test. Now, it does not fail all factors. That is the aspect we tried to play a balancing act with. I would have to know all of the parameters of your example in order to run the full test.

Assemblywoman Kirkpatrick:
I would like to follow up with you on that because I struggle with that situation, but I appreciate this amendment. It cleans up a lot, and we have been trying to do this for about three sessions.

Senator Settelmeyer:
I had Mr. Mallory and many other individuals involved in negotiations every step of the way who I think are looking out for all the examples that are out there. There are two large-scale shippers in the United States that have never agreed on a definition. The definition was sent to them, and they responded that they liked the definition. I told them that the other company agreed, but they wrote back, "There has to be something wrong." They wrote back several hours later stating, "I have no idea why my competitor is okay with it, but I have not yet figured out why they are, and we will keep looking at it." As of today, they are still in agreement.

Jack Mallory, representing Southern Nevada Building and Construction Trades Council:
Our approach on this has been open-minded, with the belief that this is a significant problem for the construction industry as a whole, particularly the drywall industry, which is where I come from. The abuse and misclassification of employees through the use of IRS Form 1099 has been pervasive over the last decade. We believe that this legislation is going to go a long way in clarifying the intent of the law as far as what an independent contractor truly is. We are proud to be involved in the discussion.

The approach I took with this was to do no harm. We do not want to create something that makes it difficult for somebody who is truly an independent contractor to establish, under law, that is, in fact, what they are. But at the same time we want to try to make sure the policy is right, with the idea that this does not create opportunity for an employer that is less than savory to misclassify its employees as independent contractors and unfairly compete in the market. If you are an independent contractor, the tests themselves are not difficult to meet. The first two criteria are establishing that you are a business entity and engaged in a business activity. The third criteria noted in section 1, subsection 1, paragraph (c) is only about the level of control that is exerted over you as an independent contractor by the principal you are doing business with. Those were the key things that we were the most concerned about when entering into this discussion.

I was honestly surprised to see this subject come up this legislative session. It scared me a little bit, but I think this has been a fairly surprising and good result. I urge support on this bill.

Assemblyman Silberkraus:
In section 1, subsection 1, paragraph (c), subparagraph (5), there are three sub-subparagraphs. Are those supposed to be stand-alones, between II and III where it says "and"? If you have to obtain a license to use the work space and you also need to have a lease for the workspace, it seems that would be an either/or, not both.

Matt Mundy, Committee Counsel:
No, it is not supposed to be conjunctive because we are talking about a nonexhaustive list of contributions of substantial investments of capital. It would not require you to have a lease and a license.

Senator Settelmeyer:
We asked the legal counsel in the Senate to insert the words "or licensee," and occasionally with attorneys they have to add a few more words than that.

Robert List, The Robert List Company, representing Kolesar & Leatham, Las Vegas, Nevada:
We have worked very hard on this bill. We have coordinated with realtors and insurance agents. This bill has an effect on a wide range of Nevadans, for example, personal trainers who work in fitness centers. I think it has resolved the primary differences. There have been a number of compromises made.

I would seek one thing and that is to clarify what I believe we intended with reference to the words "substantial capital investment." In our discussions, it

has been kind of interchangeable with "operating expenses." Ordinarily I would say those are two very different things, but the expenditure of capital in the context of our discussions and negotiations has included such things as the education of an individual, their training, the travel expenses that they might incur in their day-to-day work, and any extra expenses that relate particularly to that job, rather than an investment in a business itself as a single, freestanding investment. I think the consensus we have reached with this bill is an excellent one. It is good for a wide range of people throughout Nevada, including employees, independent contractors, and employers.

Zev E. Kaplan, Kolesar & Leatham, Las Vegas, Nevada:
We worked closely with Senator Settelmeyer, Governor List, and the other parties in helping draft this. With regard to the comment by Governor List about substantial capital investments, I think you would also have to look at what is considered a substantial capital investment for that particular occupation. A number of these occupations may require very little actual capital investment, and it should not be related to the income that is generated from it.

Chairman Kirner:
I have a question for Senator Settelmeyer. Given the testimony of these gentlemen with regard to the words "substantial capital investment," and by occupation and so on, what are your thoughts?

Senator Settelmeyer:
They were offering information and discussion of the concepts we discussed. The concept or perception that you need to put everything in here to get the bill out is not considered unfriendly; it is considered extremely hostile considering all the work we have put into this. That can be said by everyone who has been in those rooms. We are at a good place. Everyone seems happy at this point in time. They are not completely happy. Certain people would have liked the bill to be dragged further to the left and to the right, which means we are at an interesting place.

Chairman Kirner:
I see some heads nodding. Thank you, gentlemen. Are there others who wish to come forward in support of S.B. 224 (R1)?

Paul Enos, Chief Executive Officer, Nevada Trucking Association:
We are here to speak in favor of S.B. 224 (R1). Sixty percent of the truck drivers in Nevada are independent contractors, owner-operators, out of 6,100 companies. This has an impact on our industry. Currently, there is some instability with how the "ABC test" [*Nevada Revised Statutes* (NRS) 612.085]

can be applied where one of the tests says you, as an independent contractor, cannot be in the same occupation as the entity that is hiring you. Of course, a trucking company hiring a truck driver kind of knocks that out. We feel that S.B. 224 (R1) gives us some stability and recognizes the fact that our drivers are independent contractors.

Section 1, subsection 1, paragraph (c), subparagraph (1) talks about the level of control and the regulatory or statutory obligations. We have to comply with federal hours-of-service laws as trucking companies. We need minimum insurance requirements. When a trucking company is hiring an independent contractor, we require those. I appreciate the fact that we are not saying that is a level of control, because those are regulatory or statutory obligations. We appreciate being able to work on this bill with Senator Settelmeyer and all parties involved, including Mr. Mallory. I think we have come up with one of the best definitions in the country. I know that not everybody is a hundred percent happy, but it is something that we can absolutely live with. We appreciate the stability that this law, if passed, will provide for independent contractors.

Justin Harrison, Director, Government Affairs, Las Vegas Metro Chamber of Commerce:
We are here in support of S.B. 224 (R1). We appreciate the clarity that this bill will bring as far as the definition of independent contractor. We also appreciate the effects this will have on our businesses throughout the state.

Randi Thompson, State Director, National Federation of Independent Business:
I will do a ditto. I have been fighting with Mr. Mallory for two sessions on this bill, so it is nice to actually come together and be working with him on this. I also mirror this as an independent contractor myself, and I am appreciating the definition portion. The National Federation of Independent Business works nationally with an organization called It's My Business, which fights for independent contractors. I know this is an important subject, and everyone is watching Nevada. I commend Mr. Enos for all of his hard work on this.

Jenny Reese, representing the Nevada Association of Realtors:
We appreciate Senator Settelmeyer getting us all together and finally figuring out a solution to independent contractors in this state. We are in support of the bill.

Assemblyman Ohrenschall:
Do you feel the proposed definition in this bill under the amendment (Exhibit E) is going to be in harmony with federal law? What happens when a business

entity has someone they feel is an independent contractor pursuant to NRS Chapter 608 but the United States Department of Labor does not agree?

Matt Mundy:
The U.S. Supreme Court said there is no determinative test as to determining what an employment relationship is. They follow the economic realities test. In a vacuum without a statute like this defining what an independent contractor is, the Nevada Supreme Court adopted the same economic realities test in the case *Terry v. Sapphire Gentlemen's Club,* 130 Nev. Adv. Op. 87 (2014). I can provide you offline with what the status of that employment relationship would be based on case law without the statute. To answer your question, it would not conflict with the Fair Labor Standards Act (FLSA) or any federal case law.

Assemblyman Nelson:
When you say that complies with federal law, would that also include the IRS and its regulations?

Matt Mundy:
That is a good question and a good example because the IRS, for the purposes of determining what an independent contractor is, uses what is called the IRS 20-factor test. It is different than what federal courts use to determine what an independent contractor is for the FLSA. To the extent that there is no determinative test as to what an independent contractor is without some kind of statuary definition, different states and jurisdictions are a bit all over the place.

Chairman Kirner:
Is there anyone in opposition? [There was no one.] Is there anybody who wishes to speak in the neutral position? [There was no one.] I invite the bill sponsor back.

Senator Settelmeyer:
The desire would be for the federal government to realize that our test is best and to adopt it.

Chairman Kirner:
Thank you for all the work that all involved parties did to address this issue. I will close the hearing on Senate Bill 224 (1st Reprint). I will open the hearing on Senate Bill 231 (2nd Reprint).

Senate Bill 231 (2nd Reprint): Revises provisions relating to workers' compensation. (BDR 53-986)

Senator James A. Settelmeyer, Senate District No. 17:
Senate Bill 231 (2nd Reprint) and Senate Bill 232 (1st Reprint) are both works of compromise. We have worked with many interested parties on both of them. Compromise is a good thing, but as people start to propose amendments, sometimes it can rock the boat a little too much.

Chairman Kirner:
I assume you are satisfied with where we are and you oppose any amendments that are being proposed?

Senator Settelmeyer:
I have to fully vet all amendments through all interested parties who have weighed in. I will do so at your request.

Robert Ostrovsky, representing Employers Insurance Company of Nevada:
This bill, as amended, does three things. First, it has to do with the dispensing of drugs. We are talking about workers' compensation only. We are not talking about any other medical setting or health insurance or self-pay. This all has to do with workers' compensation. Section 1 puts some limitations on dispensing of drugs in a physician's office, not at a pharmacy, and indicates a physician may dispense to the injured worker up to 15 days' worth of a drug classified as schedule II or schedule III. Any further fills would be done at the pharmacy. Those would be done with a regular script that you are used to. In every case, the employer is paying for these drugs through its insurance company. The original bill had some limitations on what the physician could charge. This has no such limitations.

We ask that the provider of those drugs use the National Drug Code (NDC), which is the code from the manufacturer that tells us what the drug is and how it is dispensed. It is also used at the pharmacy. Part of the problem is that drugs dispensed directly from a doctor's office do not necessarily get reported to the State Board of Pharmacy, which tracks opiates. This is really all about opiates; it is all about schedule II and schedule III drugs. We have had considerable issues nationwide, and Nevada is no different than the rest of the country in that we have a terrible problem with opiates. We have also discovered that if you keep an injured worker on opiates for a lengthy period of time, that injured worker is probably going to have to go through some kind of program to get off those opiates. We are trying to control that so we can keep people from becoming adversely affected by opiates.

The way section 1 is written, you can get your first 15 days of medication so you are never without them. You then take your script to the pharmacy to get the rest of the script filled. Those pharmacies report to the State Board of Pharmacy (NSBP), which keeps a record, so we know whether an individual is getting drugs from more than one source or getting drugs prescribed in quantities which exceed what the Federal Drug Association (FDA) has approved for the use of those drugs. Again, what drugs are dispensed and how they are used is entirely up to the medical professional.

One of the amendments we put into this bill to satisfy the Nevada State Medical Association removed language which would have limited the ability of a physician to choose a drug. There are no limitations on the physician's ability to choose a drug. This is a consistent problem across the nation. Drugs that are dispensed from a doctor's office are very expensive compared to those we can buy from a pharmacy. We have contracts with all of our pharmacies. You go to those pharmacies, you get your drugs, and you do not pay a copay. The insurer then reimburses the pharmacy based on its contracted rates for every type of drug you may get.

We had problems with the dispensing of oxycodone and other kinds of drugs. I have testimony on the negative impacts of those drugs, but I think that discussion has already happened not only in this Committee, but in other committees this year. One of the First Lady's primary issues this year is to try to control these drugs. We want injured workers to get the drugs that their physicians think are appropriate, but we also want to look out for their interests so they do not get addicted to some of these drugs over a long period of time. That is the purpose of section 1.

Section 2 of the bill has to do with the payment of bills. Under current state law, if I, as an insurer, get a workers' compensation claim, I have 30 days to either approve or deny that bill. I have an additional 30 days to pay the bill to the provider, whether it is a pharmacy or doctor. Do not get this confused with the acceptance of a claim; that is in a different section of the law. As an insurer, I have certain standards to meet in order to accept or deny a claim. As proposed, this section would change that 60-day window—30 days to approve and 30 days to pay—to 45 days to approve and pay a bill. It means people who provide services will get paid faster. It would also mean we would nolonger have a two-step process to worry about, which comes up particularly when the Division of Industrial Relations (DIR), Department of Business and Industry, is doing audits to determine whether you approved or paid claims on time. We think it is easier to have one date, which would be 45 days for everything. Right now, the DIR requires us to show some record that we approved it. One of DIR's actual regulations says we have to have a rubber stamp on it. We said

we cannot stamp things when they are in the computer. We think this is a reasonable change.

Section 3, the last section of the bill, has to do with intoxication. You might want to listen to this one quite carefully. Under current law in Nevada, if you are injured on the job and you are drug-tested and found to have drugs or alcohol in your system, we have the right to deny that claim. You have the right to challenge that denial under the law. The original purpose of putting that into law was to establish drug-free workplaces. This Legislature approved that many years ago, and the Supreme Court of Nevada recognized that in a number of cases. However, in two particular court cases—*Construction Industry Workers' Compensation Group v. Chalue*, 119 Nev. 348, 74 P.3d 595 (2003), and *Desert Valley Construction v. Hurley*, 120 Nev. 499, 96 P.3d. 739 (2004)—the Court said if the claimant had a co-worker and that co-worker said "I don't think he was drunk. He seemed to be doing just fine to me."—in both of those cases, the employer lost its case and the person won his claim. There is no longer any bright line about whether you are intoxicated.

A few years go by and now enter in medical marijuana. Marijuana can now be consumed legally in this state for medical purposes. There is the issue of someone smoking marijuana on a Saturday night, and two weeks later he is injured on the job. He takes a test and tests positive for marijuana. The way the current law is written, the employer would have the right to deny that claim because he had drugs in his system. We are proposing a new bright line. With the changes in this bill, we are proposing a new rule: If you are intoxicated to the level of a driving under the influence (DUI) standard—and we reference in here those sections of the law—you will be considered intoxicated on the job. This means that you could smoke marijuana on Saturday night and if, a week later, you are injured on the job and are tested, you are not going to rise to the level of a DUI standard and therefore would win your claim. It also means that you can go out at lunchtime and have a beer, and we cannot deny the claim because you had alcohol in your system. However, if you had a six-pack at lunchtime and came back to work and were injured, we are going to deny that claim based on the alcohol in your system, and you will not win that claim.

When I proposed this language, the Nevada Justice Association (NJA) had some issues with it and pointed out that you could be injured through no fault of your own. The example given was a passenger in a vehicle who has consumed alcohol, maybe too much alcohol, but is not driving the vehicle. He is on his way back to the shop, and he is going to go home after work. It is the end of the day, he is still on the job, there is an accident, and he is injured. The employer is going to deny that claim. The NJA asked that we put in some presumption so they could challenge and win those cases. In section 3, we

landed on the language, "unless the employee can prove by clear and convincing evidence that his or her state of intoxication was not the proximate cause of the injury." I think you will hear testimony from the NJA that they are agreeable. Hopefully we will hear that from labor. I tried to work with all parties that would be impacted by this.

I know an amendment (Exhibit F) may be presented or requested today on a dispensing issue. A similar amendment was proposed in the Senate and not added to this bill. I think it flies in the face of what we are trying to do with dispensing, but that is a policy decision this Committee will have to make.

This bill does not stop an employer from having a drug-free workplace. You might win your claim, but you might get fired. If you have a drug-free workplace policy—Mr. Enos has a particular problem in regard to this because in the trucking industry, if you are a truck driver, or if you run a train or you fly an airplane, you have a much higher standard of zero tolerance than you do elsewhere—you can lose your job and win your workers' compensation claim. We as employers would like to have a bright-line standard where we can decide whether you are intoxicated. We know we are going to be testing someone, and if they test positive for marijuana but not to an intoxication level, they are going to present their medical marijuana card and say they are following doctor's orders just as with any other drug. We hope this would satisfy and fix that problem.

The important thing to remember is that we are trying to do the right thing for employees. There is a letter from the Property Casualty Insurers Association of America (PCI) in the Senate. It talks about dispensing from the physician's office and the costs we have seen in other states that have office dispensing of prescription drugs. I would direct you to that letter for more background information on why it is so important for us to limit dispensing as we have requested in this bill.

[Assemblywoman Seaman assumed the Chair.]

Assemblyman Nelson:
I am trying to figure out if I am looking at the correct version of the amendment. It looks like you placed back in the bill the section setting a maximum of 110 percent of the average wholesale price of the least expensive clinically equivalent prescription drug calculated on a preemptive basis. Is that correct?

Bob Ostrovsky:
No, sir. If we look at the S.B. 231 (R2), those sections have been deleted and no longer appear in the bill. We are not telling a physician what they can charge for dispensing in the office; the original bill did have those limitations.

Assemblyman Ohrenschall:
In section 1 on page 2, lines 11 through 17—the provisions about the National Drug Code (NDC) which are proposed to be stricken in the amendment—what does that do to the price? I am worried that there could be a scenario where an injured worker goes to get his prescription filled, and the NDC registers with the insurance that it is not going to cover the cost of the medication. Will that cause a problem for the injured worker if it is at a set price but that is not what the pharmacy is willing to sell it for? Is this a price control that could hurt the injured worker?

Bob Ostrovsky:
If you are speaking to the amendment that is going to be proposed later during this hearing, I do not support it. I think striking it is a problem. The purpose of putting this in is so we can track the kinds of drugs that are being prescribed. The actual payment—what we pay for the drug—is actually a negotiated rate. Almost every health insurer has a negotiated rate with pharmacies, whether it is Walgreens or John Smith's pharmacy on the corner. The purpose is tracking, not price control.

Assemblyman Ohrenschall:
Do you not feel it could lead to that in terms of something not being covered?

Bob Ostrovsky:
That is certainly not the intent of this legislation at all.

Assemblywoman Carlton:
When I looked up the NDC, there is a price associated with that. By saying in section 1 that the provider shall include the drug code as assigned on all bills and reports, wouldn't that mean they would have to charge the price that came along with it?

Bob Ostrovsky:
No, that is not my reading on it. The purpose is tracking only. If that needs to be clarified, we would be happy to do that. We are not attempting to establish a price control at the pharmacy. There is no price control for the first 15 days' supply prescribed by the doctor either.

Assemblywoman Carlton:
That was my concern because if we are stuck with a certain price because of the way those codes work, what would the adverse impact be? I am confused by it saying that that code will be the number that will be used.

Bob Ostrovsky:
I think someone from the Nevada Self-Insurers Association (NSIA) is here and can address your question.

Donald Jayne, representing Nevada Self-Insurers Association:
The Nevada Self-Insurers Association was founded in 1980 to provide members with the opportunity to confer and discuss the many questions that arise pertaining to workers' compensation in Nevada. We worked with Mr. Ostrovsky and others in putting together this bill and the next bill that will be heard. We are in support of this bill.

I would like to point out one area that Mr. Ostrovsky did not mention that we had put in the bill. It is on page 5 of the second reprint. If someone were transported to the hospital and did not have the occasion, within the employer's drug policy, to release the information on a drug test, we think it is appropriate the employer can get access to the drug test so we can see it. That is new language added in section 3, subsection 2, paragraph (c) on page 5.

Vice Chair Seaman:
Are there any questions from the Committee?

Assemblywoman Neal:
I have a question on section 3, lines 30 through 45. In paragraph (c), you struck out "Proximately caused by the employee's" and then added the language "That occurred while the employee was in a state of" [intoxication]. Two things are happening in this section. One, you are changing how you prove the injury, because proximate cause means that it was a direct result of an uninterrupted action because someone was drunk or on some substance. Second, you changed the standard unless they can prove by clear and convincing evidence that his or her state of intoxication was not the proximate cause. Why are you making those changes? To me, it looks like you are changing the level of proof on one end and then increasing it on another end. Why?

Bob Ostrovsky:
The intent of the old law was that if a person was injured and he had some level of drugs or alcohol in his system, the law said that was the proximate cause of the injury and therefore a claim could be denied. We are saying, in a sense, we

want to loosen that standard. A person would not just have to have alcohol in his system, but he would have to have an intoxicating level, which is further defined in lines 39 and 40 where it says, "meets or exceeds the limits set forth in subsection 1 of NRS 484C.110." That section of NRS is the DUI standard.

We think this is helpful to employees. The way the law is written now, any exposure at all in any test that comes back will be interpreted to mean that we will deny your claim. In *Construction Industry Workers' Compensation Group v. Chalue*, the Nevada Supreme Court said that this law "provides that any amount of a controlled substance creates a rebuttable presumption that the controlled substance was a proximate cause of a claimant's injuries. The statute is unequivocal: if an employee has marijuana is his system when injured, then marijuana caused the accident unless proven otherwise. The legislative intent of NRS 616C.230 was to create a drug-free workplace." This has absolutely become a problem for us with marijuana in trying to adjudicate these claims. We put in the second "unless . . . clear and convincing evidence" language for the NJA, which said even if the person is intoxicated, we still want an opportunity to challenge that. We agreed to "clear and convincing" because that is the highest legal standard available. We said if you can climb that hill, you can still win that claim. I hope that is responsive to your question.

Vice Chair Seaman:
I am going to ask those in support of S.B. 231 (R2) to please come forward.

Jason Mills, representing Nevada Justice Association:
We are here in support of S.B. 231 (R2) and would like to express our appreciation to both Senator Settelmeyer and Bob Ostrovsky and proponents of the bill for working with us. What was just spoken about was our concern originally on this bill. What they were attempting to do was set that bright-line rule so that any intoxication would have to be met under the DUI statutes. If you fell below that, your claim was covered. Currently we litigate that issue on almost every single case. If there is any amount of drugs or alcohol in a person's system, we litigate the claim's compensability. I think that is why the case law started to get more and more lax, because they were overusing the denial regardless of the level of the drugs or alcohol in the person's system. The employers offered language that set a bright line at the drug and alcohol statute and essentially said, below that we will not automatically say that there is a presumption that you do not have a claim, and above that you have no claim. We approached them and said there might be a due process constitutional problem with that, set forth with the fact pattern he mentioned earlier where a completely not-at-fault coworker who is then a quadriplegic from an accident that had nothing to do with his intoxication level.

We talked back and forth. We thought, Well, since we are going to have this bright-line rule that anyone who falls below it will not have a presumption against them, in return for having some way to rebut if a person is intoxicated or under the influence of drugs, we would be comfortable dealing with the highest level of civil proof in American jurisprudence, and that, of course, is clear and convincing evidence.

Elizabeth MacMenamin, Vice President, Government Affairs, Retail Association of Nevada:
I spent a lot of time looking at prescription drug abuse in the interim. In conversation with the workers' compensation group and their industry, it became very clear to me that one issue they had been dealing with is the problem with controlled substance abuse within the system itself. I want to thank them. I specifically want to spea to section 1 of the bill. I think they are addressing something that we have needed to look at for a long time. Many of us had failed to move forward. The First Lady looked at this issue, too, and I think this is another piece that helps bring in the intent of the Governor and First Lady for our state, and that was to look at this issue and find ways to address it.

However, I am in opposition to the amendment (Exhibit F) that has been proposed. I think it moves us backward as opposed to where it needs to go. The NDC codes are required for reporting for the prescription drug monitoring program (PDMP), but I will not speak to that issue because I know someone is here from the State Board of Pharmacy who can speak to it. I think that any controlled substance needs to be the issue, as opposed to coming back and weeding it out. We need to look at all controlled substances because they are dangerous. Looking at the policy, maybe this is something you as the Committee can take into consideration. Also, California has passed legislation that would require dispensing practitioners, which we allow in our state, to repackage and sell at possibly a higher price than a pharmacy. They now require these dispensing practitioners to charge no more than a pharmacy for the drugs they sell through this system.

Vice Chair Seaman:
If anybody has any problems with the bill the way it stands now, please testify in opposition.

Jeanette Belz, representing Property Casualty Insurers Association of America:
As Mr. Ostrovsky mentioned, Property Casualty Insurers Association of America submitted a letter in the Senate, and I appreciate his referral to that. We are in support of this bill.

Justin Harrison, Director, Government Affairs, Las Vegas Metro Chamber of Commerce:
We are in support of the second reprint of this bill. I will echo the comments of the rest of the panelists as well as Mr. Ostrovsky.

Vice Chair Seaman:
Are there any questions?

Assemblyman Ohrenschall:
In section 2, what was the impetus behind changing the 30 calendar days to 45 calendar days? Mr. Ostrovsky talked about the issue with medical marijuana. How will that work?

Jason Mills:
The NJA was focused on section 3 of this particular bill, which had to do with the intoxication, so I will address that aspect. I cannot address the 30-day versus 45-day change. With regard to your question of whether medical marijuana is being used and the intoxication levels, I think the rule still stands. If you have an under-the-influence level that matches NRS 484C.110, which is the DUI drugs and alcohol statute, if you have the level of nanograms in your system that the statute sets forth, then they will be able to use that to create the presumption. If you do not have that level, you would not be able to use it against them, from my understanding. It is no different than, say, the use of an opiate. If the person has the right to have an opiate, whether they are intoxicated on the job from that opiate is the question, not whether there are trace amounts or insufficient amounts in the system to cause intoxication. The concept is that the intoxication causes the person to do something stupid, which then causes the injury. I think that is what is behind this particular rule and change.

Liz MacMenamin:
The Retail Association of Nevada is in total support of S.B. 231 (R2). We came to the table only in opposition to the amendment that has been submitted outside of the bill.

Assemblyman Nelson:
I am still concerned with section 1, subsection 1, paragraph (b) about the NDC and whether or not that would lead to some sort of price fixing. Are any of you competent to testify on that? [All panelists indicated they were not.]

Assemblywoman Neal:
I have concerns with the language of section 3, subsection 2, paragraph (c), at lines 24 through 28 which states, "The results of any testing for the use of alcohol or a controlled or prohibited substance, irrespective of the purpose for performing the test, must be made available to an insurer or employer upon request, to the extent that doing so does not conflict with federal law." Where is this coming from? With regard to the relationship of privacy, drug tests, and the Health Insurance Portability and Accountability Act (HIPPA), there are certain provisions where an employer or an insurance agent may not have the benefit of getting a test. The "irrespective of the purpose" language is what concerns me. Where does that come from?

Jason Mills:
To be honest, the NJA's focus was more on the rebuttability on the intoxication and "under the influence of" portion of the bill. It may behoove you to query Mr. Ostrovsky on that particular issue. Our focus was on another issue.

Don Jayne:
The intent of that section is for employers who have a drug testing program to be able to get test results. I testified earlier that if the injured worker was not competent, not conscious, could not sign the release form, it is still germane and relevant to us in the workers' compensation process to have that information. We are merely looking at the case where an individual has had an injury at work, has gone to a facility, and the facility has done some drug testing to determine a course of treatment. If the employer has a drug testing program, we would like to get the results of that drug test. We do get the results in some instances, but in other instances we are not able to because they will not release it. That is the intent in that section. The intent is not to go anywhere else with it, but it is for the employer with a program to be able to get the results of the test because it is germane to compensability of the claim.

Terry Graves, representing Nevada Trucking Association:
We support the bill as presented today. I want to thank Senator Settelmeyer, Mr. Ostrovsky, and Mr. Jayne for all of their efforts.

Vice Chair Seaman:
Is there anyone else in support of S.B. 231 (R2)? [There was no one.] Is there anyone in opposition to S.B. 231 (R2)?

Kathleen Conaboy, McDonald Carano Wilson, representing Automated HealthCare Solutions:
We, too, are concerned about opiate overprescription and abuse. We are in no way intending to undermine all of the efforts made in this building in that

regard. We also understand the important contents of the other sections of this bill, and we are hoping not to upset Senator Settelmeyer's apple cart. We have concerns with section 1, which is why we submitted an amendment (Exhibit F) to you. We actually worked on this amendment on the Senate side. We thought the Senate Committee on Commerce, Labor and Energy had understood our intention. Four to six amendments were considered in committee simultaneously. We feel that our language simply did not end up in the reprint of the bill. We had worked with Senator Settelmeyer, who asked us to coordinate with Senator Hardy, so we visited with him about this amendment. He is waiting to see what this Committee is interested in doing.

We are concerned about section 1 because we interpret section 1, subsection 1, paragraphs (b) and (c), as an attempt to set prices for medical services in statute. I understand Mr. Ostrovsky reads it differently. I think maybe some of the issues are conflated, so I would like to give you some background.

Automated HealthCare Solutions is an information technology company that operates in 38 states. It has platforms that integrate data about workers' compensation protocols, payer payment rules, and claims processing. With regard to physicians who dispense medications, it handles the dispensing and inventory management for physician practices that contract with it. It also does automated claims management. Importantly, the corporation has a best practice that requires it to report the dispensed drugs to the PDMP in the state within a 24-hour window. That is considered its corporate best practice. I think that is totally in support of the opioid issue in this state.

Section 1 deals with what physicians can bill when they dispense drugs in their offices. Because there has been some mention of physician dispensing, I would like to clarify a few things. I believe Mr. Ostrovsky indicated that drugs that are dispensed out of physicians' offices are not reported, and that is not the case. Dispensing physicians are subject to exactly the same state inspections that pharmacies undergo. There are rigorous examinations ensuring the proper storage, labeling, record-keeping, monitoring, and safety of prescription drugs. Inspections require the physicians to produce records and documentation of what medications are dispensed and from where they were purchased. Doctors who fail to meet these requirements are subject to the same penalties as a noncompliant pharmacy. Physicians who dispense controlled substances are also regulated by the U.S. Drug Enforcement Administration (DEA) and are subject to reporting inspection requirements by the DEA as well.

So what is the connection between the information I just shared with you and this bill on workers' compensation? Workers' compensation is a highly

regulated system. There are case managers who oversee the entire process for every injured worker. Case managers can deny treatment that they deem unnecessary or inappropriate, and they engage in utilization review where necessary.

Our proposed amendment (Exhibit F) is designed to address three issues. In section 1, subsection 1, paragraph (a), the first line reads, "The provider of health care may dispense an initial supply of a controlled substance which is listed in schedule II or III by the State Board of Pharmacy." That is fine with us. The next sentence says, "Any controlled substances prescribed," so we just wanted to clarify that we are still referencing schedules II and III, and that is what we are trying to do down below in subsection 2, paragraph (a) as well.

We propose to strike the language in section 1, subsection 1, paragraphs (b) and (c). I will go back to a comment made by Assemblywoman Carlton. The NDC does, indeed, conform to a price. We feel that requiring a prescribing physician to submit a bill with the original NDC rather than the repackaged NDC automatically sets the price that they can bill. We think this language is unnecessary because a statutory and regulatory framework already exists within which the Division of Industrial Relations (DIR) develops a medical fee schedule relative to workers' compensation. *Nevada Revised Statutes* (NRS) 616C.260, subsection 2, states, "The Administrator shall, giving consideration to the fees and charges being billed and paid in the State, establish a schedule of reasonable fees and charges allowable for accident benefits provided to injured employees whose insurers have not contracted with an organization for managed care or with providers of health care services pursuant to NRS 616B.527. The Administrator shall review and revise the schedule on or before February 1 of each year." The new schedule for this year just came out in February.

In that schedule, there is reference to pharmaceutical reimbursement. We feel that this is already dealt with. You require DIR to do this, and it has done it. Under “Pharmaceutical Reimbursement,” the DIR's current Nevada Medical Fee Schedule reads, "An insurer shall reimburse all pharmaceuticals, except those provided to an injured employee occupying a bed in a hospital, at the average wholesale price plus a $10.25 dispensing fee, or the provider's usual and customary price, whichever is less, unless there is a written agreement between the insurer and provider for a lower reimbursement." Indeed, Mr. Ostrovsky referenced the fact that the employers often contract with pharmacies. They can also contract with physicians who dispense.

Finally, NRS 616C.260 states that the DIR shall designate a vendor who compiles data on a national basis about fees and charges that are billed and

periodically reviews the structure of the schedule. Right now, DIR is doing that. Funding was appropriated last session for DIR to update its schedule. The last review had been done in 2002 by Milliman. Milliman has just taken another look at that. We attended a January hearing on the topic, submitted comments, and will be going back to the next meeting, which is scheduled for June 3, 2015.

Lastly, the workers' compensation system allows for directed care. In addition to having case manager oversight, Nevada's workers' compensation laws allow the employer or the carrier to select a physician that the patient must see. An employer has absolute control over whether to allow a physician who dispenses to be part of its network. Indeed, if they do not want to use a physician who dispenses from their offices, they can select from other physicians.

We think our amendment (Exhibit F) avoids price fixing. We are in full support of the control and reporting of the prescription of opiates. We certainly agree to the 15-day limitation on schedule II and schedule III drugs for the initial supply. We are asking you to look at this in a little bit different context. I do not think it is good public policy to be setting fees in statute when they are accommodated in the regulatory framework.

[Chairman Kirner reassumed the Chair.]

Chairman Kirner:
Thank you. Are there any questions?

Assemblywoman Kirkpatrick:
You said you do not have a problem with the initial supply, but your amendment strikes out "on a one-time basis." That is my first concern. At the end of the day, we want people to go back and get proper prescriptions rather than continue to get a 15-day supply here and there, so maybe it was a typo that you took that language out or you misspoke?

Kathleen Conaboy:
I was just looking at that. I thought "initial" meant the one time. We had agreed to the initial 15-day supply at one point, and it seemed like redundant language; there was not any other purpose for taking it out.

Assemblywoman Kirkpatrick:
From my perspective, many people worked very hard during this interim to try to address prescription drugs on so many levels. Whether it is a back or knee injury at work, we are seeing more and more people dependent on prescription

drugs. We have to do our part as legislators to ensure that they do not become dependent on those drugs because we make the laws that do that. I struggle with why you want to get rid of section 1, subsection 1, paragraph (c). I do not feel that you have made a compelling argument there.

The whole goal here is to have them go to a pharmacy. Doctors can, as much as they are in the network, repackage things so that people do not go through the proper procedure so that we can keep track. All day we have heard how expensive workers' compensation gets, yet you are taking out some of the things that I believe are going to put in some more accountability, so that when the next legislative session begins and people talk about workers' compensation, we can show some things we have made changes to.

My understanding, based on what you just said, is that you are fine with putting back in your amendment the 15-day supply "on a one-time basis." I guess I am looking for a better argument on why paragraph (c) has to come out. I understand redundancy. Unfortunately, with term limits this session, I think it is more important than ever that we make bills very clear. I have had that argument with many others—that the everyday person is not going to read or know where to find all of those statutes. I am a big believer in putting things in one spot so everybody knows what the legislative intent is going forward.

Gregory L. McDermott, Counsel, Automated HealthCare Solutions:
Our goal with the 15 days and removing the one-time limit was not intended in any way to erode any reforms or attempts to tighten up the use or dispensing of opioids. You will see that those stronger opioids are commonly used in postsurgical care. For example, you will have surgery and get a supply. Usually a doctor will not want to dispense for a long period because he wants you to take that medication for a week or ten days and then come back to reevaluate you. From there they will decide what course is best for you, and maybe it is another seven to ten days. They do not like to dispense 30 days of the schedule II opiates. The intent was to allow the physician to provide the patient with another supply if, in the physician's judgment, the patient needed the additional supply when he came back in. It was not meant to erode any of the things you are trying to do.

Assemblywoman Kirkpatrick:
I worked hard on prescription drugs, and I heard all of the reasons why people did not want to be at the table or why we could not do it, yet I see all kinds of people today who are in a situation. It is either a yes or a no. Are you agreeing to put the one-time basis back in? I think if the patient comes back in 15 days and it has not changed, then write a regular prescription and go get it filled appropriately.

Greg McDermott:
Ultimately, we would be okay with the one-time limitation going back in. We are not married to it. Again, for the reasons I explained, it is something that we would support taking out; we would agree to it at the end of the day.

Assemblywoman Kirkpatrick:
What about in paragraph (c) where you want to take out the repackaging language? I think that is a pretty big deal, whether or not physicians can repackage things out of their office and send them out or they give their patients a real prescription.

Greg McDermott:
No physician can repackage medications in their office. A repackager is licensed by the FDA just like a manufacturer is, and they are subject to all the same strictures and requirements as a manufacturer. Physicians use repackaged medications because it allows them to forgo some of the things a pharmacy does, such as buying in bulk and counting and sorting pills, ensuring there is no cross-contamination, and possibly hiring some pharmacy technicians to do so, which a physician's office does not have the money to do. They do dispense the repackaged medications.

Our goal is \that, in almost all instances, fee schedules and the prices being charged are being set through the regulatory process, which allows for much greater flexibility. It also allows a much more in-depth analysis of what the real cost is for a repackaged medication versus an unrepackaged medication, and what are the appropriate steps, if any, to take. That was the forum in which we would like to be able to do this and see if there is data specific to Nevada that would allow us to determine if this is an issue, and if so, is it going to be this proposed language or is there another solution and what might it be. We felt that rather than trying to legislate it, doing it in that forum where there was more opportunity was more advantageous and allowed for greater flexibility moving forward.

Assemblywoman Kirkpatrick:
I misspoke. I understand that they cannot repackage, but they do have repackaged samples, sometimes smaller packs of different things. Sometimes that, too, can lead to fraud by giving out too many different packets. I am trying to understand why we would not want to have the paper trail. I understand they are all controlled and there are reporting mechanisms. We spend a lot of time trying to get the PDMP things in statute so that there is a mechanism for people to report it. All of the people here today have said how expensive workers' compensation is, and this is a way for us to track whether

or not it really is. If there are repackaged materials there, would you be reporting that to workers' compensation—how many of those repackaged drugs you gave out to the consumer? What is the protection for the client, the expectation?

Kathleen Conaboy:
Subsection 1, paragraphs (b) and (c) are related specifically to the billing of an insurance company. Paragraph (b) says that the provider of health care shall include the original manufacturer's NDC, as assigned by the FDA, "on all bills and reports submitted to an insurer pursuant to this chapter." This is not related to reporting to the PDMP. Dispensing physicians are required to report what they dispense, so that is already happening. The way we read this, and the reason we came to you with an amendment, is because we see this as fixing the price that can be billed. The NDC, as Assemblywoman Carlton noted, is indeed related to a specific price. We are not in any way, shape, or form trying to circumvent the reporting requirements, either to the state or to the DEA, that a dispensing physician is responsible to do, just as a dispensing pharmacy is responsible to do. One of the Automated HealthCare Solutions best practices is when it handles these claims for physicians, it automatically reports within 24 hours. We see that absolutely as a best practice. This is not related to reporting to the state nor reporting to the DEA. The way we read this language, this is related to billing the insurance company. That is the rationale behind the amendment.

Assemblywoman Kirkpatrick:
I have to go back and read NRS 453.146. I am a big believer in spelling it out rather than referring to a statute.

Assemblywoman Carlton:
Your argument is that the NDC has a price associated with it. We heard from Mr. Ostrovsky that this is not the intention. If you would report this code, you would have to bill that price. What would the differences be for you with this code versus what is done now?

Greg McDermott:
You are correct. Right now, DIR regulations require reimbursement at the average wholesale price. There are three or four main reference manuals that deal with prescription medications where you can look up all the NDCs.

Anytime a medication is manufactured, labeled, and repackaged, the FDA assigns an NDC to that medication. That is reported to those reference manuals. A specific average wholesale price (AWP) is assigned to every NDC. You have to have an NDC on a bill; a bill without one is not a bill and it would

be sent right back. It is like billing for a procedure without a current procedural terminology (CPT) code—you would not know what it is. When you look up that NDC, it tells you what price is associated with that. If you were changing which NDC had to be used, you would be effectively potentially changing the price because there may be a different price associated with each NDC. The impact of that, in terms of cost, is one of the reasons we thought exploring this through DIR, the regulatory process, and the Milliman report was appropriate, because it would be a better forum to analyze specifically what the impact of that is.

Assemblywoman Carlton:
I guess I need to go back to the proponents of the bill who, when we asked the question, pretty much stated that was not their intent. My goal is to make sure that no one gets overcharged for their drugs, which inflates the cost of workers' compensation to everyone. Setting prices in statute is not a good idea because things change and you have to come back to statute to change it, but I do not want to put a hole through this big enough to drive a truck through where people can charge too much. I will wait for the bill sponsor to come back up and make sure we get this addressed.

Kathleen Conaboy:
When we look at the maximum allowable provider payment in the Nevada Medical Fee Schedule issued February 1, it talks about the average wholesale price "or the provider's usual and customary price, whichever is less, unless there is a written agreement between the insurer and provider for a lower reimbursement." That is in the existing Medical Fee Schedule.

Chairman Kirner:
Thank you. Are there any others who are in opposition to this bill? [There was no one.] Is there anybody in the neutral position?

Michael Hillerby, representing State Board of Pharmacy:
I am here only to answer questions on the National Drug Code. I will address Assemblywoman Carlton's question. From the Board's perspective, we do not involve ourselves in any way with the pricing component. It is only a requirement that for a dispensing practitioner or a pharmacy to upload the information to the PDMP, we have to have the NDC from the packaging on the drug.

Chairman Kirner:
Would the bill sponsor like to make any closing comments?

Bob Ostrovsky:
We reject the amendment requested. We rejected the amendment in the Senate that was similar to this. I will remind you of two things. First, follow the money, because that is what this is all about—who is going to get paid and how much. We think the drug code is necessary for tracking drugs. Second, if you have a question about that, all you need to do is google Automated HealthCare Solutions, which is the company that came here to request this amendment, and see what the history is in other states. Those are my only two suggestions. I look forward to the opportunity to work this bill in work session.

Chairman Kirner:
We thank you for bringing this bill forward. I will now close the hearing on S.B. 231 (R2). I will open the hearing on Senate Bill 232 (1st Reprint).

Senate Bill 232 (1st Reprint): Makes various changes relating to workers' compensation. (BDR 53-987)

Donald Jayne, representing Nevada Self-Insurers Association:
Senate Bill 232 (1st Reprint) has three key sections. Section 1 of the bill addresses *Nevada Revised Statutes* (NRS) 616C.138, and according to the Legislative Counsel's Digest, "provides a reciprocal right to reimbursement in situations in which an insurer, organization for managed care, third-party administrator or employer appeals an order of a hearing officer, appeals officer or district court and the order is not stayed pending the appeal. In such situations, if the appeal is successful, the insurer, organization for managed care, third-party administrator or employer is entitled to seek reimbursement."

In a prior session, health insurers came forward and said if they denied a claim as a workers' compensation insurer and ultimately began to pay under a health policy, and it was later determined through a hearing, an appeal, or a district court that it was, in fact, a workers' compensation claim, they could be reimbursed for those expenses. We are seeking the same reciprocal arrangement in reverse.

Let us say we initially deny a claim, we do not think it is workers' compensation, and we are ordered to pick up the claim. We pick it up and are not able to get a stay, so we begin to pay the bills and treat on the claim. If we are later successful on that appeal and it is determined not to be a workers' compensation claim, then we do not think the workers' compensation insurer should bear the burden of those expenses. We should have the same ability to go to the health insurer and request reimbursement for those expenses. That is what section 1 does.

During the hearing in the Senate, concerns were expressed by Rusty McAllister, president of the Professional Fire Fighters of Nevada, and Ryan Beaman, president of Clark County Firefighters Local 1908. We worked with them extensively to try to find a way to protect their health fund because of the uniqueness of the claims in NRS Chapter 617. They can be incredibly large and have different types of treatment plans. I sent an email to the Chairman of the Senate Committee on Commerce, Labor and Energy and told him that we probably would not be successful in getting an amendment agreed to, but surprisingly enough, we were able to pick up an amendment that is incorporated into the first reprint of the bill. It satisfied their concerns and kind of put a firewall between those sections in NRS Chapter 617.

Section 2 of the bill addresses language regarding the reopening of claims in the workers' compensation law in NRS 616C.390. In subsection 5, there is a portion that refers to an injured worker being off work. Over time, that definition has begun to cause problems for us as well. Jason Mills was testifying earlier on a different bill and mentioned how case law begins to pile up. We have begun to see losses on what "off work" is when somebody was off work for an hour or half a day. We felt that the original legislative intent of this would be someone who was off work for a more extensive period of time to be in the reopening sections. In this section, we are looking to point to existing law in NRS 616C.400 to give some clarification as to what off work would mean. This section essentially talks about being off work for 5 consecutive days, or 5 days out of 20, and is a trigger used for the temporary total disability (TTD) benefits. Our initial version of this bill did not reference NRS 616C.400 until we worked with the Nevada Justice Association (NJA) to try to clarify what we were intending to do. That is where we incorporated a specific reference to NRS 616C.400.

Section 3 of the bill addresses the current limitation on the amounts of a permanent partial disability (PPD). Currently, you cannot take more than 25 percent of your PPD in a lump sum, the balance of which is paid in installments, and those installments can be paid until the individual is age 70. With the recent developments in bringing in the fifth edition of the *Guides to the Evaluation of Permanent Impairment* and addressing activities of daily living, we are finding more and more claims coming in with PPDs that exceed 25 percent. There are some situations where you could have a 25-year-old injured worker who wanted a lump sum for his claim; we would give him the 25 percent, and he would have 1 or 2 percentage points left over, and we would be sending him a small check every year until he was 70 years old. We think the change is appropriate because this section has not been updated in more years than I could find. I could not find where we put 25 percent in, and I only go back to 1991 with my work in workers' compensation in Nevada.

In section 3, our recommendation is to move that up to 30 percent. By choice, if an injured worker wants a lump sum, he can take up to 30 percent with the language we are proposing here, and the balance and installments. Recognizing that the PPD awards have escalated over time, we feel it appropriate to move that percentage up a bit. Do not forget that this is a voluntary move. With a PPD, the injured worker, if he chooses to, could take installments. This was a limitation placed in the law to prevent the situation where an injured worker, without intent of finding himself in duress because he was behind in his bills and had other issues going on, would take a lump sum and then would not have any additional money. I believe that is why the 25 percent was originally put in. I was not here for that, but we are looking to raise that in recognition of the increase in the PPD awards that is occurring.

The other part of that section also clarifies that the person, over time, cannot receive more than 100 percent of the whole body, or what we call a "whole man." When you look at the body, it is a 100 percent body; if you get a PPD that is 20 percent, that is 20 percent of the whole body. Unfortunately we sometimes have individuals with multiple claims, and we are looking to clarify that you cannot get more than 100 percent of what your whole man is. The American Medical Association's *Guides to the Evaluation of Permanent Impairment* gives us direction on how to calculate that just in case somebody had a PPD that was on a second, third, or fourth version. There are methods in there on how to calculate and adjust those. We believe it is appropriate to point out that 100 percent of the whole man is the limitation.

Chairman Kirner:
Are there any questions?

Assemblyman Ellison:
Let us say an injured worker gets a PPD of 30 percent and takes a lump sum. Can he reopen that claim ten years down the road?

Don Jayne:
This section does not really impact that, if I understand your question. I was talking about reopening in a different section. Section 3 does not apply to reopening. Under section 3, when it is time to get your PPD award, when you get your lump sum, the lump sum could go from 25 percent to 30 percent. All the other limitations would still exist.

Assemblywoman Carlton:
I have some concerns with the limits. This will impact the injured worker because if he hits 110 percent or 155 percent, statutorily, we are going to be

taking a benefit away from him. I have some problems with that. I know it does not happen often and it is probably someone who was injured over his career, but there could be a construction worker who gets injured when he was younger, middle-aged, and older, and if he subsequently injures himself again, by the time you add all of this together, we will be taking a benefit away. I do not think it is something we should take lightly and gloss over. How many people do we have who are over 100 percent? Do we know?

Don Jayne:
We have addressed these issues and discussed them over time. I do not have a number of how many are over 100 percent. What may be helpful is if I could bring to you the way that is calculated and we could start a conversation. It is my understanding—and I am not an expert on how to do a PPD rating—that there are guidelines and directions within the rating guides. If possible, I would like to show those to you individually. If there are problems from there, we can take a look at the language.

Assemblywoman Carlton:
If we do not talk about it in the Committee, there is no record of it. Meetings in our offices are great, but getting answers in the Committee is the way we build an actual record. I want to make sure that everyone understands this proposal takes away money from injured workers.

Assemblywoman Kirkpatrick:
In section 1, subsection 4, starting at line 36, does this in any way help expedite the process? I had a firefighter in my district who was waiting for his workers' compensation claim to go through. Unfortunately, he passed away before that came to fruition. If we are going to solve one problem, we should look at how we get people in and through the system. As far as the payment and the appeal process, is it expedited at all? It is kind of like social security; they deny you first and make you go back and reprove everything. I am wondering if this speeds up the time frame.

Don Jayne:
Unfortunately, I do not believe the intent in bringing this bill was to try to speed up the process. It may not speed up the process. The very nature of what we are bringing here would say that, for whatever reason, the insurer had denied the claim. That could be in the presumptive benefits or somewhere else, but it is across the board. If the insurer is of the mindset that it is not a workers' compensation claim and they want to deny it, this process begins. The workers' compensation insurer is then ordered to pick up the claim and starts paying it. We do not want anybody out-of-pocket for that money, so the workers' compensation company will begin to pay it. However long it takes for

that process to complete and come to resolution in the adjudication of the claim—a determination of whether it is a compensable claim—these provisions would come in once that is over. If the workers' compensation company was correct, if it was ultimately determined it was not a workers' compensation claim and should have been paid by health insurance or some other form, and if the workers' compensation company had bills, then it would have a right to seek reimbursement from the health insurer.

Assemblywoman Kirkpatrick:
I wish we could fix the process so that it could go much quicker. Do you foresee a situation in the appeal process where a worker could get stuck with a large medical bill that somebody said was not workers' compensation, but it was regular, and now they are in a catch-22? My concern is that I do not want people to assume that the bill is being paid, and then it comes back through an appeal process where it shows it was never workers' compensation. Now they have someone putting a lien on their home or something similar. Is there a time frame? I do not see any numbers as to what we think the time frame should be so it does not get so far out there that it is hard to come back.

Don Jayne:
The intent of this proposed legislation would be to recover, but to recover from the insurer, not the individual. It is not our intent to go after the individual. It would be our intent to be reimbursed by the health insurer with these provisions. If it is not clear in the bill, I would like to be clear on the record. We are not looking to go after the injured worker. In this case, if the person had been deemed not an injured worker, it would not be our intent to go after the individual that might be disadvantaged by payments that we were making. We want to regress against other insurers.

Assemblywoman Kirkpatrick:
Mr. Jayne, I was pretty hard on you in regard to the first workers' compensation bill you brought before this Committee, so I want to applaud you for going back to the way we have done things in the past, because they are complicated issues. I appreciate that people have been working to try to address the concerns.

Assemblyman Ohrenschall:
The language in section 2, subsection 5, states, "An application to reopen a claim must be made in writing within 1 year after the date on which the claim was closed if: (a) The claimant . . . ." You are striking the language "was not off work" and adding "did not meet the minimum duration of incapacity as set forth in NRS 616C.400," which says 5 days in a 20-day period. Can you

explain this section? My other question has to do with the lump sum payments going from 25 percent to 30 percent in section 3.

Don Jayne:
I will need clarification on your question in regard to section 3. Addressing your first question, it was my intent to try to explain that the original language, "was not off work," has been in the statutes for quite some time. It has become difficult to understand what that means. We are beginning to find that in court cases, if somebody was off work for any amount of time, they were technically off work. We do not believe that is the intent. In fact, we would like to recommend that we help define that in some fashion. The best language we had—and we ultimately worked with the NJA on this—was to point to existing statutory language to try to clarify it. We are trying to get clarification that the reopening is intended for claims where the person had met the criteria, received TTD payments or other payments, PPD payments, and qualifies for the reopening.

Assemblyman Ohrenschall:
What is the rationale for going from 25 percent to 30 percent on the lump sum payments?

Don Jayne:
The 25 percent provision has been in statute for many years, longer than I can personally remember. We are finding, with the evolution, changes, and additional guides coming in, that many injuries—particularly back injuries, knee injuries, shoulder injuries, and neck injuries—are resulting in awards that exceed 25 percent. We are looking to provide the injured worker with an opportunity if he wants a lump sum. For example, for a 28 percent PPD award, rather than giving the injured worker a 25 percent lump sum and saying the marginal difference of 3 percent is going to be paid out in installments for the rest of your life or until you are age 70, we are allowing him to take a lump sum of up to 30 percent, if he chooses, and the difference beyond that in installments. We are looking to increase that lump sum amount from 25 percent to 30 percent to capture the larger number of awards that are falling into that range.

Assemblyman Nelson:
If I am reading the bill correctly, though, that only applies to injuries that were sustained prior to July 1, 1995. Am I reading that wrong, in section 3, subsection 1, paragraph (c)?

Don Jayne:
Mr. Ostrovsky says that it did not exist before that. My general recall is that over time, as legislatures met and made changes to the provisions, these were scaled in there to recognize some of those changes.

Assemblyman Nelson:
What if somebody is injured after 1995? Do you still want the hike up to 30 percent? I do not see that in the bill.

Don Jayne:
Yes.

Bob Ostrovsky:
It is just the reverse. I think people prior to the enactment of the 25 percent did not have the option of taking a lump sum. They always received installment payments. I was around when we bargained the 25 percent, Danny Thompson of the AFL-CIO and I. It was a number we picked out of the air at the time, but the concern of organized labor was that an injured worker, let us say a roofer, got a choice of a lump sum or payments. Too many people could take lump sums and a year later go back on the same roof after the doctor said he should not be a roofer anymore. It was an incentive to put some money in the hands of the injured worker, but to make some protections that that same injured worker did not end up on Medicaid or having to get some other public assistance; that is not the purpose of workers' compensation. I will admit the date in there is confusing.

Chairman Kirner:
I will invite those in support of the bill to the table.

Jason Mills, representing Nevada Justice Association:
We are here in support of S.B. 232 (R1) and would like to thank Mr. Jayne for working on this bill, as well as Senator Settelmeyer. I wanted to point out a couple of issues that I think I heard, and I could probably help clarify them from a legal standpoint. In regard to Assemblywoman Kirkpatrick's question on the speed of the benefits being provided, I do not think it will impact that. In section 1, currently what happens is, if the claim is denied and then they lose at a hearing or appeal or at the district court, they often request a motion for stay. That is, even though they have lost and the claimant has won, the insurer or self-insured employer will ask for a stay. Those are regularly granted because the insurer or the self-insured employer indicates that they have no ability to recapture the money if they ultimately are successful and it is proven that it is not a compensable claim.

The reason we are in support of section 1 is we think it will help the claimants, because when they bring the stay motion, they now have the ability to subrogate against a health insurer. Regarding the past argument, when they say they were right but cannot recapture their money, we get to point out, Yes, you do because the person has health benefits, so go ahead and provide those benefits in the meantime. We think the ability for the claimant to get medical benefits and have their stays more often denied with regard to medical benefits will inure to the benefit of the claimant and still protect the insurers and the employers if there is health coverage that they can then turn around and subrogate against. The way I read it, this particular language does not allow them to go after the individual claimant, only against those health and casualty insurers.

Our original concern with regard to section 2 was that they wanted the reopening of a claim tied to whether or not the claimant had received short-term disability benefits. Our concern was that it should not be based upon the reception of those benefits, because you could have bad actors basically not provide the benefits to which the injured worker is entitled for a period of days, weeks, or months. Then the injured worker seeks to reopen the claim, and they are a year past that, and they would have been entitled to months of TTD, but since they did not receive it, they would be able to deny it. We proffered this particular language because we think it was in response to the Nevada Supreme Court case *Williams v. United Parcel Services*, 129 Nev. Adv. Op. No. 41 (2013), where their concern was that a person was off work only half of his shift, and he was able to reopen the claim for greater than a year.

They wanted to mimic the entitlement statute of short-term disability pay of the 5 days in 20 days or 5 consecutive days, so we proffered why not be off work for the minimum duration of incapacity as defined by NRS 616C.400. They were not comfortable with using the language "off work." I think the *Williams* case spooked them, to be frank. It seemed to make most sense that as long as we mirror that duration of incapacity under NRS 616C.400, it waylaid their concerns, but still protects injured workers from reopening the claim within the one year, and then allows them to reopen for life beyond that.

There was a question that Assemblyman Nelson brought forth with regard to section 3 on the 30 percent applying to injuries sustained prior to 1995. You will note that section 3, subsection 1, paragraph (d) gives the DIR Administrator the power to set the lump sum. I have been practicing workers' compensation for 15 years, and it has been my experience that the DIR usually mimics whatever the statute is for the lump sum cap. It is our understanding that the DIR would then see these changes and implement a 30 percent lump sum by regulation. Technically, this would not compel them to do it, but is has been

their practice to basically look at the statute and mirror the percentage cap in regulation.

Terry Graves, representing Nevada Trucking Association:
We are in support of this bill and would like to thank those who put the bill together.

Justin Harrison, Director, Government Affairs, Las Vegas Metro Chamber of Commerce:
I would like to echo the comments of Mr. Jayne and Mr. Ostrovsky. We are in support of S.B. 232 (R1) and the proposed changes to NRS Chapter 616.

Bryan Wachter, Senior Vice President, Retail Association of Nevada:
We, too, support this bill.

Chairman Kirner:
Are there any other questions? [There were none.] Is there anyone in opposition to this bill?

Rusty McAllister, President, Professional Fire Fighters of Nevada:
I am in opposition to section 2, subsection 5, located on page 6, lines 19 through 21, of the bill. We believe that this adds another hurdle for an employee to reopen a claim. Many times the insurers reference NRS 616C.400, which states that to be considered for a partial disability, you have to have been off work for either 5 consecutive days or 5 days in a 20-day period. We believe that provision was set up in law a long time ago for a person who works an eight-hour day. For a person who does not work an 8-hour day, but works 24-hour shifts and injures his knee and gets sent home, now he is off for his cycle, which is three 24-hour shifts. All told, that is a two-week period—the days off that he has prior to his cycle, his cycle, and the days off he has afterward. He may be able to come back to work and only miss 3 days of work, but he has been off for 13 days. If he does not have any type of settlement, which he would not, the question would be, Would he not be able to reopen his claim down the road if the condition worsened?

We had a conversation with Mr. Jayne earlier, and he is aware of my concerns. The gentleman who was with him confirmed that this person in the example would not be able to reopen his claim if it got worse, based on the provisions of this the way it is. We currently have insurers in this state that are denying claims for heart and lung benefits, under NRS Chapter 617, by referring to the provisions under NRS 616C.400. If you are not off work for a total of five days, they deny your claim in heart, lung, and cancer claims, saying that you are not disabled because you were not off work for five days. If a worker has

an atrial fibrillation and he goes to the doctor on his days off, gets treated, gets medication, and returns to work, they say he has no disability and he has not been off work for five days, so therefore, we are denying his claim. This would make it so that person could not reopen the claim. They would not accept it in the first place, but even if they did accept it, he could not reopen it later.

We certainly have concerns, especially because of the number of claims that are being denied under NRS Chapter 617 using a provision in the law that is not in NRS Chapter 617. *Nevada Revised Statutes* Chapter 617 says, "Notwithstanding any other provision of this chapter," yet they are using NRS 616C.400 to deny our claims. When we saw that, it certainly raised bells and whistles for us. We had concerns that this might be an attempt by insurers to find another means by which to deny our claims.

Tim Ross, President, Washoe County Sheriff Deputies Association, and representing Peace Officers Research Association of Nevada:
I wanted to echo the sentiments of Mr. McAllister and add the alternative shift. We also work the alternative shifts and wanted to take a look at that.

Assemblyman O'Neill:
Mr. McAllister, what is your proposed fix?

Rusty McAllister:
I do not know the proposed fix. I believe that Mr. Jayne's intent is not to inflict upon NRS Chapter 617. As far as someone who gets hurt and is off for three shifts, but it equates to two weeks and then they lose their claim, I do not know how you can fix that. The NJA agreed to this, but I do not know whether they thought about people like us who do not work an eight-hour shift.

Chairman Kirner:
Is there anyone who is neutral? [There was no one.] Mr. Jayne, do you have a response for Mr. McAllister?

Don Jayne:
I think Mr. McAllister fairly represented our conversation. We are in a reopening section and looking to clarify the off-work portion of the bill. There is already a claim when you are in the reopening section, so it is not a claim compensability issue. I appreciate how complex and confusing the sections of NRS Chapter 617 can be in regard to the presumptive benefits. If individuals are using this loophole or this option to deny claims, that is certainly not our intent. We do not want this used to deny claims. We are trying to find a way to clarify what the definition for "off work" is. We felt we had a statutory definition we could point to, but Mr. McAllister sees this definition as a problem

because it is being used in some circumstances to deny a claim. It is not our intent to put this in here for claims denial or anything of that nature.

I appreciate what Assemblywoman Kirkpatrick said about trying to hammer this out. We will continue to try to get this done. It has always been our intent to try to work with the opposition. When opposition came forward on this bill, we tried to work with them. Unfortunately, we created another concern when we pointed to NRS 616C.400.

Chairman Kirner:
We will close the hearing on S.B. 232 (R1). I appreciate all those who testified today and everyone's hard work. Is there any public comment? [There was none.] The meeting is adjourned [at 5:04 p.m.].

RESPECTFULLY SUBMITTED:

_____
Janel Davis
Committee Secretary

APPROVED BY:

_____
Assemblyman Randy Kirner, Chairman

DATE: _____

EXHIBITS

Committee Name: Assembly Committee on Commerce and Labor

Date: May 6, 2015 **Time of Meeting: 1:33 p.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 194 (R1)	C	James Wadhams, Alliant Insurance Services	Proposed Amendment
S.B. 194 (R1)	D	Robert Vogel, Pro Group Management, Carson City	Proposed Amendment
S.B. 224 (R1)	E	Senator James Settelmeyer	Mock-Up Amendment
S.B. 231 (R2)	F	Kathleen Conaboy, Automated HealthCare Solutions	Proposed Amendment