

BROKEN PROMISE: THE DEMISE OF “SURE AND CERTAIN RELIEF” UNDER THE NORTH DAKOTA WORKERS’ COMPENSATION ACT

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ABSTRACT

The workers’ compensation bargain in which employees gave up the ability to sue their employers in exchange for “sure and certain relief” is premised on the economic theory that such voluntary agreement between competing interests promotes efficiency in an unfettered market. The cost of workers’ compensation, ostensibly borne by employers, is supposedly priced into the cost of the product or service. This is said to “internalize” the cost to industry, a bedrock economic principle necessary to ensure efficient allocation of resources and employee safety. Yet, in North Dakota, the bargain is broken. Employee safety has taken a backseat to saving employers money. This is evident in nearly every aspect of workers’ compensation in North Dakota. Medical necessity determinations are subject to resolution under a binding dispute resolution mechanism without a right to a hearing. And once disability benefits have been terminated, a mistaken decision by the North Dakota Supreme Court precludes opportunity for reinstatement in a great number of cases. In addition, the byzantine and restrictive Century Code, conservative rulings of the Court, and the adversarial litigation posture of Workforce Safety and Insurance have resulted in the near death of the claimants’ bar. Employees who have lost their job and are denied workers compensation benefits are often unable to afford to hire an attorney. Further, Workforce Safety’s vigorous defense strategy includes excessive reliance on out-of-state Independent Medical Examinations. And the Agency’s consistent lobbying against any legislation that improves benefits or merely levels the playing field highlights the degree to which North Dakota has broken its promise of relief to injured employees. Unfortunately, a remedy does not appear anywhere on the horizon. Employees attracted to North Dakota find that if they are unfortunate enough to suffer a work injury here, their financial health is as devastated as their physical being. Admittedly, not all physical injuries can be prevented. But human virtue requires North Dakota live up to its promise of “sure and certain” relief.

I.	INTRODUCTION.....	613
II.	CAUSATION ISSUES	614
	A. ARISING OUT OF EMPLOYMENT.....	615
	B. MENTAL INJURIES.....	619
	C. NARROW CAUSATION UNDER THE TRIGGER STATUTE ..	622
	D. WSI INTRODUCED THE “PAIN BILL,” H.B. 1163, IN AN EFFORT TO ELIMINATE PAIN AS EVIDENCE OF A WORSENING IN A PREEXISTING CONDITION	627
	E. THE AGGRAVATION STATUTE	634
III.	MEDICAL NECESSITY DETERMINATIONS.....	635
	A. THE RIGHT TO “REASONABLE AND NECESSARY” MEDICAL CARE SHOULD BE HELD A PROTECTED PROPERTY RIGHT	635
	B. THE BDR PROCESS DOES NOT PROVIDE ANY PROCEDURAL PROTECTIONS TO ENSURE A FAIR HEARING AND SHOULD BE DECLARED UNCONSTITUTIONAL	637
	1. <i>WSI’s BDR does not Employ an Independent Decision- Maker and is Opaque to Meaningful Judicial Review</i>	640
	2. <i>The BDR Does Not Allow Cross-Examination and an In-Person Hearing</i>	641
	C. DUCKING THE CONSTITUTIONAL QUESTION—IMPROPERLY INVOKING SUBJECT MATTER JURISDICTION.....	643
IV.	DISABILITY	645
	A. THE NORTH DAKOTA SUPREME COURT’S INTERPRETATION OF ACTUAL WAGE LOSS IN DETERMINING DISABILITY ON REAPPLICATION IS NOT CONSISTENT WITH BASIC COMPENSATION PRINCIPLES.....	646
	B. EMPLOYMENT DECISIONS AS SUBTERFUGE TO TERMINATE DISABILITY.....	656
	C. EARNINGS CAPACITY UNDER THE VOCATIONAL REHABILITATION CHAPTER	658
	D. EMPLOYEES ARE MANEUVERED TO VOCATIONAL NONCOMPLIANCE.....	660

- E. DISABILITY OF THE ELDERLY662
- F. CAUSE OF DISABILITY.....664
- V. WSI’S ADVERSARIAL LITIGATION STRATEGY665
 - A. CLAIMANTS LACK ACCESS TO LEGAL COUNSEL.....665
 - B. WSI RELIES ON IMES ABOVE TREATING PHYSICIANS...669
 - C. THE SAME “BUMP RULE” APPLICABLE IN THE DISTRICT COURT SHOULD APPLY IN ADMINISTRATIVE HEARINGS SEEKING COMPENSATION BENEFITS.....672
 - D. IT IS TIME TO CONSIDER ALLOWING PRIVATE INSURANCE.....674
- VI. CONCLUSION.....676

I. INTRODUCTION

North Dakota is enjoying national attention from the oil boom. But our great state is not just blessed with oil and gas and good agricultural land, but also with an industrious, hard-working, and dedicated people. North Dakota has lured workers from every part of the country; they come to earn good wages, and they make a valuable contribution to our state’s economy. Many of these new jobs are hard labor and carry with them risk of injury. It is increasingly common for an individual hurt at work to return to his or her home state if disability persists. They carry with them stories of pauperism resulting from an injury inadequately compensated by North Dakota Workforce Safety and Insurance (“WSI”). As never before, our state’s workers compensation system is front and center. Unfortunately, this highlights the failure to live up to the high standard set by the authors of the Act in 1919—the grand pronouncement that “the prosperity of the state depends in a large measure upon the well-being of its wageworkers, and, hence, for workers injured in hazardous employments, and for their families and dependents, sure and certain relief is hereby provided regardless of questions of fault”¹

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1. N.D. CENT. CODE § 65-01-01 (2013).

In the last year for which statistics are available (2012), North Dakota led the country with the highest fatality rate in the work-place (17.7 per 100,000 workers).² At the other extreme, the state's workers compensation premiums are the least expensive.³ Moreover, WSI has rebated to employers premiums amounting to \$774.3 million since 2005.⁴ How do we keep rates so low? This article argues that such extremities come from the fact that North Dakota law contains many benefit limitations and outright exclusions to coverage. Most of these limitations or exclusions are created by statute, but some are rooted in decisions of the North Dakota Supreme Court. The scope of coverage has been limited by the double-barreled shotgun of a blinkered view of the necessary causal relationship between work and injury and the adversarial litigation technique of trial by IME. This article addresses a number of causation issues in part II, with closely related "medical necessity" questions in part III. Part IV addresses disability issues, while Part V closes with an overview of the adversarial litigation posture of WSI.

II. CAUSATION ISSUES

A number of fault provisions now scar the "no-fault" landscape. The North Dakota Worker's Compensation Act bars compensation in connection with a self-inflicted injury, including suicide or attempted suicide;⁵ an injury caused by the use of intoxicants;⁶ an injury that arises out of an altercation in which the employee is the aggressor;⁷ and an injury that

2. *Death on the Job Report*, AFL-CIO, <http://www.aflcio.org/Issues/Job-Safety/Death-on-the-Job-Report>.

3. The country's 2012 median value is \$1.88 per \$100 of payroll, and premium rate indices range from a low of \$1.01 in North Dakota to a high of \$3.01 in Alaska. See OREGON DEP'T OF CONSUMER AND BUS. SERVS., 2012 OREGON WORKERS COMPENSATION PREMIUM RATE RANKING SUMMARY (2012).

4. In June, 2013, WSI announced it would send employers almost \$160 million in payments as a distribution of surplus reserves, the latest in a series of eight employer rebates since 2005 totaling nearly three quarters of a billion dollars. See Forum News Service, *N.D. employers to get rebate*, BAKKEN TODAY, June 22, 2012, http://www.bakkentoday.com/event/article/id/189332/publisher_ID/10/

5. N.D. CENT. CODE § 65-01-02(10)(b)(2) (2013). The burden of proof, however, is on WSI to establish willful self-injury. N.D. CENT. CODE § 65-01-11 (2013).

6. N.D. CENT. CODE § 65-01-02(10)(b)(3) (2013). The burden of proving injury due to use of alcohol or a controlled substance is on WSI, but drug testing that establishes a concentration level at a specified amount creates a presumption that "the injury was due to [drug] impairment." N.D. CENT. CODE § 65-01-11 (2013).

7. N.D. CENT. CODE § 65-01-02(10)(b)(4) (2013). The North Dakota Supreme Court has not discussed the meaning of "aggressor" under North Dakota Century Code title 65, but has in the context of Job Service disqualification for misconduct. See *ProServe Corp. v. Rainey*, 536 N.W.2d 373 (N.D. 1995). Professor Larson suggests that "words alone, however inflammatory, are not such aggression as to deprive claimant of compensation." 1 LEX K. LARSON, *WORKERS COMPENSATION LAW* § 8.01[5][c] (Matthew Bender, Rev. Ed.).

arises out of an “illegal act committed by the injured employee.”⁸ Additionally, the Act bars compensation when an employee aggravates or worsens his work injury in any activity “which exceed the treatment recommendations of the employee’s doctor”⁹ Nonparticipation in certain medical treatments¹⁰ and vocational requirements such as job search¹¹ also result in termination of benefits. These limitations generally deal with some act or circumstance that is deemed sufficient to bar compensation based on attenuation of cause between employment and injury. Recently, the North Dakota Supreme Court has further restricted the range of compensable injuries in deciding the meaning of the causal component of the basic compensation test.

A. ARISING OUT OF EMPLOYMENT

North Dakota’s definition of “compensable injury” is plain vanilla standard in the industry, meaning “an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings.”¹² There has been litigation over the meaning of “accident,”¹³ but the term is no longer controversial. While some advocates believed that the added requirement of “objective medical findings” might serve to deny compensation for soft tissue injury and the like (injuries that are not verifiable with medical tests such as EMG, x-ray, or MRI), fortunately the North Dakota Supreme Court has held that “objective medical evidence” may “include a physician’s

8. N.D. CENT. CODE § 65-01-02(10)(b)(5) (2013). Professor Larson states that “[t]he great majority of cases involving simple traffic ordinances and statutes, such as speed or stop laws, have failed to find willful misconduct on the strength of the violation.” Moreover, the violation must have caused the accident to be a valid defense. 2 LARSON, *supra* note 7, at § 37.03.

9. N.D. CENT. CODE § 65-05-28(5) (2013). The North Dakota Supreme Court has held that WSI “must prove the claimant knew of the specific work restrictions and intentionally engaged in activities exceeding those restrictions before benefits can be denied based on aggravation of a prior injury.” *Holen v. N.D. Workers Comp. Bureau*, 2000 ND 145, ¶ 13, 615 N.W.2d 141, 144.

10. N.D. CENT. CODE § 65-05-28(4) (2013). Professor Larson notes that the majority of Courts hold that a claimant may not be required to invasive care, such as surgery, “because of the graver danger of the procedure involved.” 2 LARSON, *supra* note 7, at § 10.10(3). WSI may also “require the employee to begin treating with another doctor” N.D. CENT. CODE § 65-05-28 (2013).

11. N.D. CENT. CODE §§ 65-05.1-04(4), (6) (2013).

12. N.D. CENT. CODE § 65-01-02(10) (2013).

13. *See Stout v. N.D. Workmen’s Comp. Bureau*, 236 N.W.2d 889, 894 (N.D. 1975) (holding that the “by accident” requirement is satisfied if the cause is a sudden accident or a repetitive injury due to the routine performance of the claimant’s duties).

medical opinion based on an examination, a patient's medical history, and the physician's education and experience."¹⁴

"Course of" employment primarily refers to time and place of the injury,¹⁵ as in employer-paid travel outside normal work hours. There is more litigation concerning the meaning of "arising out of" employment, for this refers to a *causal connection* between the work and the injury.¹⁶ The North Dakota Supreme Court has recently narrowed the scope of injuries that can be said to have a causal connection to employment.

In 1988, the WSI Fund did not require showing of an "increased risk" of injury, but recognized the positional (neutral) risk doctrine, which affords coverage due to an actual employment risk even if the general public is also exposed to such risk—as in a tornado.¹⁷ In fact, many courts "no longer stringently apply the separate elements of the compensation causation test 'arising out of' and 'in the course of' employment, favoring a more general causal nexus standard."¹⁸ For the first time in *Fetzer v. Workforce Safety and Insurance*,¹⁹ the North Dakota Supreme Court rejected the positional risk doctrine, which grounds awards for workplace injuries arising from a "neutral" risk—that is, a risk neither directly associated with the employment, nor personal to the employee.²⁰ Rejecting the positional risk theory under the premise that the injury could have just as well occurred at home is to imagine a contrary history that did not occur—a notoriously barren and fruitless exercise.²¹ While the *Fetzer* court declined to compensate an employee who fell while walking down a hallway at work, rejection of the positional risk doctrine applies with no less force to injuries that occur from a random tornado or terrorist attack.²² Professor Larson notes that "[i]n spite of the tremendous personal losses associated with the Oklahoma City

14. *Myhre v. N.D. Workers Comp. Bureau*, 2002 ND 186, ¶ 15, 653 N.W.2d 705, 710 (quoting *Engebretson v. N.D. Workers Comp. Bureau*, 1999 ND 112, ¶ 24, 595 N.W.2d 312, 319 (Maring, J., concurring)).

15. *Boyko v. N.D. Workmen's Comp. Bureau*, 409 N.W.2d 638, 640 (N.D. 1987).

16. *Choukalos v. N.D. Workers Comp. Bureau*, 427 N.W.2d 344, 345-46 (N.D. 1988).

17. Clare Hochhalter & Dean J. Haas, *An Introduction to N.D. Workers' Compensation*, 64 N.D. L. REV. 173, 194 n.155 (1988).

18. Dean J. Haas, *Falling Down on the Job: Workers' Compensation Shifts From a No-Fault to a Worker Fault Paradigm*, 79 N.D. L. REV. 203, 237 n.253 (2003).

19. 2012 ND 73, ¶ 13, 815 N.W.2d 539, 544.

20. 1 LARSON, *supra* note 7, at § 4.03.

21. *Id.* at § 7.03.

22. Professor Larson explains that unexplained falls *are* a positional risk case—just as clearly as in the case in which a claimant is injured by a stray bullet, rabid dog, lunatic, lighting strike, tornado, or in a terrorist attack. *Id.* at § 7.04[1][a]. Larson says "*a lot of confusion, circumlocutions, and fictions could be avoided* in the unexplained-fall cases by merely accepting the proposition that what is unexplained is neutral." *Id.* at § 7.04[1][c] (emphasis added).

bombing . . . [no case questions] the employers' basic liability for workers' compensation benefits."²³

Unfortunately, rejection of the positional risk doctrine requires a claimant to prove an increased risk of injury, as in a fall: from a height, on a slippery floor, over frayed carpet, due to loose shoes, or simply attributable to a harried response to an emergency. The need for a unifying legal principle is best illustrated where employees strain to explain an increased risk of injury due to a fall from a height. The history of these legions of cases shows that what begins as an understandable increased risk of injury due to fall from a great height soon extends to consider falls from a few feet and even to a few inches. Professor Larson observes bitinglly: "conclusions about the effects of falls, when one gets down to distinctions based on inches, become factual matters of physics and physiology rather than of legal principle."²⁴ There is no reason to extend this subjective and unprincipled exercise to the neutral risk cases where it is not needed.²⁵

It is precisely such "hard facts"—e.g., a terrorist bombing that targets random Americans, not particular employees—that should have steered the court's nerves to adopt Larson's neutral risk test and avoid judicial gerrymandering regarding the types of neutral risks that are compensated (e.g., terrorist attacks and tornados only). Adoption of the neutral risk test would also negate the need to draw non-principled artificial distinctions regarding the heights, obstacles, stresses or emergencies, articles of clothing, and more, that pose an 'increased risk' of injury from falling.

Fetzer is also notable in that ambiguous legislative history was used to justify deviating from the majority coverage rule espoused by Professor Larson. In 1977, at the request of the agency, the Legislature adopted the industry standard coverage formulation "arising out of and in the course of employment" in response to a court decision that had required payment of benefits to an employee injured in a fight at work that was rooted in personal animosity.²⁶ The case citing this change in the legislative history,

23. *Id.* at § 7.02[2].

24. *Id.* at § 9.01[4][d].

25. Larson notes that "[p]roving increased risk can be quite difficult," discussing a decision in a jurisdiction, Illinois, that does not accept the positional risk theory. *Id.* at § 7.02[4] (citing *Brady v. Louis Ruffalo & Sons Constr. Co.*, 578 N.E.2d 921 (Ill. 1991)). Larson concludes that the decision may even bar compensation for a claimant seeking to recover "from a September 11-like attack . . ." *Id.* It seems clear that denying benefits for unexplained fall claimants may have unintended consequences.

26. *Fetzer v. N.D. Workforce Safety and Ins.*, 2012 ND 73, ¶ 18, 815 N.W.2d 539, 542. The statute was actually amended in 1977 to overturn a lower court decision allowing compensation for an injury occurring to an employee as a result of a *personally motivated fight*. See *Mitchell v. Sanborn*, 536 N.W.2d 678, 684 n.4 (1995). If an assault is *personally motivated* or a fall occurs due to a personal risk of the employee, Larson says that it then makes sense to apply the principle that the employment must contribute to the risk of injury. 1 LARSON, *supra* note 7, at § 9.01[4][b].

Mitchell v. Sanborn,²⁷ was a horseplay case. Notably, the North Dakota Supreme Court, citing Professor Larson, recognized that modern workers' compensation principles had evolved to place the risk of loss on the employer unless the risk is distinctly personal.²⁸ The horseplay cases show a remarkable change from a rule disfavoring compensation to perpetrators, to a rule favoring awards.²⁹ Larson notes that the "arising" element is remarkably simple to meet: "once it has been concluded that the horseplay activity was no departure from employment," the "the 'arising' test can be simply met by the argument that if the activity itself qualifies as part of the employment, and the harm arises out of that activity, then the harm arises out of the employment of which that activity was a part."³⁰ The North Dakota Supreme Court similarly stated that the compensation test is whether the horseplay activity (horseplay is itself never a work duty) is nevertheless somehow "commingled with his duties."³¹

The *Fetzer* court did not answer the most basic of all questions: if horseplay can be commingled with duty, why isn't walking down a hallway at work? Perpetrators of horseplay are entitled to compensation not because they pose an increased risk of injury to themselves, but because the 'arising' element is satisfied unless the perpetrator had deviated from her employment. *Mitchell* shows that the 1977 amendment was necessary to ensure that compensation does not flow from a *distinctly personal risk of injury*, whether in an idiopathic fall, or a personally motivated assault.

Because the legislative history is indeed contradictory, the *Fetzer* court also found comfort in legislative revocation of the rule of liberal construction.³² This is a slim reed, one that does not bear the weight. The legislative history of the revocation of the rule of liberal construction presents a caricature of the courts "second guessing" the Agency. Its major proponent, Representative Carlson, thought that courts were liberally construing the facts, stating: "cases are to be decided strictly based on the facts of each case."³³ While premium rates were part of the discussion, the actuary confirmed that rejection of the rule of liberal construction is "not

27. 536 N.W.2d at 685.

28. *Id.* at 684 (citing 1A LARSON, WORKMEN'S COMPENSATION LAW §§ 23.00, 23.20, 23.60 (1995)).

29. 2 LARSON, *supra* note 7, at § 23.06. Victims of horseplay are now uniformly compensated. *Id.* at § 23.02.

30. *Id.* at § 23.07[1].

31. *Mitchell*, 536 N.W.2d at 685. The perpetrator's injury would have been compensable as the "momentary act of horseplay was commingled with his duties." *Id.*

32. *Fetzer v. N.D. Workforce Safety and Ins.*, 2012 ND 73, ¶ 12, 815 N.W.2d 539, 543 (citing N.D. CENT. CODE § 65-05-01 (2011)).

33. *Hearing on H.B. 1217 Before H. Judiciary Comm.*, 54th Leg. Assemb., Reg. Sess. 1 (N.D. 1995) (statement of Rep. Carlson).

projected to have a material impact on the required rate and loss reserve levels of the Fund.”³⁴ Senator Wayne Stenehjem observed that labor’s concerns about the bill were “over-reacting,” citing cases that reject giving liberal construction *to the facts* but allowing *questions of law* to be decided based on “similar doctrines requiring reference to ‘legislative purpose which prompted their enactment,’ as well as ‘the policy to be accomplished,’ ‘the evil to be remedied, and the object to be obtained.’”³⁵

It is also notable that the expansive coverage afforded to instigators of horseplay in *Mitchell* was not dependent upon the rule of liberal construction.³⁶ Clearly, the abrogation of liberal construction in 1995 does not logically instruct us what the Legislature had intended in adopting the plain vanilla standard definition of compensable injury in 1977. While providing benefits to instigators of horseplay may appear to benefit employees, probably the primary effect of this rule is to shield employers from suit. While the immunity shield is inviolate, the basic coverage formulation as to the arising element is easily allowed to erode the right to sure and certain relief.³⁷ The liberal construction doctrine appeared to be a feel-good mantra, cited to support a known outcome. More prescient were the authors of *Are Employees Obtaining “Sure and Certain Relief” Under the 1995 Legislative Enactments of the North Dakota Workers Compensation Act*,³⁸ who said “[p]erhaps the greatest travesty of the 1995 amendments was to deny the injured employee liberal construction under the Workers’ Compensation Act.”³⁹

B. MENTAL INJURIES

North Dakota is also deficient in its treatment of the mentally ill, excluding from the definition of compensable injury any “mental injury arising from mental stimulus.”⁴⁰ Post-Traumatic Stress Disorder (PTSD) commonly exists without a physical trauma. The United States

34. *Id.* at 9 (The fiscal note states the change is not projected to have a material impact on the Fund).

35. *Hearing on H.B. 1217 Before S. Judiciary Comm.*, 54th Leg. Assemb., Reg. Sess. 14-16 (statement by Sen. Wayne Stenehjem) (citing *Hughes v. State Farm Mut. Auto Ins. Co.*, 236 N.W.2d 870, 882 (N.D. 1975); *Kash-N-Karry vs. Johnson*, 617 So.2d 791 (Fla. Dist. Ct. App. 1993)).

36. The court observed in the footnote discussing the legislative history of SB 2158, that “former cases” invoked the rule. *Mitchell*, 536 N.W.2d at 684 n.4.

37. See Haas, *supra* note 18, at 289-97.

38. Susan J. Anderson, and Gerald (Jud) Deloss, *Are Employees Obtaining “Sure and Certain Relief” Under the 1995 Legislative Enactments of the North Dakota Workers Compensation Act*, 72 N.D. L. REV. 349, 378-80 (1996).

39. *Id.* at 378.

40. N.D. CENT. CODE § 65-01-02(10)(b)(10) (2013).

Departments of Defense and Veterans Affairs are deeply concerned about PTSD, which is now known to be a typical reaction to severe mental stress.⁴¹ Professor Larson is deeply critical of the “mental-mental” exclusion, as “[t]here is nothing talismanic about physical impact,” and unjustifiably shifts the risk of loss from the employer to employee.⁴² Early on, courts grounded such awards in physical damage to the brain, stating that the requirement of physical injury “must refer to the entire body . . . a living, breathing, functioning individual . . . not as a static, inanimate thing.”⁴³ Medical science establishes the essential truth that the brain is a physical thing that itself changes not only during personality formation and under severe stress, but in the everyday as when memories form.⁴⁴ Nevertheless, Professor Larson argues that once an employee establishes damages with a causal connection to employment, the additional requirement to identify the precise physical structures involved is “wearing thin.”⁴⁵

Frankly, there is no justification for this exclusion. The hostility toward compensation for purely mental or emotional injuries demonstrated by North Dakota and a significant minority of state legislatures is not supported by science or any sound compensation principle. Indeed, the exclusion highlights the dissonance between the legal and scientific conceptions. This defense-minded strategy is based on the theory that mental injuries are less real than physical ones and that they are not generally work-related but attributable to the employee’s psychological predisposition.⁴⁶ The line between mental and physical injuries is intellectually shabby, and inexcusably cheap to workers. Such mind/body distinctions have been criticized by science and philosophy ever since its most famous proponent, Rene Descartes, set it out in the terms by which it is known today. This discord between compensation law on the one hand, and ethics, economics, and science on the other is profoundly disturbing

41. The military has found that initial estimates of the incidence of PTSD must be revised higher. See, e.g., DEP’T OF VETERANS AFFAIRS, CONTRACTED REPORT OF FINDINGS FROM THE NATIONAL VIETNAM VETERANS’ READJUSTMENT STUDY (2013). See also Lisa K. Richardson et al., *Prevalence Estimates of Combat-Related PTSD: A Critical Review*, 44 AUSTRALIAN AND NEW ZEALAND J. OF PSYCHIATRY 4 (2010).

42. 3 LARSON, *supra* note 7, at § 56.04[1] (quoting *Wolfe v. Sibley, Lindsay, & Carr Co.*, 330 N.E.2d 603, 606 (N.Y. 1975)).

43. *Bailey v. Am. Gen. Ins. Co.*, 279 S.W.2d 315, 318 (Tex. 1955). See also *Indemnity Ins. Co. of N. Am. v. Loftis*, 120 S.E.2d 655, 656 (Ga. Ct. App. 1961).

44. See, e.g., Lisa M. Shin et al., *Regional Cerebral Blood Flow in the Amygdala and Medial Prefrontal Cortex During Traumatic Imagery in Male and Female Vietnam Veterans With PTSD*, 61 ARCH. GEN. PSYCHIATRY 168 (2004).

45. 3 LARSON, *supra* note 7, at § 56.04[1].

46. See Martha T. McCluskey, *The Illusion of Efficiency in Workers’ Compensation Reform*, 50 RUTGERS L. REV. 657, 783-87 (1998).

because this shift of an employment risk to employees is not a rare event, as there is increasing acknowledgment that workplace stress and mental injuries are rampant.⁴⁷

The idea that allowing mental stress claims will burden the system because they are too easy to prove, shifting non-employment risks to the employer are not tenable. The competing concepts are illustrated by a decision of the Ohio Supreme Court in 2005, where a majority upheld that state's mental/mental exclusion against an equal protection challenge, giving short shrift to bank teller's fright and emotional shock from being robbed and diagnosed with PTSD.⁴⁸ Rather, like Pilate was said to do, the majority washed its hands of the iniquity, admitting that although "psychological and psychiatric injuries may arise from an individual's employment, and we do not discount their impact on those who suffer them," nevertheless, the policy choice made by the state legislature did not offend the constitution.⁴⁹ The dissent is based in reality and found no rational basis for distinguishing mental/mental injuries from those mental injuries arising out of a physical insult to the body.⁵⁰

North Dakota has also enacted a significantly restrictive statute regarding coverage for mental injuries that arise from a physical injury, adding the unrealistic requirement that the employee must prove the work contribution is "at least fifty percent of the cause of the condition as compared with all other contributing causes combined, and only when the condition did not preexist the work injury."⁵¹ WSI apparently reads the statute to exclude compensation if there had been a previous diagnosis of the psychological condition. It is as though destiny precludes a new psychological injury. North Dakota law is extremely conservative and punitive in this regard. The state should adopt the normal rule for compensability of mental injuries—whether the work is a "substantial contributing factor" to the condition claimed.⁵²

47. The National Institute for Occupational Safety and Health notes that 25-40% of all employees report significant job stress, more than with any other life stressor, including financial problems and family problems. See National Institute for Occupational Safety and Health, *STRESS . . . At Work*, CENTER FOR DISEASE CONTROL (1999), <http://www.cdc.gov/niosh/docs/99-101/>.

48. *McCrone v. Bank One Corp.*, 839 N.E.2d 1 (Ohio 2005).

49. *Id.* at 10.

50. Justice Resnick observed: "[n]ow what kind of rational explanation or legitimate state interest could possibly justify distinguishing the compensability of one posttraumatic stress disorder from another under equivalent life-threatening circumstances based on the fortuity of a stubbed toe?" *Id.* at 11-12 (Resnick, J., dissenting).

51. N.D. CENT. CODE § 65-01-02(10)(a)(6) (2013).

52. See, e.g., *Ex parte Saad's Healthcare Servs., Inc.*, 19 So.3d 862 (Ala. 2008) (quoting 3 LARSON'S WORKER'S COMPENSATION LAW § 56.03[1] (2008)).

C. NARROW CAUSATION UNDER THE TRIGGER STATUTE

As argued above, “but for” causal reasoning has, until recently, satisfied the “arising” test, especially since the competing “increased risk” test poses alternative history scenarios in which the employee could also have been injured as a member of the general public.⁵³ The exploration of alternative histories that did not occur in our universe lead nowhere. Causation is notoriously difficult in science and philosophy; as Professor Prosser said, in some sense “the fatal trespass done by Eve was cause of all our woe.”⁵⁴ Unfortunately, North Dakota is transfixed with one view of the Necker cube in determining causation: an erroneous focus on preexisting susceptibility to injury under the “trigger statute,” North Dakota Century Code section 65-01-02(10)(b)(7).⁵⁵

The statute, repeatedly amended, excludes benefits for preexisting conditions, “including when the employment acts as a trigger to produce symptoms in the preexisting . . . condition unless the employment substantially accelerates its progression or substantially worsens its severity.”⁵⁶ Under WSI’s blinkered view of causation, the focus is on the morphology. An MRI, for example, will show that degenerative disc disease exists in most of us over age thirty or so, but most of us will not have any symptoms. WSI commonly calls its medical consultant or an independent medical examiner (“IME”) to testify that an employee’s work injury “merely triggered symptoms” in degenerative disc disease but did not alter the course of the “disease itself.”⁵⁷ But which is the better measure of a worsening: the change in the appearance of an MRI or the shattering of the very health and life of the employee by injury? Though the North Dakota Supreme Court has twice ruled that pain can be a significant worsening of a preexisting condition,⁵⁸ the battle continues to rage, as WSI asked the 2013 Legislature to amend the statute to preclude a significant change in pain complaints to evidence change in a preexisting condition.⁵⁹

53. In a classic positional risk case, a court noted:

[t]he [alternative history] question whether or not the employee might have been injured in the same way, and even at the same place and time had he not been called there by the necessities of his employer’s business, but had gone there only for his own pleasure or in pursuit of his own business, has nothing whatever to do with the case.

Kern v. Southport Mill, 141 So. 19, 21 (La. 1932).

54. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 236 (5th ed. 1984).

55. N.D. CENT. CODE § 65-01-02(10)(b)(7) (2013).

56. *Id.*

57. Haas, *supra* note 18, at 237-38.

58. *See generally* Mickelson v. N.D. Workforce Safety and Ins., 2012 ND 164, 820 N.W.2d 333; Geck v. N.D. Workers Comp. Bureau, 1998 ND 158, 583 N.W.2d 621.

59. H.B. 1163, 63d Leg. Assemb., Reg. Sess. (N.D. 2013).

WSI's litigation strategy elevates the "trigger statute" to an exception that swallows the rule by forcing a tight focus on the preexisting morphology to deny coverage. According to WSI's Performance Evaluator, the agency's claims adjusters reported a "shift in management focus to a more aggressive and in-depth search for prior injuries or pre-existing/degenerative conditions, which could possibly reduce WSI liability for the injury."⁶⁰ On paper, North Dakota continues to follow the well-known and universally accepted maxim that susceptibility to injury is not relevant, as the employer takes the employee as he finds him.⁶¹ "Putatively, almost every injury could, with sufficient scrutiny, be linked to some preexisting weakness or susceptibility."⁶² The North Dakota Supreme Court has long held that "[t]he fact that an employee may have physical conditions or personal habits which make him or her more prone to such an injury does not constitute a sufficient reason for denying a claim To the contrary, the work injury need only be a 'substantial contributing factor.'"⁶³ In stark contrast to the current predilection to blame every spinal complaint on preexisting morphology, the 1980s era North Dakota Supreme Court held compensable a disc injury that, according to the treating physician, resulted from "minute trauma" from her hair-dressing job, causing the annulus "fibers supporting the disc [to] give way."⁶⁴

The foremost authority on workers' compensation law, Professor Larson, notes that "[n]othing is better established in compensation law than the rule that, when industrial industry precipitates disability from a prior latent condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable," and "degeneration and infirmities due to age," are not grounds for reduction of benefits.⁶⁵ Larson states the central tenant that susceptible employees are also entitled to sure and certain relief, "the employer takes the employee as it finds that employee"—thus, "[p]reexisting disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' [causal] requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which

60. N.D. WORKFORCE SAFETY & INSURANCE, 2008 PERFORMANCE EVALUATION (2008), http://www.nd.gov/auditor/reports/WSI_PE_08.pdf.

61. *Bruns v. N.D. Worker's Comp. Bureau*, 1999 ND 116, ¶ 16 n.2, 595 N.W.2d 298, 303 n.2.

62. *Balliet v. N.D. Workmen's Comp. Bureau*, 297 N.W.2d 791, 795 (N.D. 1980).

63. *Manske v. N.D. Workforce Safety & Ins.*, 2008 ND 79, ¶ 12, 748 N.W.2d 394, 397 (quoting *Satrom v. N.D. Workmen's Comp. Bureau*, 328 N.W.2d 824, 831 (N.D. 1982)).

64. *Satrom*, 328 N.W.2d at 830.

65. 5 LARSON, *supra* note 7, at § 90.04[1].

compensation is sought.”⁶⁶ Thus, the bedrock workers’ compensation principle is to place the risk of loss on the industry that caused the claimant’s *damages*. Any other result alters the basic bargain between employees and employers in which employees exchange the right to sue employers in tort in for “sure and certain relief” in the form of medical and disability benefits.⁶⁷

In 1998, the North Dakota Supreme Court held that a compensable aggravation of arthritis does include a worsening of symptoms.⁶⁸ Applying the former incarnation of the trigger statute, the administrative law judge (“ALJ”) denied benefits concluding that the employment was “merely a trigger,” to her pain.⁶⁹ The ALJ also concluded that there was no evidence that the employment was a substantial aggravating factor.⁷⁰ Upon appeal, the court reversed and remanded because there was evidence that the employee’s work activities “resulted in her latent underlying condition of arthritis becoming symptomatic and painful. Pain can be an aggravation of an underlying condition of arthritis.”⁷¹ The majority found the distinction between worsening the “condition itself” and the symptoms to be without significance.⁷²

Although the statute was subsequently amended, WSI’s then counsel, Regan Pufall, advised the Legislature that “[t]his bill does not significantly change the substance of this paragraph. It removes unnecessary and confusing language.”⁷³ Mr. Pufall testified that the trigger exclusion means that a condition that is getting progressively worse is not compensable if it merely takes a turn for the worse at work but is compensable if the employment significantly alters the significance of the condition “so that it got much worse more quickly than it would have otherwise.”⁷⁴

The focus, as the *Geck* court found, is squarely on the significance of the damages suffered by the injured employee. Accordingly, Professor Larson observes that “denials of compensation in this category [due to a preexisting condition] are almost entirely the result of holdings that the evidence did not support a finding that the employment contributed to the final result

66. *Id.* at § 9.02[1].

67. *See* N.D. CENT. CODE § 65-01-01 (2013).

68. *Geck v. N.D. Workers Comp. Bureau*, 1998 ND 158, 583 N.W.2d 621.

69. *Id.* ¶ 11, 583 N.W.2d at 624.

70. *Id.*

71. *Id.* ¶ 10.

72. *Id.*

73. *See Hearing on H.B. 1269 Before H. Comm. on Indus., Bus., and Labor*, 55th Leg. Assemb., Reg. Sess. 5 (N.D. 1997) (testimony of Reagan Pufall).

74. *Id.*

[damages].”⁷⁵ Post *Geck*, the North Dakota Supreme Court repeatedly said that it is not necessary under the “trigger statute” to show the employment was the sole cause of the injury.⁷⁶ Rather, to establish a causal connection under the statute, the claimant must demonstrate his employment was “a substantial contributing factor” to the disease or injury.⁷⁷ Employment plays a substantial causal role where it worsens or aggravates the pre-existing condition, causing damages that would not have occurred but for the employment.

The North Dakota Supreme Court addressed the issue numerous times over the years, frequently upholding an ALJ’s findings of fact that the claimant’s work injury merely “triggered symptoms” rather than substantially worsened the preexisting condition. In *Bruder v. North Dakota Workforce Safety and Insurance Fund*,⁷⁸ WSI attributed the claimant’s pain to his degenerative disc disease that had been symptomatic for many years before he filed his workers’ compensation claim.⁷⁹ Similarly, in *Bergum v. North Dakota Workforce Safety and Insurance*,⁸⁰ the claimant “had a long history of treatment for back pain,” which baseline condition included “daily low back discomfort, and . . . the regular use of an anti-inflammatory drug and a muscle relaxant.”⁸¹ *Curran v. North Dakota Workforce Safety and Insurance*⁸² also details a long history of back symptoms prior to the alleged work injury, triggered by bending down to pick up a band-aid.⁸³

While another ALJ might have found differently in these cases, the courts will not overturn factual findings that a “reasoning mind” could have made.⁸⁴ Unfortunately, all too frequently the factual findings of ALJs are conclusory as to whether the employee has proven a compensable worsening. ALJs typically do not make any specific findings relating to the *change in the employee’s disability status and increased demand for*

75. 1 LARSON, *supra* note 7, at § 9.02[4].

76. 2009 ND 23, ¶ 8, 761 N.W.2d 588, 591-92.

77. *Id.* at 592.

78. *Id.* ¶ 2, 761 N.W.2d at 590.

79. *Id.*

80. 2009 ND 52, 764 N.W.2d 178.

81. *Id.* ¶ 19, 764 N.W.2d at 184.

82. 2010 ND 227, 791 N.W.2d 622.

83. *Id.* ¶ 1, 791 N.W.2d at 622.

84. The court’s deferential review standard is well known; the court affirms the agency if a reasoning mind “could have” reached the decision. *See, e.g., Kershaw v. Workforce Safety & Ins.*, 2013 ND 186, ¶ 10, 838 N.W.2d 429, 432. But the old cases retain a hint of true scrutiny of fact-findings. *See, e.g., Spangler v. N.D. Workers Comp. Bureau*, 519 N.W. 2d 576, 578 (N.D. 1994) (remanding for the agency to conduct further examinations of the various medical opinions on offer); *Satrom v. N.D. Workmen’s Comp. Bureau*, 328 N.W.2d 824 (N.D. 1982) (reversing based on the testimony of the treating physician).

medical services stemming from the work injury. The cases illustrate that the ALJs are more apt to focus only on whether or not the *preexisting condition* substantially contributed to the final result, rather than on the pertinent question: whether the *work injury* substantially contributed to the final result. Damages, after all, are measured by the increased need for medical care, and placing of work restrictions. It seems as though ALJs are prone to finding a natural progression of any preexisting condition, crediting IME doctors over treating physicians. But the focus is generally on a progression of the preexisting morphology rather than on whether the employee's symptoms would have progressed in a similar manner but for the work injury. Unfortunately, the predilection appears to be akin to the judicial review of deferring to the agency rather than using a *de novo* determination of the facts required for a fair hearing.

ALJs should be required to show critical examination of the effects of both the preexisting condition and the work injury in the findings. This might be accomplished if the courts critically review the findings of WSI as it once did. Alternatively, if WSI is actually interested in an even-handed adjudication, it could promulgate an administrative rule detailing the criteria by which a significant worsening of the condition is proved. For example, the OSHA Recordkeeping Handbook⁸⁵ provides an industry example of the definition of a significant aggravation of a pre-existing condition, defining a significant aggravation of a pre-existing injury to include “[o]ne or more days away from work, or days of restricted work” due to injury, or “[m]edical treatment in a case where no medical treatment was needed for the injury or illness before the workplace event or exposure, or a change in medical treatment was necessitated by the workplace event or exposure.”⁸⁶

In 2012, the North Dakota Supreme Court, in *Mickelson v. North Dakota Workforce Safety and Insurance*,⁸⁷ again stressed that the root of the issue is whether the claimant's pre-existing injury or condition is such that its clinical course would naturally progress on its own timetable without regard to the employment in which the employee was engaged. The court clarified that to afford compensation, the employment contribution must “in some real, true, important, or essential way [make] the preexisting injury,

85. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, OSHA RECORD KEEPING HANDBOOK: THE REGULATION AND RELATED INTERPRETATION FOR RECORDING AND REPORTING OCCUPATIONAL INJURIES AND ILLNESS 14 (2006), https://www.osha.gov/Publications/recordkeeping/OSHA_3245_REVISED.pdf.

86. *Id.*

87. 2012 ND 164, 820 N.W.2d 333.

disease or other condition more unfavorable, difficult, unpleasant, or painful.”⁸⁸

The *Mickelson* court

decline[d] to construe [the statute] so narrowly as to require only evidence of a substantial worsening of the disease itself to authorize an award of benefits. Rather, the statute . . . requires consideration of whether the preexisting injury, disease or other condition would have progressed similarly in the absence of employment.⁸⁹

The court said that “employment can also substantially worsen the severity, or substantially accelerate the progression of a preexisting injury, disease, or other condition when employment acts as a substantial contributing factor to substantially increase a claimant’s pain. That conclusion is consistent with our decision in *Geck*, that pain can be a substantial aggravation of an underlying latent condition.”⁹⁰ The ALJ, the court said:

misapplied the law by looking too narrowly at . . . degenerative disc disease itself without considering whether his injury, disease, or other condition would likely not have progressed similarly in the absence of his employment so as to substantially accelerate the progression or substantially worsen the severity of his injury, disease, or other condition.⁹¹

The case was remanded to WSI.

D. WSI INTRODUCED THE “PAIN BILL,” H.B. 1163, IN AN EFFORT TO ELIMINATE PAIN AS EVIDENCE OF A WORSENING IN A PREEXISTING CONDITION

In reaction to *Mickelson*, WSI offered legislation to amend the “trigger statute,” North Dakota Century Code section 65-01-02(10)(b)(7), to provide that “[p]ain is a symptom and is not a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition.”⁹² WSI representatives testified in favor of this drastic change to the law, yet contending that *Mickelson* represented a *change* in interpretation of the

88. *Id.* ¶ 36, 820 N.W.3d at 346.

89. *Id.* ¶ 21, 820 N.W.2d at 342.

90. *Id.* ¶ 20.

91. *Id.* ¶ 23, 820 N.W.2d at 344.

92. H.B. 1163, 63d Leg. Assemb., Reg. Sess. (N.D. 2013).

statute.⁹³ In support of the pain bill, WSI representatives further advocated that an employee need not be taken “as is.”⁹⁴ For, taking the employee as is forcefully contradicts WSI’s theory that even a drastic change in symptoms is not compensable if the morphology does not change. Clearly, under WSI’s favored interpretation, an employee’s preexisting susceptibility to injury due to aging joints and discs is a defense. Fortunately, the bill did not pass as introduced, but it is remarkable that it was offered in this stark form.

This legislation reflects a profound misunderstanding of the effects of pain on life. Pain is a primary generator of medical treatment. Pain is often disabling. The legislation offered by WSI could preclude compensation for chronic pain if the ALJ, like the IME examiner, focuses only on the morphology of the preexisting condition rather than on the effects of the injury. Claimants’ advocates have noted that WSI commonly calls the IME examiner to testify that the preexisting condition is unchanged by the injury, and thus said to show a simple “natural progression” of the preexisting condition. In many cases, claimants’ lawyers lament, the IME examiner does so without reference to the changes in the employee’s clinical condition, relying solely on whether the “objective” appearance of the condition appears changed on an MRI. Yet, the worker’s life might be utterly shattered and ruined.

Such unremitting pain creates a demand for medical care, including treatments in chronic pain programs, and may impel the doctor to place the employee under work restrictions. Employees whose very lives are ruled by pain, unable to engage in the activities of daily living, to work, to sleep, to do anything at all without constant use of pain medications, have described this ruinous existence as a living hell. Who among us would not recognize this as a significant worsening in the life of a family member? What, after all, is the purpose of workers’ compensation if we do not care about the effect of the injury on life and health in determining compensation? WSI’s disturbing focus on preexisting morphology and discounting pain is highlighted by a case *Parsons v. Workforce Safety and Insurance Fund*,⁹⁵ which was pending at the time H.B. 1163 was under consideration in the Legislature. In that case, despite an IME examiner who found the claimant sustained a disc tear and cervical strain from his truck driving job, the ALJ denied the claim because his preexisting condition made him “especially vulnerable to injury,” and the work injury had

93. *Hearing on H.B. 1163 Before the H. Comm. on Indus., Bus., and Labor*, 63d Leg. Assemb., Reg. Sess. 49 (N.D. 2013) (testimony of Tim Whalin).

94. *Id.*

95. 2013 ND 235, 841 N.W.2d 404.

resolved by the time of the hearing, and did not cause “significant damage” to the disc.⁹⁶ It is discouraging that the dissent would have affirmed, elevating the susceptibility to an absolute defense, on the premise that this was simply a fact question.⁹⁷

Opponents of the pain bill noted that *Parsons* proved that WSI’s construction of the already conservative statute made the preexisting condition exclusion an exception that swallows the rule—elevating susceptibility to an absolute defense. While WSI supported this legislation, it could not find one independent physician to testify in favor. Its medical consultant did testify in favor, stating that “[n]o physician can reliably measure pain,” but “if the *Mickelson* case progresses to where a person’s report of increased pain in a preexisting condition establishes a compensable injury, unreliability will become prevalent in the system.”⁹⁸ WSI’s medical consultant claimed that despite the language in the legislation that “pain is a symptom and not a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition,” the bill “does not eliminate the symptom of pain as an important evidence of a work injury.”⁹⁹

As a result of persistent opposition to this legislation, including from Senator Ralph Kilzer, a physician and former medical consultant for WSI, the bill was amended to state “[p]ain is a symptom and may be considered in determining whether there is a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition, but pain alone is not a substantial acceleration or a substantial worsening.”¹⁰⁰ The legislation does not alleviate Chief Justice VandeWalle’s concern about the failure of the statute to distinguish a substantial worsening in the severity of an underlying condition from those in which pain is simply a symptom triggered by employment.¹⁰¹ But, the *Mickelson* court’s focus on whether there is a natural progression points the way: has the employment

96. *Id.* ¶ 16, 841 N.W.2d at 409. The majority explained that the “ALJ misapplied the law in finding the injury was attributable to Parsons’ preexisting condition because the preexisting condition made him more susceptible to the injury.” *Id.* ¶ 19, 841 N.W.2d at 410.

97. *Id.* ¶ 29, 841 N.W.2d at 413 (Crothers, J., dissenting). As in *Mickelson*, WSI’s exclusive focus is on the morphology; it was not disputed that the work had caused Parsons physical injuries (a disc tear and cervical/trapezius strain) and had caused him significant damage—medical expenses and disability. WSI’s focus on mere morphology is misplaced, “[p]lutatively, almost every injury could, with sufficient scrutiny, be linked to some preexisting weakness or susceptibility.” *Balliet v. N.D. Workmen’s Comp. Bureau*, 297 N.W.2d 791, 794 (N.D. 1980) (emphasis added).

98. *Hearing on H.B. 1163*, *supra* note 93, at 98-99 (testimony of Gregory Peterson).

99. *Id.* at 99.

100. *Hearing on H.B. 1163*, *supra* note 93, at 123.

101. *Mickelson v. N.D. Workforce Safety and Ins.*, 2012 ND 164, ¶ 30, 820 N.W.2d 333, 345 (VandeWalle, C.J., specially concurring).

substantially changed the nature of the medical care needed and the disability, or has it not? If medical care is periodically needed both before and after an employment incident that caused an employee to go to the doctor, a simple flare-up in a condition prone to flare-ups is probably not compensable.

The best place to start is to measure the change in the employee's clinical course: the medical attention required and the work restrictions placed. The Federal Workers Compensation Act attempts to distinguish the mere manifestation of the preexisting injury at work from an aggravation, stating that "the fact that the condition manifests itself during a period of federal employment" is not "sufficient in itself to establish causal relationship."¹⁰² However, the regulations and cases show that a condition is compensable if the injury acted on the preexisting condition and temporarily or permanently aggravated it.¹⁰³ Similarly, OSHA is of the view that an employment injury that substantially alters the need for medical attention is a significant worsening of a preexisting condition.¹⁰⁴

The outright oddity of the pain bill is further highlighted by the fact that the Legislature had agreed in 2009 that the preexisting condition issue required study, recognizing that North Dakota law excluding coverage for preexisting conditions is more restrictive than other jurisdictions.¹⁰⁵ In recommending study of the issue, the 2009 House Resolution cited WSI's 2008 Performance Evaluation documenting North Dakota's extremely conservative approach to deny claims based on presence of preexisting morphology.¹⁰⁶ Thus, Study Recommendation 6.6 was to create a "study group formed of all the stakeholder groups . . . to review how other jurisdictions' statutes handle these important Workers' Compensation issues."¹⁰⁷

Rather than engage all "stakeholder[s]," WSI itself presented information to the Legislature's interim committee, and asked the next

102. 20 C.F.R. § 10.1115(e) (2009).

103. See OFFICE OF WORKERS' COMPENSATION PROGRAMS, INJURY COMPENSATION FOR FEDERAL EMPLOYEES (1994), <http://www.dol.gov/owcp/regs/compliance/feca810m.htm#3>. The handbook provides that determining the causal relationship "is based entirely on medical evidence provided by physicians who have examined and treated the employee." *Id.* at § 3(5). Under the federal rules, both temporary and permanent aggravations are compensated. "Permanent aggravation occurs when a condition will persist indefinitely due to the effects of the work-related injury or when a condition is materially worsened by a factor of employment such that it will not return to the pre-injury state." *Id.* at § 3(5)(b). This focus is proper, as it measures the effect of the employment on the damages and the need for medical care and disability.

104. See OSHA RECORD KEEPING HANDBOOK, *supra* note 60, at 73.

105. H. Con. Res. 3008, 61st Leg. Assemb., Reg. Sess 1 (N.D. 2009).

106. 2008 PERFORMANCE EVALUATIONS, *supra* note 57, at 111.

107. *Id.*

performance evaluator, Sedgwick, to address the issue.¹⁰⁸ Sedgwick averred that although some other states might be as conservative as North Dakota in attributing damages to preexisting conditions, the state is not a lone outlier.¹⁰⁹ Sedgwick cited case law from Wisconsin for this proposition.¹¹⁰

Contrary to Sedgwick's characterization of Wisconsin cases as equally conservative as the North Dakota statute, the test in that state is whether the work injury caused a *substantial change in symptoms* "in the form of a precipitation, aggravation, and acceleration of the applicant's preexisting back condition *beyond normal progression*."¹¹¹ In discussing "normal progression" to determine compensability, the Wisconsin courts use a similar test as expounded in *Mickelson*, that compensation depends upon:

whether or not the underlying preexisting injury, disease, or other condition would likely have progressed similarly in the absence of employment We decline to construe those terms so narrowly as to require only evidence of a substantial worsening of the disease itself to authorize an award of benefits.¹¹²

Sedgwick is not reliable for the claim that North Dakota law is not an outlier. The dissent in *Geck* had earlier also offered case authority said to deny that a significant change in pain complaints constitutes a compensable aggravation of a preexisting condition. For example, the dissent said that in Oregon a work injury did not cause any new anatomical injuries that could be observed is not compensable, even though it "aggravated" her preexisting condition as it increased her pain.¹¹³ However, this was a claim for *occupational disease* which is *distinguished from accidental injuries* in that occupational disease is not unexpected and are recognized as an

108. NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE, 2010 PERFORMANCE EVALUATION 88-98 (2010), <https://www.workforcesafety.com/library/documents/reports/PerformanceEvaluation8-09-10.pdf>.

109. *Id.* at 93.

110. *Id.* (explaining that "Wisconsin precludes benefits for any injury or condition preexisting at the time of employment with the employer against whom a claim is made.")

111. *Greenfield Pontiac-Buick, Inc. v. Labor and Indus. Review Comm'n*, 776 N.W.2d 288, 291 (Wis. Ct. App. 2009) (emphasis added). *See also Aurora Health Care Metro, Inc. v. Labor & Indus. Review Comm'n*, 776 N.W.2d 101, 103 (Wis. Ct. App. 2009) (holding that an increase in the limitations on the employee's daily living and work restrictions showed an "aggravation, acceleration and precipitation of her preexisting condition beyond its normal progression"); *Emerson Elec. Co. v. Labor & Indus. Review Comm'n*, 686 N.W.2d 456 (finding that the employee's *actual living* (clinical) *condition* is simply due to a natural progression of a preexisting degenerative disc disease).

112. *Mickleson v. N.D. Workforce Safety and Ins.*, 2012 ND 164, ¶ 21, 820 N.W.2d 303, 342.

113. *Geck v. N.D. Workers Comp. Bureau*, 1998 ND 158, ¶ 20, 583 N.W.2d 621, 625 (Sanstrom J., dissenting) (citing *In re Hall v. Home Ins. Co.*, 651 P.2d 186, 187 (Or. Ct. App. 1982)).

inherent risk of continued exposure to conditions of the particular employment and are gradual rather than sudden in onset.¹¹⁴ Thus, aggravation of symptoms makes no sense for occupational disease claims. Oregon analyzes most cases under the “combined condition” statute, which provides:

If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition.¹¹⁵

As in federal law, Oregon holds that if the work injury changes the work restrictions sufficiently to cause disability or causes the claimant to require medical attention not previously needed, the entire condition is compensable.

The *Geck* dissent also cited a number of cases from Tennessee to argue that pain cannot constitute a compensable aggravation.¹¹⁶ Tennessee law is more nuanced, providing that if a work injury advances the severity of the pre-existing condition or the employee suffers a new distinct injury other than increased pain, then the work injury is compensable.¹¹⁷ In other words, if pain is said by the claimant’s doctors to be indicative of an injury, as is inflammation or microscopic tearing, the clinical worsening can be compensable. *Medical causation recognizes that pain is normally indicative of an injury.* Nature designed this feedback mechanism to avoid additional injuries, including the everyday wear and tear that if allowed to accumulate unnoticed, can result in much more significant damage to the body. ALJ’s should not focus solely on ‘natural progression of

114. *In re Hall*, 651 P.2d at 188.

115. OR. REV. STAT. § 656.005(7)(a)(B) (2012).

116. *Geck*, ¶¶ 22-23, 583 N.W.2d at 626 (citing *Townsend v. State*, 826 S.W.2d 434 (Tenn. 2002); *Cunningham v. Goodyear Tire and Rubber Co.*, 811 S.W.2d 888 (Tenn. 1991); *Smith v. Smith’s Transfer Corp.*, 735 S.W.2d 221 (Tenn. 1987)).

117. *See Trosper v. Armstrong Wood Prod., Inc.*, 273 S.W.3d 598, 604-07 (Tenn. 2008). *See also Vawter v. Volunteer Mgmt. Dev.*, No. W2012-00471-SC-WCM-WC, 2013 WL 542812, at *4 (Tenn. Feb. 13, 2013) (finding that although work activities did not “progress” her condition, the fact that work made it “more symptomatic and painful” with “an anatomical explanation for the increase in [claimant’s] symptoms during her [employment]” was sufficient to afford compensation). North Dakota must similarly focus on the *effects of the work injury*, rather than on the morphology. Unfortunately, many Administrative Law Judges continue to find credible the ipse dixit opinion of IME examiners who blithely conclude that the work injury did not substantially worsen a preexisting condition. This leads to an inordinate number of denials that are then upheld on appeal for reasons of fact.

morphology,' as do most IME examiners, but also the change in the employee's need for medical care and in work restrictions caused by the work aggravation.

As introduced, H.B. 1163 would have expressly denied for all employees any opportunity to establish that a significant increase in pain from an employment injury constitutes a significant worsening in a preexisting degenerative condition. This offends basic compensation principles, and North Dakota law has never so held. Even as enacted, the legislation is a retrograde step, as it questions the central principle of workers' compensation law, which states that the industry that created the risk of damage to the employee must bear the loss. While WSI argued at the legislative hearing that North Dakota does not necessarily follow this sacrosanct principle that the worker should be taken "as is," as yet the North Dakota Supreme Court continues to hold that simple susceptibility to injury is not a defense.¹¹⁸ In tort law the focus is on whether or not the injury produced the symptoms and damages,¹¹⁹ not on the appearance of the MRI for MRIs of the spine show a near universal affliction of aging discs by age thirty. After all, MRIs of the spine show a near universal affliction of aging discs by age thirty. But most people are not symptomatic, and DDD itself does not necessarily correlate with its appearance on the MRI. WSI created a straw man arguing that absent this legislation, the agency will become a general insurance carrier, on the theory that simple triggering of any symptom will be compensable. This is nonsense. As the discussion of federal law on this point shows, preexisting conditions that are progressing of their own accord and on their own natural timetable are not worsened beyond their normal progression by simple manifestation of symptoms in the workplace. WSI also threatened the legislature with the portent of dire financial consequences if the law was not changed. This cry of wolf also does not wash, since the Court has given the statute the same legal meaning from 1998 through the present, without any negative financial consequences to the fund. This legislation, which may allow WSI to blame an injury on the employee's susceptibility to injury due to abnormal morphology, mocks sure and certain relief.

118. *Manske v. N.D. Workforce Safety and Ins.*, 2008 ND 79, ¶12, 748 N.W.2d 394, 397; *Bruns v. N.D. Worker's Comp. Bureau*, 1999 ND 116, ¶ 16 n.2, 595 N.W.2d 298, 303 n.2.

119. Modern tort principles distinguish between the *eggshell plaintiff doctrine* and the *aggravation doctrine*. The eggshell plaintiff rule applies when the condition had been asymptomatic prior to injury, which is distinct from the aggravation doctrine that applies when there is a prior symptomatic injury. *Rowe v. Munye*, 702 N.W.2d 729, 740-41 (Minn. 2005) (noting difference between aggravation and eggshell-plaintiff rules); see also RESTATEMENT (SECOND) OF TORTS § 461 cmt. a (1965) (noting that eggshell-plaintiff rule applies to "peculiar physical condition" of the plaintiff).

E. THE AGGRAVATION STATUTE

Few commentators support a reduction in benefits in the circumstances in which a work injury acts upon a preexisting injury combining to produce damages. The 1972 National Commission on Workers Compensation recommended that full compensation be paid to an employee when both work and nonwork causes substantially contribute to an injury or disease.¹²⁰ Similarly, Professor Larson notes that the “great majority” of compensation acts do not reduce benefits under an apportionment of cause theory.¹²¹ Sedgwick recommended in its performance evaluation that the aggravation statute be repealed,¹²² under the sound analysis that though only forty cases per year were afflicted by the statute, “[a]necdotal comments from WSI claim staff indicates that it is very difficult for the claim staff to identify an aggravation case when it is presented.”¹²³

Unfortunately, North Dakota has an apportionment statute,¹²⁴ which was once liberally construed in favor of injured workers,¹²⁵ but now conceivably applies in any case in which a prior condition is said by an IME examiner to “contribute” to an injury, as in increasing the risk of recurrence.¹²⁶ Nearly any prior injury can theoretically qualify under this interpretation of the aggravation statute to reduce a worker’s benefits to half of what they should be, for whether a “causal relation” exists between the prior injury and the recurrence is completely within the eye of the beholder. This lax causation test is a lamentable retreat from the objective criteria once applied by the court: whether the prior injury continued to be disabling

120. NATIONAL COMMISSION ON STATE WORKMEN’S COMPENSATION LAWS, REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN’S COMPENSATION LAWS 51 (1972), <http://workerscompresources.com/wp-content/uploads/2012/11/Introduction-Summary.pdf>.

121. 5 LARSON, *supra* note 7, at § 90.03.

122. *See* 2010 PERFORMANCE EVALUATIONS, *supra* note 108, at 98.

123. *Id.* at 96.

124. *See* N.D. CENT. CODE § 65-05-15(1) (2013) (providing an acute period of 100% coverage for the first sixty days); N.D. CENT. CODE § 65-05-15(3) (2013) (providing a presumption that the apportionment is 50% to the work injury and 50% to the nonwork injury or condition).

125. Formerly, the court liberally construed the requirement in the statute that to reduce and apportion benefits, the prior injury must be “known in advance of the work injury,” and must have “caused previous work restriction or interference with physical function.” *See, e.g., Elliott v. N.D. Workers Comp. Bureau*, 435 N.W.2d 695, 698 (N.D. 1989); *Jepson v. N.D. Workmen’s Comp. Bureau*, 417 N.W.2d 184, 185 (N.D. 1987).

126. *Mickelson v. N.D. Workers Comp. Bureau*, 2000 ND 67, ¶ 1, 609 N.W.2d 74, 75. In this case, the court upheld the Bureau’s reduction of the claim to a 50% award under the aggravation statute because an independent medical evaluator concluded that a healed injury from four years previously somehow made a *causal contribution* to the severity of a second injury to that area of the body. *Id.* ¶¶ 3-4, 609 N.W.2d at 74-75. The notion of cause is a notoriously difficult one in science. In fact, the National Commission, Professor Larson, and Sedgwick agree that the aggravation statute is not based on sound compensation principles, and should be repealed.

or impairing at the time of the work injury. The aggravation statute should be repealed as it can be applied to any claim in which a prior injury or condition can be said by an IME doctor to elevate the risk of recurrence.

III. MEDICAL NECESSITY DETERMINATIONS

WSI is responsible to provide an injured employee “reasonable and appropriate” medical services “necessary” to treat a compensable injury.¹²⁷ WSI frequently denies benefits—including medical benefits—for lack of sufficient causal relationship between employment and injury. In such case, the employee has a right to a hearing under North Dakota Century Code chapter 28-32. But WSI also denies medical care for lack of medical necessity under North Dakota Century Code section 65-02-20. Here, the Legislature has created an odd—and arguably unconstitutional—alternative dispute resolution mechanism to resolve medical necessity disputes.¹²⁸ The statute provides that any “managed care” dispute is subject to “binding dispute resolution” (“BDR”), which is not subject to the procedural protections in the North Dakota’s Administrative Agencies Practices Act, found in North Dakota Century Code chapter 28-32.¹²⁹ While the Legislature has directed WSI to “make rules for the procedures,” the administrative code provision does not contain any procedural protections to safeguard due process of law.¹³⁰

A. THE RIGHT TO “REASONABLE AND NECESSARY” MEDICAL CARE SHOULD BE HELD A PROTECTED PROPERTY RIGHT

Unfortunately, after studiously avoiding the constitutional issue, the North Dakota Supreme Court recently decided that an injured employee does not have a protected property right regarding the appropriate prosthetic device to replace a hand.¹³¹ Remarkably, the court decided the constitutional issue even though the employee made the argument for the first time on appeal.¹³² The majority did not cite a single case holding an

127. N.D. CENT. CODE § 65-05-07 (2013).

128. N.D. CENT. CODE § 65-02-20 (2013).

129. *Id.*

130. The administrative code merely advises that the decision-makers—the identity of whom are not specified—shall review “the relevant information in the record,” and may “request additional information or documentation.” N.D. ADMIN. CODE § 92-01-02-46(5) (2013).

131. *Whedbee v. N.D. Workforce Safety & Ins. Fund*, 2014 ND 79, 845 N.W.2d 632.

132. *Whedbee* filed a Notice of Appeal and Specification of Issue in McKenzie County asserting the myoelectric prosthesis is cost-effective and medically appropriate, and requesting reversal of WSI’s BDR decision *Id.* ¶ 6, 845 N.W.2d at 634. Normally, of course, the court

employee does not have a property right to receive reasonable and necessary medical care. Instead, the court shifted focus, claiming that medical benefits were not denied, but that merely “one prosthetic device was approved over another. [Claimant] does not have a protectable property interest in receiving one device over another, here, a myoelectric prosthesis rather than a body-powered prosthesis.”¹³³ The court said that an employee “must have a legitimate claim of entitlement to [the benefit.] A crucial factor in determining whether a particular statutory benefit constitutes a property interest is the nature and degree of discretion given to the governmental administrator in awarding or denying the benefit.”¹³⁴ According to the court, the employee must prove entitlement to the specific medical benefit before having a protectable property right in fair process in making this very determination. This ignores that injured workers are entitled to reasonable and necessary medical care under the Workers Compensation Act; WSI does not have unfettered discretion to award or simply deny reasonable and necessary medical care.

The United States Supreme Court has explained that an individual has a protected property interest under statutory schemes that set out a right to benefits if certain criteria are met that do not allow program administrators to use unfettered discretion to award or deny benefits.¹³⁵ The Act does not provide WSI with discretion to deny medical care but sets out a right to care under lawful criteria. The Connecticut Supreme Court concluded that an *applicant* for medical benefits has a protected property right in a fair process to determine the nature of reasonable and necessary medical care.¹³⁶ The question as to the whether a protected property right exists cannot logically depend upon the subsequent determination in the hearing as to the precise nature of that care. That would be the very definition of the cart before the horse.

The North Dakota Supreme Court had already held that an *applicant* for workers compensation benefits has the right to a fair hearing under the constitutional due process guarantee.¹³⁷ Significantly, the court did not only rely upon North Dakota Century Code chapter 28-32 in concluding that a formal hearing was required, but extensively discussed the constitutional

refuses to address issues not raised in the district court. See *Risovi v. Job Service North Dakota*, 2014 ND 60, ¶ 12, 845 N.W.2d 15, 20.

133. *Wheddbee*, ¶ 11, 845 N.W.2d at 635.

134. *Id.* (quoting *Ennis v. Williams Cnty. Bd. of Comm’rs*, 493 N.W.2d 675, 678 (N.D. 1992) (internal quotations and punctuation omitted)).

135. *Regents v. Roth*, 408 U.S. 564, 570-71 (1972).

136. *Giaimo v. City of New Haven*, 778 A.2d 33, 48-50 (Conn. 2001) (distinguishing *Am. Mfg. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999)).

137. *Steele v. N.D. Workmen’s Comp. Bureau*, 273 N.W.2d 692, 702 (N.D. 1978).

guarantee of due process that require the result.¹³⁸ In construing chapter 28-32 to require due process safeguards, the court held that the applicant for workers' compensation benefits had a right to a formal hearing.¹³⁹ It would be odd indeed that the claimant denied a five-day claim for disability benefits is entitled to due process, but an employee who has lost a hand is not.

While primitive societies are rightly criticized for an eye for an eye justice, by at least one measure, the law of talion values life and limb more than we do:

Our modern economies thrive because we tend to limit personal liability. If I sell you a defective ladder, and you fall and break your neck, I may have to pay you some compensation. But I will not have to pay you nearly as much as I would be willing to pay not to having my own neck broken. In our society we are constrained by the value a court puts on the other guys neck; in a culture ruled by talion law, we are constrained by the value we place on our own.¹⁴⁰

Any reasonable measure of the value of a hand must be measured from the view of the man or woman who lost one. Unfortunately, an employee who suffers the devastating injury of the loss of a hand at work is not afforded a fair and impartial hearing.

B. THE BDR PROCESS DOES NOT PROVIDE ANY PROCEDURAL PROTECTIONS TO ENSURE A FAIR HEARING AND SHOULD BE DECLARED UNCONSTITUTIONAL

The administrative rule does not provide for an in-person hearing, a right to appear through counsel, or a right to cross-examine. The decision is made by WSI employees, and the procedure itself is opaque—and so nearly immune from meaningful review—as the BDR decision does not contain findings of fact and conclusions of law to explain the grounds of the decision.¹⁴¹ Because WSI probably cannot lose a medical necessity appeal under the limited review standard, the agency is prone to decide even causation questions under the BDR statute, bypassing that annoying right to a hearing.

138. *Id.*

139. *Id.*

140. SAM HARRIS, *THE MORAL LANDSCAPE: HOW SCIENCE CAN DETERMINE HUMAN VALUES* 61 n.93 (2001).

141. N.D. CENT. CODE § 65-02-20 (2013).

If the Legislature or a subsequent court corrects the *Whedbee* error that an employee who loses a hand does not have a protectable property right, it seems apparent that the BDR procedure currently in use by WSI must also be altered to provide some minimal level of due process. For example, in *Jassek v. North Dakota Workforce Safety and Insurance*,¹⁴² counsel argued that although there are many ways to afford basic procedural protections,¹⁴³ the Administrative Code provides none of them. In contrast to the requirement in the APA that findings of fact and conclusions of law be entered to explain the grounds of the decision,¹⁴⁴ the BDR determination provides only the brute conclusion denying that the care is medically necessary. Moreover, the BDR decision-makers include claims personnel whose participation would be precluded under the APA.¹⁴⁵

Mr. Jassek challenged WSI's binding dispute resolution determination that a hook device was a sufficient prosthetic device for his amputated left hand, rather than the state of the art myoelectric devices, such as provided to our nation's military. As to the merits, WSI hired an IME examiner who determined that since his job exposed him to grease, the myoelectric device was not the most cost-effective.¹⁴⁶ However, the IME examiner did not take into account Mr. Jassek's whole life and the recommendation and plea of his medical provider: "if I lost my hand in a work place accident . . . I hope that I would be offered the chance that would give me the best [device]."¹⁴⁷

142. 2013 ND 69, 830 N.W.2d 582.

143. The court has held that although an agency deciding adjudicative facts is acting in a quasi-judicial capacity, the minimal due process that must be afforded participants are not necessarily synonymous with minimal requirements in a court of law. *First Am. Bank & Trust Co. v. Ellwein*, 221 N.W.2d 509, 514 (N.D. 1974). Rather, the court, in *Steele v. North Dakota Worker's Compensation Bureau*, quoted the *Eldridge* three part balancing test to determine the nature of the process due: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation and the probable value of additional procedural safeguards; and, (3) the Government's interest, including the fiscal and administrative burdens that the additional procedural requirement would entail. 273 N.W.2d 692, 699 (N.D. 1978) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 341-43 (1976)).

144. N.D. CENT. CODE § 28-32-39 (2013). The court has also said that:

WSI has the responsibility to weigh the credibility of medical evidence and resolve conflicting medical opinions . . . [T]he authority to reject medical evidence selectively does not permit WSI to pick and choose in an unreasoned manner. WSI must consider the entire record, clarify inconsistencies, and adequately explain its reasons for disregarding medical evidence favorable to the claimant.

Huwe v. Workforce Safety and Ins., 2008 ND 47, ¶ 10, 746 N.W.2d 158, 161-62.

145. N.D. CENT. CODE §§ 28-32-37, 38 (2013).

146. Excessive concern about cost by the very agency deciding benefits has long troubled the courts. A Louisiana court acknowledged that "some of the policy considerations raised in [claimant's] brief, notably that case managers work for the compensation carrier and thus are motivated to reduce medical expenses." *Reed v. St. Francis Med. Ctr.*, 8 So.3d 824, 829 (La. Ct. App. 2009).

147. See Brief for Appellant at ¶ 21, *Jassek v. N.D. Workforce Safety and Ins.*, 2013 ND 69, 830 N.W.2d 582.

The U.S. military provides hundreds of soldiers with state of the art myoelectric prosthesis, and it is difficult to understand why WSI should not be compelled to restore a more useful hand than a hook to injured employees. Sadly, despite the devastating injury of the loss of a hand at work, Mr. Jassek was not given an in-person hearing. He and other similarly situated persons are not allowed to cross-examine witnesses, and he did not have an independent tribunal.

Echoing *Eldridge* balancing,¹⁴⁸ Judge Friendly argued that agencies should be allowed to experiment with various procedural rules to guarantee due process, contending that perhaps some of the formal rules as right to cross examine may be relaxed if the decision maker is truly independent.¹⁴⁹ As we engage in *Eldridge* balancing, it is important to keep in mind the standards set by the United States Supreme Court for evidentiary hearings, which include:

- (1) timely and adequate notice detailing the reasons for the proposed termination;
- (2) an effective opportunity for the recipient to defend by confronting any adverse witness and by presenting his own arguments and evidence orally;
- (3) retain counsel if desired;
- (4) an impartial decision-making;
- (5) a decision resting solely on the legal rules and evidence adduced at the hearing; and
- (6) a statement of reasons for the decision and the evidence relied on.¹⁵⁰

However, the procedures required must be flexible, and recognize that all medical necessity questions are not equal. It is one thing to afford little process for a claim for an additional chiropractic treatment and another to give a man a hook instead of a myoelectric hand. The *Whedbee* court's concern that "if all managed care decisions merited a trial-type process, the increased administrative costs would be too great to justify the perceived benefit of the hearings"¹⁵¹ is misplaced because the extent of the procedural protection provided should be closely tied to the nature of the medical care sought. Additionally, the court overlooked that attorney's fees are both

148. *Eldridge* balancing applies to questions of adjudicative fact, not in regulatory matters (where legislative facts are at issue). In the latter case, a trial-type hearing is not available because even though the private interests affected may be high, the value of additional safeguards is considered to be minimal, given that the agency weighs the legislative facts of the regulated industry as a whole. II RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW, 813-15 (5th ed. 2010).

149. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-80 (1975).

150. *Steele v. N.D. Workmen's Comp. Bureau*, 273 N.W.2d 692, 700 n.4 (N.D. 1975).

151. *Whedbee v. N.D. Workforce Safety & Ins. Fund*, 2014 ND 29, ¶ 12, 845 N.W.2d 632, 636.

contingent on prevailing and limited to 20% of the value of the award.¹⁵² There is no risk that WSI will be flooded with utilization review hearings.

1. WSI's BDR does not Employ an Independent Decision-Maker and is Opaque to Meaningful Judicial Review

To the layperson, the most disturbing aspect of administrative law is that the decision-maker is the agency that decided against him; indeed, the very individuals involved in the investigation may have also acted as the hearing officers. Under criteria adopted by the APA, an individual who had served as “investigator, prosecutor, or advocate in the investigatory or prehearing stage of an adjudicative proceeding [may not] serve as hearing officer.”¹⁵³ Such standard provisions in Administrative Agencies Practice Acts “supplement” the “due process requirement of a neutral decisionmaker.”¹⁵⁴ Clearly, if North Dakota Century Code chapter 28-32 were applicable, the BDR decision maker (the BDR Director, the Medical Director and the Claims Adjuster or supervisor) could not act as both the investigators and hearing officers nor, as hearing officers, engage in the ex-parte contacts with WSI’s claims department. WSI’s BDR is far from the unbiased Tribunal required by due process.

In fact, “[s]cholars and judges consistently characterize provision of a neutral decision maker as one of the three or four core requirements of a system of fair adjudicatory decision making.”¹⁵⁵ In the eyes of the claimant, prior participation constitutes bias.¹⁵⁶ Distrust of a bureaucracy that appears intent on denying and disputing entitlement is normal human reaction, and Judge Friendly wisely notes that this “is surely one reason for the clamor for adversary proceedings in the United States.”¹⁵⁷ Judge Friendly is prescient as he observes that ensuring impartiality with “less reliance on the bureaucracy for decision making” might best address the issue.¹⁵⁸ A neutral decision maker that might lessen the need for the full panoply of procedural protections is one “with no connection with the agency”¹⁵⁹

Clearly, the procedural safeguards typical of a trial-type hearing are especially important when the tribunal is the agency rather than an

152. N.D. CENT. CODE § 65-02-08 (2013).

153. N.D. CENT. CODE § 28-32-38(1) (2013).

154. II PIERCE, *supra* note 148, at 846.

155. *Id.*

156. Friendly, *supra* note 149, at 1279.

157. *Id.* at 1279-80.

158. *Id.* at 1280.

159. *Id.* at 1289.

independent ALJ. The combination of a BDR Tribunal composed of WSI employees, without any procedural protections such as right to counsel, right to testify, to cross-examine and rebut, is extremely troubling. From what it appears, WSI employees have not proven to be wholly impartial decision makers.

The appearance of impropriety is high, which is compounded by WSI's failure to provide adequate procedural protections, or to even address the evidence favorable to the employee in the BDR decision. Because the courts will review any decision under the extremely deferential abuse of discretion standard, the failure to set out detailed findings of fact and conclusions of law makes a mockery of the employee's right to judicial review.

2. *The BDR Does Not Allow Cross-Examination and an In-Person Hearing*

North Dakota law is also deficient because those subject to BDR are given a paper-only review and are not afforded opportunity to meet the decision makers to present the claim in person. Judge Friendly notes that few administrative schemes are disposed to deny the right to call witnesses.¹⁶⁰ The ability to present a case in one's own way is fundamental to human engagement. Most injured employees seeking a usable prosthetic or surgical cure will especially appreciate the opportunity to testify in-person, face to face.

The right to present a case in his or her own way is fundamental to fair process. Those practitioners in this area of law know the impact of a formal hearing where we meet the actual human being referred to bloodlessly in the records: minds change during the course of those hearings. The right to appear is rooted in the same fundamental human nature that compels us to seek face-to-face encounters with adversaries or wielders of power or money.¹⁶¹

The court has stated that the aggrieved party should normally "be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts."¹⁶² Professor Larson agrees with Professors Pierce and Davis about the need for formal hearings when adjudicating a workers' entitlement to compensation under state law, stating:

160. Friendly, *supra* note 149, at 1282.

161. *See Coy v. Iowa*, 487 U.S. 1012, 1017-18 (1988) (noting the core of the right to a fair trial involves the right for the aggrieved to be present in person).

162. *Colgate-Palmolive Co. v. Dorgan*, 225 N.W.2d 278, 281 (N.D. 1974) (quoting KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 412 (1958)).

Fair play rules include the right of cross-examination, rules against ex-parte statements, necessity of having all evidence on the record, and restrictions on determinations made by independent investigation conducted by the tribunal. These rules are based on fundamental notions of fairness. Nothing is more repugnant to our traditions of justice than to be at the mercy of witnesses one cannot see or challenge, or to have one's rights stand or fall on the basis of unrevealed facts that perhaps could be explained or refuted.¹⁶³

While the nature of workers' compensation proceedings "justify some relaxation of strict rules of evidence"—e.g., medical records and physician letters are normally admitted into evidence in compensation hearings—"nevertheless it is fundamental that the right to confront witnesses, to cross-examine them, to refute them, and to have a record of their testimony must be accorded unless waived."¹⁶⁴ These rules, "such as the right to cross-examine, are designed to guarantee the substantial rights of the parties and are based on fundamental notions of fairness."¹⁶⁵ Wigmore has characterized cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth."¹⁶⁶ Consistent with Judge Friendly's observation that while cross-examination can be overrated,¹⁶⁷ nevertheless, cross-examination can be useful to elicit the IME examiner's assumptions that may not be based on the actual history. The Advisory Committee on Proposed Rules of Evidence stated that cross-examination has become a "vital feature" of our system "in exposing imperfections of perception, memory, and narration"¹⁶⁸

The North Dakota Supreme Court has held that where the important property right in workers' compensation benefits is at stake, claimants have the right to cross-examine, at WSI's expense, medical experts "whose opinions [WSI] uses to refute the claimant's treating physicians."¹⁶⁹ The court observed that when WSI obtains an IME to refute the treating physician, and refuses cross-examination, "it effectively denies most claimants a real opportunity to prove their entitlement to benefits. If [the APA] is read to permit such a procedure, a potential due process violation may exist."¹⁷⁰

163. 7 LARSON, *supra* note 7, at § 127.11[3][a].

164. *Torres v. Allen Family Foods*, 672 A.2d 26, 31 (Del. 1995).

165. *Id.* at 32.

166. 2 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 1697-98 (1904).

167. *See* Friendly, *supra* note 149, at 1284-85.

168. FED. R. EVID. art. VII introductory note.

169. *Froysland v. N.D. Workers Comp. Bureau*, 432 N.W.2d 883, 889 (N.D. 1988).

170. *Id.*

As the North Dakota Supreme Court recognizes and Professor Larson advocates, the Montana Supreme Court also held that fair play rules of due process apply in workers' compensation matters and "include the right of cross-examination."¹⁷¹ Moreover, the court quoted Professor Larson's similar heartfelt concern about the "increasingly common practice of referral of claimant to an official medical examiner or an independent physician chosen by the commission," which made it "particularly important that commissions not lose sight of the elementary requirement that the parties be given an opportunity to see such a doctor's report, cross-examine him, and if necessary provide rebuttal testimony."¹⁷² The Massachusetts Supreme Court was equally concerned about IMEs, construing a statute that gave prima facie status to the report of the IME as potentially facially unconstitutional unless construed to allow rebuttal and cross-examination.¹⁷³ The court noted that the statute authorized the ALJ to order "the submission of additional medical testimony" and provided "an opportunity for the claimant to put before the relevant decision makers medical testimony she considers favorable to her claim," and to cross-examine the IME examiner.¹⁷⁴ As noted below however, WSI's trial by IME (whereby the treating doctor is not also deposed) has morphed this into a WSI advantage—the IME is given the sole and final word. There seems to be little question that a dispute resolution mechanism devoid of *any* of the various protections to a fair process violates the Constitution.

C. DUCKING THE CONSTITUTIONAL QUESTION—IMPROPERLY INVOKING SUBJECT MATTER JURISDICTION.

The *Jassek* court, however, avoided the constitutional question, deciding instead that it lacked subject matter jurisdiction over the case, because his medical provider has signed Jassek's request for review.¹⁷⁵ The court reached this conclusion on its own, as the issue was never raised by the parties, and even though WSI had agreed the request had been filed "for

171. *Rumsey v. Cardinal Petroleum*, 530 P.2d 433, 436-37 (Mont. 1975) (quoting 7 LARSON, *supra* note 7, at § 127.05[4]).

172. *Id.* (quoting 7 LARSON, *supra* note 7, at § 127.05[4]). *See also* *Baros v. Wyoming*, 834 P.2d 1143, 1146 (Wyo. 1992) (recognizing "the majority rule that medical reports in a written form are admissible so long as the elementary fair-play requirements of notice, timely furnishing of copies, and the right of cross-examination if requested, are observed.").

173. *O'Brien's Case*, 673 N.E.2d 567, 569 (Mass. 1996).

174. *Id.* at 570-71.

175. *Jassek v. N.D. Workforce Safety and Ins.*, 2013 ND 69, ¶¶ 6-8, 830 N.W.2d 582, 584-85.

Michael Jassek” and which WSI considered “*their* BDR request.”¹⁷⁶ Jassek was pro se at that point and relied upon WSI’s representation that he was party to the appeal. Citing *Carroll v North Dakota Workforce Safety & Insurance*,¹⁷⁷—a case in which the employee had not filed a timely appeal¹⁷⁸—the court dismissed Jassek’s appeal for lack of subject matter jurisdiction because he had not personally signed the review petition.¹⁷⁹

Jassek is out of step with the governing statutes and cases decided by the court in other matters, such as probate. North Dakota Century Code section 28-32-01(8) defines a party as “*each person* named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.”¹⁸⁰ Whether an individual is party to the BDR depends on more than the accident as to who files the BDR petition. WSI was correct that given its representations, Jassek was a party to the BDR under the law and that Jassek, as the aggrieved party, was properly party to the appeal under North Dakota Century Code section 65-02-20.

While courts have sometimes characterized a failure to satisfy certain procedural requirements before filing suit or taking of an appeal as lacking subject matter jurisdiction, many legal scholars, such as the renowned Professor Robert J. Martineau,¹⁸¹ have joined Professor Larson in criticizing the lax use of the concept.¹⁸² Professor Martineau notes that while courts have little difficulty in agreeing on an abstract definition of subject matter jurisdiction, “the difficulty comes when appellate courts apply the definition or, ignoring the definition, characterize other defects in the proceeding as the lack of subject matter jurisdiction in order to permit a belated attack.”¹⁸³ For example, Professor Martineau explores *Mesoellea v. City of Providence*,¹⁸⁴ wherein the Supreme Court of Rhode Island

176. Brief for Appellee at ¶ 20, *Jassek v. N.D. Workforce Safety and Ins.*, 2013 ND 69, 830 N.W.2d 582 (emphasis added) (“Therefore, WSI did consider Jassek to be a party to and a participant in the request for binding dispute resolution.”).

177. 2008 ND 139, 752 N.W.2d 188.

178. *Jassek*, ¶ 11, 830 N.W.2d at 585.

179. *Id.* ¶¶ 8-11.

180. N.D. CENT. CODE § 38-32-01(8) (2013) (emphasis added).

181. Professor Martineau, a Distinguished Research Professor of Law at the University of Cincinnati, is the author of two casebooks on appellate practice.

182. See Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, 1988 B.Y.U. L. REV. 1, 3 (1998). As Professor Martineau argues, “[a]llowing the issue of subject matter jurisdiction to be raised for the first time on appeal has enormous implications for the parties to a legal proceeding, the trial and appellate courts, and the proper functioning of a judicial system.” *Id.* Professor Martineau notes that cases can be litigated for years, and if subject matter jurisdiction may be first raised on appeal to the supreme court, “the waste of private and public resources is enormous.” *Id.*

183. *Id.*

184. *Id.* at 8 (discussing *Mesoellea v. City of Providence*, 508 A.2d 666 (R.I. 1986)).

distinguished between procedural requirements for filing an action and subject matter jurisdiction,¹⁸⁵ as courts often “confused the lack of jurisdiction over a particular action for failure to comply with the conditions precedent with a lack of jurisdiction over the class of cases to which that action belongs.”¹⁸⁶

The real question posed in *Jassek* was not one of subject matter jurisdiction. According to Professor Martineau, “procedural obligations placed on a party to initiate an action . . . should not be treated as a limitation on the court’s subject matter jurisdiction.”¹⁸⁷ Martineau explains that subject matter jurisdiction goes to the type of case the court can hear, not what a party must do to invoke it. This should not be confused with the procedural obligations, for “if this were not the case, the anomalous situation would be created in which subject matter jurisdiction would be dependent upon the actions of a party, exactly the opposite of the principle that subject matter jurisdiction cannot be conferred by the parties.”¹⁸⁸

Similarly, the Eighth Circuit Court of Appeals, sitting en banc, held that a jurisdictional error failing to join the United States as a party did not make the judgment void.¹⁸⁹ Since the issue in *Jassek* was not a question of subject matter jurisdiction, the issue regarding the procedural obligation of the party to initiate the action should not have been allowed to be raised for the first time on appeal. There is no question but that as to subject matter jurisdiction, the court had jurisdiction over this “class of case”—BDR disputes.¹⁹⁰ Hopefully, Mr. Jassek will be the last pro se injured worker denied his day in court by the erroneous use of subject matter jurisdiction.

IV. DISABILITY

Disability is defined as the loss of earnings capacity—the inability to obtain or perform employment due to injury.¹⁹¹ There are different

185. *Id.*

186. The *Mesoletta* court noted the confusing use of the word jurisdictional, holding that failure to comply with a *procedural notice requirement* does not divest a court of *subject matter jurisdiction*. *Mesoletta*, 508 A.2d at 665. Because the lack of proper notice defense does not go to subject matter jurisdiction, it cannot be raised belatedly. *Id.*

187. Martineau, *supra* note 182, at 23.

188. *Id.* at 23-24.

189. *Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 824, 825 (8th Cir. 1980), *cert. denied*, 449 U.S. 955 (1980).

190. *See Olson v. Estate of Rustad*, 2013 ND 83, ¶ 19, 831 N.W.2d 369, 378 (the court had subject matter jurisdiction because it “*had the power to hear and determine the general subject involved in the action*”) (emphasis added).

191. N.D. CENT. CODE § 65-01-02(14) (2013). *See also Rodenbiker v. Workforce Safety and Ins.*, 2007 ND 169, ¶ 18, 740 N.W.2d 831, 835 (defining disability as the inability to “*perform or obtain any substantial amount of labor in his particular line of work, or in any other for which he would be fitted.*”) (emphasis added).

eligibility standards for disability on initial application, and on reapplication for disability benefits.¹⁹² As argued in subsection A below, North Dakota law is profoundly mistaken in determining eligibility for disability benefits on reapplication, which has recently been applied to end disability eligibility to disabled prisoners on release. Part B discusses employer transitional job offers that are often a subterfuge to end disability benefits. Part C argues that the vocational rehabilitation chapter to determine post injury earnings capacity has devolved to a termination statute, given WSI's continued use of one size fits all vocational plans for return to work in the same generic jobs. Part D discusses the inability of many workers to remain in compliance with onerous work search for entry level jobs they are not interested in, have no aptitude or skills for, and are unlikely to obtain, resulting in benefit termination for noncompliance. Part E sets out the plight of the elderly disabled, many of whom are reduced to penury in their golden years by various retirement offsets. Part F addresses the simple need for the employee to prove a causal relationship between injury and disability and WSI's refusal to apply prior precedent of the North Dakota Supreme Court.

A. THE NORTH DAKOTA SUPREME COURT'S INTERPRETATION OF ACTUAL WAGE LOSS IN DETERMINING DISABILITY ON REAPPLICATION IS NOT CONSISTENT WITH BASIC COMPENSATION PRINCIPLES

Claimant's attorneys have long been troubled by the harsh construction of the reapplication statute, North Dakota Century Code section 65-05-08(1), which requires proof of a "significant change in the compensable medical condition" and "actual wage loss," prior to *reinstatement* of disability benefits.¹⁹³ The 2013 Legislature demonstrated a basic misunderstanding of workers' compensation law in a "housekeeping bill," applying the reapplication statute to inmates so as to effectively preclude disabled inmates from entitlement to disability benefits on release from incarceration.¹⁹⁴ Prior to the amendments, North Dakota Century Code section 65-05-08(2) provided that disability benefits must be *suspended* during the period of incarceration but must also be reinstated upon release if

192. If disability benefits are paid and discontinued, additional disability benefits may be paid on reapplication only on proof that the employee has sustained: (a) a significant change in the compensable medical condition; (b) actual wage loss; and (c) the employee has not withdrawn from the job market. See N.D. CENT. CODE § 65-05-08(1) (2013).

193. N.D. CENT. CODE § 65-05-08(1) (2013).

194. H.B. 1080 63d Leg. Assemb., Reg. Sess. (N.D. 2013).

otherwise entitled.¹⁹⁵ The crafty amendments are disguised to look as though there is no substantive change, providing that “[a]ll payments of disability and rehabilitation benefits of any employee who is eligible for, or receiving, benefits under this title *must be discontinued* when the employee is confined . . . in excess of hundred and eighty consecutive days.”¹⁹⁶ WSI characterized the bill as housekeeping, and did not explain the effect.¹⁹⁷

To understand the effect of the legislation, one must understand that a much harsher standard for entitlement to disability applies in an application for reinstatement after benefits had been discontinued under the reapplication statute, North Dakota Century Code section 65-05-08(1).¹⁹⁸

195. This provision formerly provided that payments of disability and rehabilitation must be *suspended* during the period of confinement over seventy hours, but reinstated if the disability remained at the time of release from incarceration. N.D. Cent. Code § 65-05-08(2) (2011).

196. H.B. 1080 63d Leg. Assemb., Reg. Sess. (N.D. 2013) (emphasis added).

197. *See Hearing on H.B. 1080 Before the S. Comm. on Indus., Bus., and Labor*, 63d Leg. Sess., Reg. Assemb. 17 (N.D. 2013) (testimony of Tim Wahlin) (confirming Senator Klein’s indication that “this is the annual WSI cleanup bill.”). WSI counsel, Jodi Bjornson, provided a written explanation of section five in her January 14, 2013 handout that does not reveal the effect of the amendment on the incarcerated:

Section 5. This section of the bill proposes to change how disability benefits are restarted after an injured employee is released from incarceration. Currently, if an injured employee who is receiving disability benefits becomes incarcerated for more than seventy-two consecutive hours, disability benefits are suspended. Upon release, the disability benefits are immediately reinstated regardless of the length of incarceration. So, for example, if an injured employee has been in the penitentiary for ten years, their disability benefits restart as soon as they are let out without any explanation or reapplication process. The proposed change would create a tiered process so that if an injured employee is jailed for a period between seventy-two consecutive hours and thirty consecutive days, disability benefits would be immediately restarted. But, if an injured employee spends more than thirty consecutive days in jail, *he or she would be required to reapply just as any other injured worker, before receiving disability benefits again.*

Id. at 42 (written testimony of Jodi Bjornson) (emphasis added). At the February 19, 2013 hearing, it was pointed out that the legislation would make it impossible for those incarcerated to be eligible for reinstatement. *See id.* at 19 (testimony of Dean Haas). In reply, Ms. Bjornson said that under the case law, an injured worker who shows that a good faith work search failed due to injury might be entitled to reinstatement of disability. *Id.* at 20 (testimony of Jodi Bjornson). This is false; the court has precluded this argument. *See, e.g., Johnson v. N.D. Workforce Safety & Ins.*, 2010 ND 198, ¶ 20, 789 N.W.2d 565, 570. WSI also left the impression with the Legislature that an individual incarcerated for a lengthy period—its example was ten years—was, absent the sought for amendment to the law, automatically entitled to immediate reinstatement on release. *See id.* at 42 (testimony of Jodi Bjornson). This is also untrue. Disability benefits are always conditioned on the claimant’s medical status, and if the inmate had recovered in this ten-year period, no disability would be paid. *See N.D. CENT. CODE* § 65-05-08.1 (2013) (requiring a claimant to submit medical verification of disability). Furthermore, WSI has *continuing jurisdiction* to determine disability status *on the merits*. *See N.D. CENT. CODE* § 65-05-04 (2013). Thus, none of the purported justifications for the amendment are real. Punishing prisoners a second time by precluding reinstatement of disability on release from prison is poor public policy.

198. This section provides that once disability benefits are “discontinued,” WSI may reinstate disability only upon written reapplication by the employee, with proof that the employee sustained a significant change in the compensable medical condition and actual wage loss caused

H.B. 1080 requires employees whose disability benefits are *discontinued* upon incarceration to reapply for benefits under North Dakota Century Code section 65-05-08(1). WSI testified before the Legislature that those employees whose benefits were previously *suspended* upon incarceration should not be automatically placed back on disability on release from jail, but should be required to “re-apply like everyone else.”¹⁹⁹ WSI did not tell the Legislature that the change in language brings into play the reapplication statute, and did not explain the significant difference between initial applications for disability, and reapplications under North Dakota Century Code section 65-05-08(1), which requires not only a “significant change in the compensable medical condition,” but also “actual wage loss.”²⁰⁰

Unlike most employees whose benefits are discontinued, those whose benefits are suspended upon incarceration were not released for work, for if they had been, disability would have terminated on the merits. These individuals are sentenced to incarceration while still disabled. *So, on release, it is almost impossible to show a change in medical condition.* How does one prove that a disabling condition is even more disabling? And what would be the point? Either one is disabled, or not.²⁰¹

Most crucially, the reapplication statute requires proof of “actual wage loss.” While WSI intimated to the Legislature that actual wage loss might be shown by an unsuccessful job search, the court has made it clear that “actual wage loss” requires proof of loss of wage income from a job actually held by the employee contemporaneously with the change in condition.²⁰² Loss of an actual job should not be required to prove disability. After all, disability is defined as the inability to “*perform or obtain* any substantial amount of labor in his particular line of work, or in

by the significant change in the compensable medical condition. N.D. CENT. CODE § 65-05-08(1) (2013).

199. See *Hearing on H.B. 1080*, *supra* note 197, at 42 (testimony of Jodi Bjornson); *id.* at 23 (testimony of Bryan Klipfel) (explaining that “the reason they looked at changing the law was a fairness issue. If you are incarcerated for a long period of time and all you have to do is come out and reapply for your benefits, where if it is anybody else with discontinuance of their benefits they have to go through the reapplication process.”).

200. N.D. CENT. CODE § 65-05-08(1) (2013).

201. Contrary to any concern that a disability might be cured while the individual is incarcerated, a simple release from incarceration does not result in *automatic* reinstatement on release without any examination of the merits. Reinstatement of disability to those released from incarceration would be determined as is any initial claim for disability. If the disability ends, so do payments. So, if an employee released from jail improves so as to be able to work, WSI can terminate disability benefits on the *merits*; after all, North Dakota Century Code section 65-05-04 grants WSI continuing jurisdiction to determine disability status. H.B. 1080 was not needed to accomplish this sensible result.

202. See *Gronfur v. N.D. Workers Comp. Fund*, 2003 ND 42, ¶¶ 14-15, 658 N.W.2d 337, 343.

any other for which he would be fitted,”²⁰³ and so measures *loss of earnings capacity*. Unfortunately, this is not the rule in reapplications. It should be. The court’s interpretation of the reapplication statute is little understood, and its harsh consequences long ignored. H.B. 1080 provided an opportunity to revisit this issue, which the Legislature, with the obfuscation of WSI, declined to take. The issue deserves much more attention than it has received.

The reapplication statute was introduced due to the difficulty of closing disability claims, which occurs for many reasons. First, after *Buechler v. North Dakota Workmen’s Compensation Bureau*²⁰⁴ was decided, the schedule award for a permanent partial disability then governed by the now repealed North Dakota Century Code section 65-05-12 could no longer be used to close partial disability claims.²⁰⁵ The *Buechler* court interpreted the permanent partial disability award as an add-on benefit to compensate for “impairment.”²⁰⁶ Schedule awards had been serving as *prima facie* evidence of the *partial disability* (loss of earnings capacity). In other words, the schedule award under North Dakota Century Code section 65-05-12 for *partial* disability (not total disability) had allowed claims closure based on a presumed wage loss element.²⁰⁷ The Legislature subsequently

203. *Jimison v. N.D. Workmen’s Comp. Bureau*, 331 N.W.2d 822, 827 (N.D. 1983) (emphasis added).

204. 222 N.W.2d 858 (N.D. 1974).

205. Permanent partial disability *schedule* awards are based on medical condition after maximum medical improvement and while paid without regard to proof of wage loss, yet were based on wage loss principles, as they were intended as presumptive evidence of wage loss. 4 LARSON, *supra* note 7, at § 80.04. This meant that an employee, for example, who lost an eye, but was able to return to work at his or her regular wage is nevertheless entitled to the schedule permanent partial disability award. *Id.* But this cuts both ways. “Conversely, if the workers’ [schedule] benefits expire, and he or she remains [unable to work] because of disability,” the benefits still stop when the scheduled number of weeks runs out. *Id.* at § 80.05[4]. The North Dakota permanent partial disability schedule award had been serving this basic purpose, and allowed for claims closure. Larson went on to explain that the wage loss principle became gradually distorted, observing that “[w]hen a system, all of whose features are keyed to a wage-loss function, is changed, whether absentmindedly or deliberately, into a physical impairment system, with no corresponding adjustment of these wage-loss-related features, there is bound to be trouble.” *Id.* at § 80.05[3].

206. *Buechler*, 222 N.W.2d at 861. Larson notes that several states came to embrace the physical impairment theory under which schedule awards are *always add-on awards*, and never used as presumptive evidence of earnings loss to close a disability claim. Minnesota accomplished this by statute in 1974. 4 LARSON, *supra* note 7, at § 80.05[7]. “In addition, several states have judicially broken ranks. North Dakota was the first, holding in 1974 that both a permanent total and a permanent partial (“22% disability of the whole man”) award could be made for the same back injury—a result that can only be explained by assuming it to be based on a theory that the former is for loss of earning capacity and the latter for physical impairment.” *Id.*

207. Of the *Buechler* opinion, Larson notes:

It is significant that the court, apart from a couple of generalizations, was unable to cite a single case from another jurisdiction reaching the same result, although the

amended North Dakota Century Code section 65-05-12 to refer to impairment, and these awards were no longer a schedule injury for presumed wage loss.²⁰⁸

The second reason that claims became more difficult to close is an equally involved story. The agency had also been operating under a profound misunderstanding of the effect of a simple discontinuation of disability benefits, believing that any work release and termination of disability benefits was final, and could not be reopened. For example, an employee might be released to heavy work, and benefits discontinued. Later, the employee might have a change in condition and be given a light work release only. If the employee had skills only to do heavy work, he or she might now be unable to work. Yet, WSI was claiming that disability could not be reopened. WSI claimed that reopening was purely discretionary, and its earlier determination of disability was *res judicata*.

The agency relied on *Jones v. North Dakota Workmen's Compensation Bureau*²⁰⁹ for the proposition that once it discontinued benefits the disability determination became final. But that case is inapposite because *Jones* did not involve disability, which can change over time. Rather, *Jones* had to do with the causal relationship between the injury and the condition.²¹⁰ A decision on cause is something that can be—and should be—finally decided and not continually reopened.

The doctrine of *res judicata* does not apply with equal force to disability determinations because the ability to work can change over time. A WSI decision is *res judicata* as to the worker's disability status as it then exists. The court in *Lass v. North Dakota Workmen's Compensation Bureau*²¹¹ observed that disability determinations must be reconsidered based on change in condition. This, the court said “is a recognition of the obvious fact that, no matter how competent a commission's diagnosis of claimant's condition and earning prospects at the time of hearing may be, that condition may later change markedly for the worse, or may improve, or may even clear up altogether.”²¹²

With the questionable end of claims closure under *Buechler*, but the spot-on *Lass* holding, WSI lost the ability to close disability claims.

North Dakota statute is of a routine type, and although the combination of permanent total and permanent partial occurs thousands of times every year.

Id. at § 80.05[7] n.63.

208. See *Kroeplin v. N.D. Workmen's Comp. Bureau*, 415 N.W.2d 807, 809-10 (N.D. 1987).

209. 334 N.W.2d 188, 191 (N.D. 1983).

210. *Id.* at 189.

211. 415 N.W.2d 796, 800 (N.D. 1987).

212. *Id.* at 800 (quoting 3 LARSON'S WORKMEN'S COMPENSATION LAW § 81.10 (1983)).

Adjusters at the time of the *Lass* decision called these re-openings “vault crawlers” because a claim with no activity and stored in the vault might be reactivated by a claimant who provided medical records showing disability, often dating back months or even years. Clearly, something had to be done. WSI submitted legislation to enact the reapplication criteria in North Dakota Century Code section 65-05-08(1) and also a new invention, the vocational rehabilitation chapter, North Dakota Century Code chapter 65-05.1, largely modeled on the Montana Act.²¹³ The rehabilitation statutes also allow for claims closure, based on a *retained earnings capacity*.

Because there was no procedure to limit vault crawling, some form of reapplication procedure was clearly needed. Primarily, the employee would have to prove his medical condition changed, and that due to this change, he or she had lost a significant ability to earn an income from work. But the *Gronfur* court’s interpretation of the meaning of “actual wage loss” as loss of *actual wage income* was not expected, as it is contrary to the very definition of disability, which is loss of earnings capacity.²¹⁴

The Bureau’s initial view (for the first 10 years after the statute was enacted) was that the term “actual wage loss” meant what the dissent in *Gronfur* claims: that the *inability to obtain* employment due to injury is sufficient to show loss of his or her ability to work for a living.²¹⁵ The words “actual wage loss” do not have the talismanic significance the North Dakota Supreme Court gave them in *Gronfur* and its progeny.²¹⁶ Employees have actually lost income if their injury alone precludes them from *obtaining* or performing employment. The court does not appear to express any surprise that this trio of cases first raised this issue over ten years after enactment, nor does the record appear to reflect WSI’s altered construction of the statute.

213. See MONT. CODE ANN. ch. 59-71 (2013). The Montana Supreme Court has noted that the rehabilitation chapter is intended to return employees to work and assist them “in acquiring skills or aptitudes to return to work” to “reasonably reduce the worker’s *actual wage loss*.” *Caldwell v. MACo Workers Comp. Trust*, 256 P.3d 923, 928 (Mont. 2011) (emphasis added). Just as North Dakota utilized the term “actual wage loss” in North Dakota Century Code section 65-05-08(1) to determine eligibility for disability on reapplication, Montana used “actual wage loss” to determine eligibility for vocational rehabilitation. Obviously, Montana got it right in not requiring loss of an actual job to qualify for rehabilitation. Rather, Montana law defines “actual wage loss” as “wages a worker earns or is qualified to earn after the worker reaches maximum healing are less than the actual wages the worker received at the time of the injury.” MONT. CODE ANN. § 39-71-116 (2013). Clearly, Montana recognizes that “actual wage loss” means loss of earnings capacity. That the North Dakota vocational rehabilitation was based on Montana law is also highly persuasive that the *Gronfur* court got it wrong.

214. See *Gronfur v. N.D. Workers Comp. Fund*, 2003 ND 42, ¶¶ 14-15, 658 N.W.2d 337, 345.

215. *Id.* ¶¶ 17-21, 658 N.W.2d at 343-44 (Maring J., dissenting).

216. See *Bachmeier v. N.D. Workers Comp. Bureau*, 2003 ND 63, ¶ 16, 660 N.W.2d 217, 222; *Lesmeister v. N.D. Workers Comp. Bureau*, 2003 ND 60, ¶ 24, 659 N.W.2d 350, 358.

To recap, the *Gronfur* court upheld the denial of disability despite the undisputed nature of the disability that accompanied Mr. Gronfur's surgery,²¹⁷ simply because the legislature used the term "actual wage loss" in North Dakota Century Code section 65-05-08(1)(b), rather than the more expansive term "earnings capacity."²¹⁸ This proved to the court that if a worker was not *actually working* prior to filing the reapplication, no benefits could be paid.²¹⁹ The court thereby reverses the basic principle in *Lass* that since disability may change over time, prior determinations should not bind future decision-makers on new facts regarding disability status.

Moreover *Gronfur* is premised on a misunderstanding of basic compensation principles. The court, quoting Professor Larson, noted

Degree of disability is calculated under most acts by comparing actual earnings before the injury with earning capacity after the injury. It is at once apparent that the two items in the comparison are not quite the same. Actual earnings are a relatively concrete quantity Earning capacity, however, is a more theoretical concept. It obviously does not mean actual earnings, since the legislature deliberately chose a different phrase for the post-injury earnings factor.²²⁰

This is absolutely true. The court fails to note the most crucial fact: that *actual wage income* is used to calculate and determine the *initial disability award*—which is two-thirds of the employee's *actual wages* at the date of injury.²²¹ Actual wages determine the weekly compensation rate. On the other hand, "earnings capacity" is used to ascertain whether the employee lost or retains the ability to earn a living *post injury*: thus, no state other than North Dakota—and even then only in reapplication scenarios²²²—uses actual wages earned post injury to forever determine loss

217. An examination of the facts in *Gronfur* is enlightening. Gronfur injured his back in 1996 and received disability benefits for a short time. *Gronfour*, ¶ 2, 658 N.W.2d at 339. In 1997, the Bureau terminated total disability benefits but awarded temporary disability benefits, claiming he could do light work. *Id.* He did not appeal, and the order became final. *Id.* He reapplied in 2000, claiming that his back condition had worsened. *Id.* ¶ 3. In fact, Gronfur had back surgery, which was, as a matter of medical fact, disabling. *Id.* The Bureau denied his reapplication because he had not established "actual wage loss." *Id.* at 340. In fact, Gronfur had not worked since 1996. *Id.*

218. *Id.* ¶ 3, 658 N.W.2d at 342-43.

219. *Id.* ¶ 15, 658 N.W.2d at 343.

220. *Id.* ¶ 13, 658 N.W.2d at 342 (quoting 4 LARSON'S WORKERS' COMPENSATION LAW § 81.01).

221. 4 Larson, *supra* note 7, at § 81.01[1]. As to the calculation to determine the employee's actual wage at the time of injury on which to base benefits, *see id.* at §§ 93.01-93.06.

222. Other than in reapplications, North Dakota Century Code section 65-05-10 conditions partial disability awards on loss of "wage-earning capacity." Generally, "[t]he employee's earnings capacity may be established by expert vocational evidence of a capacity to earn in the

of this earnings capacity.²²³ The Legislature’s skepticism that post injury *actual wage income* truly reflects the loss of earnings capacity is starkly illustrated by North Dakota Century Code chapter 65-05.1. There, the Legislature created a “waste basket” presumption that the employee retains some earning capacity to reduce entitlement to total disability even when none of the priority options in North Dakota Century Code chapter 65-05.1 apply.²²⁴ Actual wage income is not generally used to determine entitlement to partial disability after the employee finishes vocational training either; rather benefits are paid based upon the difference between pre-injury actual wage income and the *higher of* the actual post injury earnings or “the employee’s wage-earning capacity” after vocational retraining is completed.²²⁵

The *Gronfur* court’s cite to Larson’s Workers Compensation treatise as supportive is incorrect, as the quote is taken out of context. Larson shows that the difference between use of the terms “actual wages” and “earnings capacity” is because the former is used only to determine pre-injury wage basis and the latter to determine post injury income loss. Professor Larson explains why it is important to focus on the more expansive concept of “earnings capacity” post-injury:

In essence, the problem is one of tying earnings to a period of time. The relevant period of time for prior earnings can be made relatively short and definite, such as the six months [or one year] preceding the accident. Once an arbitrary past period is specified as setting the basis for computing an average weekly wage, there can be little argument about what wages were in fact earned. But the relevant period for post-injury earnings melts away into the indefinite future. Obviously we cannot take an arbitrary period of, say, six months after the injury as conclusive, since for a multitude of reasons that period might be entirely nonrepresentative. On the

statewide job pool where the worker lives.” N.D. CENT. CODE § 65-05-10(3) (2013). While actual post injury earnings are presumptive evidence of earnings capacity, this is strictly limited to circumstances where the employee found full time work and in a job related to the employee’s transferable skills. *Id.* Moreover, the presumption to use actual wage income is rebuttable. Also consistent with the emphasis on *earnings capacity* post injury, the vocational rehabilitation chapter clearly conditions continuing disability awards and awards of vocational training on loss of earnings capacity. *See, e.g.*, N.D. CENT. CODE § 65-05.1-04(4) (2013). There is absolutely no compensation principle to justify using anything other than *loss of earnings capacity* to determine an employee’s eligibility for benefits when he or she reapplies due to a significant change in medical or vocational circumstance.

223. 4 LARSON, *supra* note 7, at § 81.07.

224. North Dakota law provides that if none of the priority options are viable, the employee must continue to seek work or be subject to termination for noncompliance. N.D. CENT. CODE § 65-05.1-01(6)(a) (2013).

225. N.D. CENT. CODE § 65-05.1-06.1(2)(i)(2) (2013).

other hand, we cannot wait out the rest of claimant's life to see what his or her average weekly wage loss ultimately turned out to be. The normal solution is to make the best possible estimate of future impairment of earnings, on the strength not only of actual post-injury earnings but of any other available clues.²²⁶

Clearly, in determining the employee's lifetime loss of income, the employee's *actual post-injury earnings* are wholly inadequate in determining the lifelong loss of the income stream the worker could have earned but for the injury.²²⁷ Actual wages are not the measure of this loss; loss of earnings capacity is.

Thus, Larson notes that every Workers Compensation Act focuses on the employee's "retained earnings capacity" rather than actual post-injury earnings in determining the disability award (as opposed to pre-injury actual wages that set the *amount* of the weekly disability check). This focus on retained earnings capacity is essential because injured workers frequently find themselves at a considerable disadvantage in obtaining employment after released to do some kind of work, most often of a kind the worker had never performed before, as they go from performing heavy labor to light work only. Since, as the *Gronfur* Court held, "actual wage loss," means the loss of a job, the State turns its back on injured employees whose injury is the primary reason they cannot obtain work.

The extremely harsh construction of the reapplication statute should be ameliorated by allowing an employee eligibility for reopening of disability under North Dakota Century Code section 65-05.1-04(4). This would still require the employee to show not only a change in medical condition, but also a diligent work search that was unsuccessful due to the injury. In other words, the employee would have to *prove* that he or she had not just lounged on the couch, but was beating the pavement hard for work, and was unable to obtain any employment because of the injury. WSI counsel's testimony at the hearing on H.B. 1080 indicated that WSI might agree that this is a desirable approach.²²⁸

But as is its predilection, WSI did not inform the committee that the North Dakota Supreme Court has unfortunately precluded this argument in *Johnson v. North Dakota Workforce Safety & Insurance*.²²⁹ The court's summary dismissal of the argument is superficial and disheartening:

226. 4 LARSON, *supra* note 7, at § 81.01[1].

227. *Id.*

228. See *Hearing on H.B. 1080*, *supra* note 197, at 2-8 (testimony of Jodi Bjornson).

229. 2010 ND 198, 789 N.W.2d 565.

Johnson argues, however, he was not required to reapply for disability benefits under N.D.C.C. § 65-05-08(1), because he made a series of good-faith work trials and was entitled to reinstatement of disability benefits and a reassessment of his reasonable options for reemployment under N.D.C.C. § 65-05.1-04(4). However, N.D.C.C. § 65-05.1-04(4) falls within the statutory chapter addressing vocational rehabilitation services, and applies only after there has been a determination of the first appropriate rehabilitation option under N.D.C.C. § 65-05.1-01(4). Here vocational rehabilitation services were not initiated under N.D.C.C. ch. 65-05.1, and WSI did not make a determination of Johnson's first appropriate rehabilitation option. We therefore conclude N.D.C.C. § 65-05.1-04(4) does not apply, and we reject Johnson's attempt to circumvent the reapplication requirements under N.D.C.C. § 65-05-08(1) for reinstatement of disability benefits.²³⁰

Based on WSI's representations to the Legislature that an inmate's disability benefits might be resumed "if you can show that you tried to seek work and you couldn't because of your disability,"²³¹ an inmate on release must be deemed to have requested rehabilitation services under North Dakota Century Code section 65-05.1-01(8)(b).²³² This would acknowledge that any informed employee would request rehabilitation services to meet the *Johnson* exception so as to allow for reinstatement upon proof a good faith work search failed due to injury under North Dakota Century Code section 65-05.1-04(4). In pending litigation however, WSI now pretends as though it had not made this representation to the legislature, contending that job search evidence is irrelevant and that the inmate on release must show a significant change in medical condition and actual wage loss, rather than an inability to obtain work evidenced by unsuccessful job search.²³³

The Legislature should amend the reapplication statute to provide that benefits must be reinstated on proof of a significant change in medical condition, and "loss of earnings capacity." If WSI's opinions are as they

230. *Id.* ¶ 20, 789 N.W.2d at 570.

231. *See Hearing on H.B. 1080, supra* note 197, at 20 (testimony of Jodi Bjornson).

232. *See* N.D. CENT. CODE § 65-05.1-01(8) (2013) (allowing either WSI *or an employee* to initiate vocational rehabilitation services).

233. In an unreported case, *Miller v. North Dakota Workforce Safety & Insurance*, decided by an ALJ on other grounds, WSI rejected the argument that under its representations to the Legislature, it must deem the inmate to have requested initiation of vocational services to avoid the harsh result in *Johnson v. North Dakota Workforce Safety & Insurance*, 2010 ND 198, ¶ 20, 789 N.W.2d 565 (materials in possession of author).

were represented to the Senate Industry, Business and Labor Committee as the legislature considered H.B. 1080, the agency should support an amendment to allow disability benefits on reapplication under North Dakota Century Code section 65-05-08(1)(b) on proof of loss of earnings capacity—as in a failed job search. Reapplications will still be subject to strict criteria of both a substantial change in medical *and* vocational circumstance.

Unfortunately, as the Legislature ostensibly considered WSI's bill to apply the actual wage loss requirement to prisoners on release from incarceration, the committee did not seize the opportunity to understand the harsh application of the reapplication statute. Rather, the Legislature granted WSI's sought amendment to preclude incarcerated employees from ever being able to meet the exacting standard for reinstatement of disability benefits on release from prison. Even if there is little sympathy for those who offend society by committing a crime, society as whole surely does not benefit by adding a punishment under the Workers' Compensation statutes.²³⁴ As one commentator persuasively argues, because uncompensated injuries contribute to recidivism, society suffers not only property and health loss, but also the loss of a future taxpayer.²³⁵ And even if one ignores the public policy problem of transferring the economic losses to other governmental and charitable entities that often cannot fill the void, there must be some sympathy for the innocent dependents of the released inmate.

The court's construction of the reapplication statute is harsh, and offends basic workers' compensation principles. The interpretation of the reapplication statute does not allow reinstatement on the same terms as initial applications—the inability to *obtain* work—but rather requires the employee to show he or she had a job at the time of reapplication. This vicious circle precludes the employee from proving disability on reapplication for the very reason that he or she is disabled in the first place—that the employee could not obtain the job that would have proved the actual wage loss. So, on reapplication these employees find themselves confronted with a paradoxical argument: the employee's very disability that WSI seeks to refute serves as a defense to WSI on reapplication.

234. See generally Steven A. Weiler, *A Time for Recognition: Extending Workmen's Compensation Coverage to Inmates*, 61 N.D. L. REV. 402 (1985).

235. *Id.* at 421-22. Weiler argues that five public policy considerations underlie the extension of coverage to inmates: (1) economic; (2) justice and equity; (3) constitutional guarantees; (4) reduction of recidivism; and (5) nonfault liability. *Id.* at 413.

B. EMPLOYMENT DECISIONS AS SUBTERFUGE
TO TERMINATE DISABILITY

By requiring the loss of a job to prove actual wage loss on reapplication, the court has largely reversed the *Lass* principle that a prior disability determination should not be res judicata if the employee has sustained a change in medical and vocational circumstances.²³⁶ Interestingly, while an employee is no longer allowed to prove that his or her failure to obtain work despite a good-faith work search constitutes a significant change in vocational circumstances (to avoid the prior termination of disability being given res judicata effect), an employee fired for cause may be entitled to reinstatement. An employee fired for cause need not show actual wage loss, but may instead prove that after the termination he made a good faith job search and was unable to obtain work due to the work injury.²³⁷ It is odd, indeed, that an employee terminated for cause has a better opportunity for reinstatement based on a failed job search than do blameless employees who suffer a change in medical condition and cannot locate work.

Claimants' advocates have observed employers coordinating a strategy with WSI to terminate disability benefits—leaving most employees ineligible for reinstatement. The common scenario is an employee with a heavy work history who is now restricted to light duty only. If the employee's recovery and release to regular duty appears to be longer than is customary to the injury, WSI and the employer are motivated to create a transitional or modified job, which from the employee's view may be make-work. Once the physician confirms a work release, the employee is obligated to engage a work trial or benefits are terminated.²³⁸ Shortly after the transitional job begins, the make-work may end in frustration and quitting, or the employer may subsequently fire the employee without giving cause. The employee no longer has wage income, and by virtue of disability benefits having been discontinued when the job trial began, reinstatement under the reapplication statute becomes very unlikely.

Individuals coming to North Dakota for these great job opportunities may soon find themselves abandoned after an injury occurs when they

236. While some may argue that the diagnosis must have changed, the change in medical condition should be established by a *change in the work restrictions*. However, change in vocational circumstances should be proved by the inability to obtain work due to injury as demonstrated by failure of a good faith work search.

237. See *Wendt v. N.D. Workers Comp. Bureau*, 467 N.W. 2d 720, 727-28 (N.D. 1991) (holding that a change in vocational circumstances can warrant reopening of the disability claim).

238. N.D. CENT. CODE § 65-05-08(7) (2013) (providing a defense to compensation if the employee “voluntarily limits income or refuses to accept employment suitable to the employee’s capacity, offered to or procured for the employee . . .”).

return home to rehabilitate. Some cannot find a physician in their home state, but all whose disability benefits had been discontinued find that reinstatement is nearly impossible because they are unable to locate work again to establish actual wage loss. The brute fact is that many who come here have a history of heavy work only and do not have the education or skills to obtain or perform the light duty work they are restricted to performing. Workers' Compensation theory considers this proof of disability. North Dakota may be the lone outlier.

C. EARNINGS CAPACITY UNDER THE VOCATIONAL REHABILITATION CHAPTER

While the vocational rehabilitation provisions found in North Dakota Century Code chapter 65-05.1 correctly uses earnings capacity to determine post injury awards, there continues to be significant limitations. North Dakota law generally limits total disability benefits to two years²³⁹ and partial disability benefits to five years.²⁴⁰ Although partial disability is also limited to just one year if vocational training was awarded.²⁴¹ However, if the employee does not retain any earnings capacity, the partial disability benefit will be equal to the total disability award.²⁴² On its face, the vocational rehabilitation scheme is a salutary effort to encourage return to work as the first option,²⁴³ but if an employee is unable to return to her former line of work or any other for which she is fitted, the chapter provides vocational retraining.²⁴⁴ Vocational rehabilitation is awarded only when the employee is unable to return to any "substantial gainful employment"

239. North Dakota law limits temporary total disability benefits to 104 weeks. N.D. CENT. CODE § 65-01-02(29) (2013). This limit does not apply to permanent total disability, which is narrowly defined by North Dakota Century Code section 65-01-02(25). *See* N.D. CENT. CODE § 65-01-02(25) (2013).

240. N.D. CENT. CODE § 65-05-10(2) (2013).

241. N.D. CENT. CODE § 65-05.1-06.1(2)(i)(4) (2013). The court has upheld this one-year limit. *See* *Eagle v. N.D. Workers Comp. Bureau*, 1998 ND 154, ¶ 15, 583 N.W.2d 97, 102 (explaining that the legislative history for the reduction says "that benefits should be concentrated in the area of the most need, and workers who have been retrained have received rehabilitation of earnings as best the system can provide.").

242. North Dakota Century Code section 65-05.1-01(6)(c) provides that if the employee rebuts the presumption of a retained earnings capacity, "the employee may receive partial disability benefits based on a retained earnings capacity of zero." N.D. CENT. CODE § 65-05.1-01(6)(c) (2013).

243. North Dakota Century Code section 65-05.1-01(3) provides that it is the "goal of vocational rehabilitation to return the disabled worker to substantial gainful employment with a minimum of retraining, as soon as possible after an injury." N.D. CENT. CODE § 65-05.1-01(3) (2013).

244. North Dakota Century Code section 65-05.1-01(4) provides a hierarchy of priority options that returns the employee to substantial gainful employment (90% of the pre-injury wage). N.D. CENT. CODE § 65-05.1-01(4) (2013).

considering the employee's education, experience, skills, and work restrictions.²⁴⁵ Vocational rehabilitation is not available if an employee retains an "earnings capacity" of 90% of her pre-injury wage or the capacity to earn 66.67% percent of the state's average weekly wage, whichever is less.²⁴⁶ This is referred to as the "income test." In the initial years after enactment of this chapter, a significant number of workers were rehabilitated through vocational rehabilitation. However, in recent years, significantly fewer workers have received vocational rehabilitation awards.²⁴⁷ The reduction in vocational rehabilitation awards has been accomplished in two ways. First, the Legislature has consistently lowered the income test. When enacted in 1989, vocational rehabilitation was required if the workers did not retain the capacity to earn the lesser of their entire pre-injury wage, or North Dakota's average weekly wage, whichever was lower. The Legislature reduced the income test in 1991 and again in 1995.²⁴⁸

The other reason that vocational rehabilitation awards have declined is simply to reduce costs. As is the case in medical causation disputes, vocational rehabilitation should hinge upon expert evaluation and testimony, but the vocational consultants WSI hires in-house are increasingly non-expert. In recent years, vocational consultants have consistently identified low-wage, low-skilled, generic jobs as sufficient employment for an injured worker—in one case finding a man who lost his right arm did not require vocational rehabilitation because he could work delivering pizzas.²⁴⁹ Given this predilection to manufacture an earnings capacity based on make-work type jobs, the rehabilitation chapter could be aptly called a termination statute.

245. N.D. CENT. CODE § 65-05.1-01(3) (2013).

246. *Id.*

247. North Dakota Century Code section 65-05.1-02.1 requires WSI's vocational consultant to identify the "first appropriate rehabilitation option." N.D. CENT. CODE § 65-05.1-02.1 (2013). The consultant identifies a broad class of jobs she believes the employee can perform, along with the anticipated retained earnings capacity. N.D. CENT. CODE § 65-05.1-02.1(2)(a) (2013). In most cases, WSI's vocational consultant concludes that the employee is "employable" and retains a "substantial earnings capacity," thus disqualifying the worker from vocational retraining.

248. 1991 N.D. Laws 714, § 55 (reducing the income test to 75% of the state's average weekly wage); 1995 N.D. Laws 628, § 2 (reducing the income test to 66.66% of the state's average wage).

249. See for example *Zimmerman v. Valdak Corp.*, in which the injured worker brought suit against his employer, alleging an intentional tort. 1997 ND 203, 570 N.W.2d 204. The court disallowed suit against the employer, holding that even gross negligence is insufficient to pierce employer immunity, stating the intentional tort exception requires a genuine "intent to injure." *Id.* ¶¶ 6-22, 570 N.W.2d at 205-09. The case is illustrative because the vast majority of cases have upheld WSI's determination that the employee can return to entry level work, based upon the ipse dixit of WSI's vocational consultant. Unfortunately, employees do not have the funds to hire their own vocational experts to refute WSI's consultant.

In many states, the odd-lot doctrine protects the employee by shifting the burden of proof to the compensation carrier where the medical restrictions and limited vocational options are such as to render it speculative the employee could find work. The odd-lot doctrine recognizes that if an employee cannot return to any “well-known branch of the labor market,” the burden must be on the employer. For an “unskilled or common laborer,” who “couple[s] his request for employment with notice that the labor must be light . . . is quickly put aside for more versatile competitors. Business has little patience with the suitor for ease and favor. He is the odd lot man Work, if he gets it, is likely to be casual and intermittent.”²⁵⁰ North Dakota has not accepted the odd-lot doctrine, and in fact reverses it. The rehabilitation statute provides that even if the vocational consultant concludes that none of the priority options under are viable, nevertheless the employee is required to “minimize the loss of earnings capacity, to seek, obtain, and retain employment,” and that “an employee is presumed to be capable of earning the . . . wages payable within the appropriate labor market. This presumption is rebuttable only upon a finding of clear and convincing medical and vocational evidence to the contrary.”²⁵¹

Under this reasoning, WSI can reduce benefits to everyone who gets hurt, contending that injured North Dakotans should accept any trivial or mundane employment. The unfairness of this system seems rather obvious; an injured employee with a high school education, heavy-labor work history, and few computer or customer service skills is surely at a competitive disadvantage with a younger technologically literate competitor for such work.

D. EMPLOYEES ARE MANEUVERED TO VOCATIONAL NONCOMPLIANCE

Although a great number of injured workers have only high school educations, low TABE (Test of Adult Basic Education) scores, a history of only heavy manual labor, and few actual transferable skills allowing them to compete for employment with a younger, computer-savvy, and able-bodied work force, WSI is likely to write a vocational plan for a return to an occupation in the statewide job pool in generic jobs.²⁵² WSI also writes

250. *Balczewski v. Dep’t of Indus., Labor, and Human Rights*, 251 N.W.2d 794, 798 (Wis. 1977).

251. N.D. CENT. CODE § 65-05.1-01(6)(c) (2013).

252. N.D. CENT. CODE § 65-05.1-01(4)(f) (2013) (providing for return to work in the statewide job pool “which is suited to the employee’s education, experience, and marketable skills.”).

these vocational plans even when retraining would otherwise be a higher vocational option, concluding—often without evidence—that the claimant is not a vocational rehabilitation candidate.²⁵³ An employee is obligated by law to conduct a good-faith work search to remain eligible for the reduced partial disability benefits available due to an alleged retained earnings capacity.²⁵⁴ Failure to conduct a work search results in termination.²⁵⁵ Even before the vocational plan is issued, WSI is likely to have required employee participation in number of vocational tests and in remedial education.²⁵⁶ For example, an employee with a heavy work history, low grades in high school, poor TABE scores, and no ability to use a computer is often found to have a retained earnings capacity in the entry-level jobs of telephone solicitor and hotel clerk. These jobs require computer literacy. Employees report that the computer training is very basic, providing no real skills, but competency is assured by virtue of taking the same test until one learns the correct answers and passes. The employee is thereby found to have a retained earnings capacity in a job he really cannot do, but is required to continue to search for work, day after day.

On its face, of course, the job search requirement makes eminent sense. Yet, in practice, practitioners have noted WSI discounts job search via perusal of want ads in the papers and at job service. Rather, WSI claims that a good faith job search requires the employee to make five direct employer contacts per day, such as cold-calling. The job search obligation continues throughout the lifetime of the disability claim. After months of rejection, few employees are able to maintain the eager motivation to continue the pointless job search. Rather than provide real vocational rehabilitation as North Dakota Century Code chapter 65-05.1 was designed to do, WSI is able to gamble on noncompliance and win.

253. While North Dakota Century Code section 65-05.1-01(4)(g) provides for vocational rehabilitation, WSI frequently skips the retraining option, instead applying the catch-all requirement in North Dakota Century Code section 65-05.1-01(6) that requires all employees to continue to “minimize the loss of earnings capacity, to seek, obtain, and retain employment.” N.D. CENT. CODE § 65-05.1-01(4)(g) (2013).

254. North Dakota Century Code sections 65-05.1-04(4) and (6) provide that the employee is responsible to make a good-faith work search. N.D. CENT. CODE §§ 65-05.1-04(4), (6) (2013). Under WSI’s interpretation of North Dakota Century Code section 65-05-08(7), an employee is obligated to accept even make work, as disability benefits are not payable if the employee voluntarily limits income or refuses to accept suitable employment.

255. N.D. CENT. CODE § 65-05.1-04(4) (2013).

256. North Dakota Century Code section 65-05.1-04(6) also requires participation in all vocational testing and meetings with the vocational coordinator. N.D. CENT. CODE § 65-05.1-04(6) (2013).

E. DISABILITY OF THE ELDERLY

North Dakota has also reduced disability benefits available to employees who reach retirement age. While North Dakota had long offset federal social security disability benefits,²⁵⁷ in 1989 it also began to offset federal retirement benefits.²⁵⁸ Additionally, an injured employee who receives social security retirement benefits or “attains retirement age for social security retirement benefits” is presumed retired and ineligible for disability benefits.²⁵⁹ If an employee is injured within two years of reaching the presumed retirement age, disability is limited to an additional two years.²⁶⁰ For those who continue working beyond retirement age and are unfortunate enough to suffer an injury at work, the Legislature has capped disability at three years.²⁶¹ This ill-considered state policy ignores the fact that many working people have not saved for retirement and depend upon a paycheck long after they reach retirement age.

Two states, Utah and West Virginia, have questioned whether the state legislature may constitutionally impose the cost of disability on the injured worker rather than the workers’ compensation system for those over the presumed retirement age.²⁶² The Utah Supreme Court held that Utah’s statutory scheme to certain individuals who qualified for both social security retirement benefits and workers’ compensation benefits violates Utah’s uniform operation of the law guarantee.²⁶³ The court did not find it reasonable for the legislature to single out individuals for reduction of disability benefits based on receipt of social security retirement: “[p]resumably the legislature was attempting to account for the additional income available to social security retirement recipients. But if income is the criterion, there is no rational basis to rely only on income from a single source.”²⁶⁴ The court would have concluded that the classification failed to pass constitutional muster for that reason alone. Although the court noted potential legitimate purposes: to prevent duplication of disability benefits;

257. N.D. CENT. CODE § 65-05-09.1 (2013).

258. N.D. CENT. CODE § 65-05-09.2 (2013).

259. N.D. CENT. CODE §§ 65-05-09.3(1), (2) (2013).

260. N.D. CENT. CODE § 65-05-09.3(4) (2013).

261. N.D. CENT. CODE § 65-05-09.3(3) (2013).

262. *Merrill v. Utah Labor Comm’n*, 223 P.3d 1089, 1094 (Utah 2009). *See also* State ex rel. Boan v. Richardson, 482 S.E.2d 162, 168 (W.Va. 1996); *but see* Fitzgerald v. Fitzgerald, 639 S.E.2d 866, 873-75 (W.Va. 2006) (“Workers’ compensation has never been intended to make the employee whole—it excludes benefits for pain and suffering, for loss of consortium, and it provides a cap on wage benefits Accordingly, we conclude that our isolated statement in *Boan* has been implicitly modified by our subsequent rulings on this subject.”).

263. The Utah Supreme Court reversed the Utah Court of Appeals, which had upheld the statute. *Merrill*, 223 P.3d at 1091-92.

264. *Id.* at 1094.

to reduce the cost of workers' compensation for employers; and to and restore solvency to the fund.²⁶⁵ It said that reducing the employer's cost is not a legitimate objective because the Workers Compensation Act "has already limited the liability of employers" by limiting compensation to injured employees to statutorily defined recoveries.²⁶⁶ But, the court said, the legislature may be legitimately concerned to prevent duplication of disability and to protect the fund's solvency.²⁶⁷

Ultimately, the court turned to the crux of the matter: whether the legislative classification bears a reasonable relationship to these legitimate governmental purposes. The court said that the purpose of workers' compensation is to provide an exclusive remedy for work injuries, which places the burden of work injury on industry, where it belongs.²⁶⁸ The purpose of social security, on the other hand, is to guarantee pension income to the elderly, who had typically constituted an impoverished group.²⁶⁹ Thus, the court said, social security and disability are not duplicative of one another.²⁷⁰ Social security benefits are based upon having worked and contributed to the fund for the requisite number of quarters; disability benefits should be paid to any injured employee who suffers a wage loss on account of a work-related injury.

Because the statutory schemes are not duplicative, the court said the classification does not bear a reasonable relationship to a legitimate purpose of avoiding duplication of benefits.²⁷¹ It also held that punishing injured workers by reducing the degree to which they could be compensated for proven wage loss "is not a rational response to the legislature's concerns about maintaining the solvency of the workers' compensation fund"²⁷² The court agreed with the West Virginia Supreme Court of Appeals that assuming receipt of social security benefits fully compensates a worker for losses due to injury "raises a genuine issue whether the workers' compensation scheme is an adequate substitute remedy."²⁷³ The North Dakota Supreme Court has declined to address the issue, finding that a claimant failed to adequately brief her argument that the workers'

265. *Id.* at 1094-95.

266. *Id.* at 1095.

267. *Id.* at 1094.

268. *Id.* at 1095.

269. *Id.* at 1096.

270. *Id.* at 1096-98.

271. *Id.* at 1098.

272. *Id.*

273. *Id.* at 1097 (quoting *State ex rel. Boan v. Richardson*, 482 S.E.2d 162, 168 (W.Va. 1996)).

compensation statute setting forth the “retirement presumption” violated equal protection guarantees of federal and state constitutions.²⁷⁴

F. CAUSE OF DISABILITY

Just as an employment injury need not be the sole cause of injury, but only a “substantial contributing factor” to an injury,²⁷⁵ the same rule applies to disability. The North Dakota Supreme Court has long held that the employee need not show the work injury is the sole or even primary cause of disability, but a “substantial contributing factor.”²⁷⁶ *Brockel v. North Dakota Workforce Safety & Insurance*²⁷⁷ illustrates the Agency’s predilection to obfuscate the legal issues. The court reversed WSI’s termination of Brockel’s disability benefits rendered on the theory that, while he continued to have work restrictions from his injury, the “primary disabling factor” was a non-work-related vertebral artery occlusion that could not be surgically corrected.²⁷⁸ Brockel requested a hearing, claiming the legal error that violated the substantial contributing factor principle.²⁷⁹ At the hearing, WSI simply argued that the inability to surgically cure a non-work disability ended WSI’s obligations to pay disability benefits. WSI did not dispute that his work injury continued to carry a five-pound lifting restriction, which the agency had deemed disabling, paying disability benefits based on those work restrictions.²⁸⁰ Rather than decide whether the inability to cure the work-related disability to his shoulder justified termination of his disability as stated in the notice, the ALJ decided he lacked medical verification of disability²⁸¹ and that he was not “completely

274. *Weeks v. N.D. Workforce Safety & Ins.*, 2011 ND 188, ¶ 13, 803 N.W.2d 601, 606.

275. *Satrom v. N.D. Workmen’s Comp. Bureau*, 328 N.W.2d 824, 831 (N.D. 1982) (“If the Bureau’s position is that Satrom’s injury must not only be causally related to her employment, but that the employment must be the sole cause of her acute disc syndrome, we do not agree. It is sufficient if the work-related stress is a ‘substantial contributing factor’ to the injury.”).

276. *Holtz v. N.D. Workers Comp. Bureau*, 479 N.W.2d 469, 471 (N.D. 1992) (citing *Satrom*, 328 N.W.2d at 831).

277. 2014 ND 26, 843 N.W.2d 15.

278. *Id.* ¶¶ 19-21, 843 N.W.2d at 23-24. The court, noting that it had long held that a claimant need not prove that the work-related injury is the sole cause or even primary cause of the disability, but only that it be a “substantial contributing factor” to the disability, said “[c]learly, it is work-related injury that is at the center of the legislature’s attention.” *Id.* ¶ 21, 843 N.W.2d at 24.

279. *Id.*

280. *Id.* ¶ 22. The court explained that the ALJ’s conclusion about his work injury is “especially troubling” because “WSI had been paying Brockel disability benefits since the accident” and no doctor had released Brockel to return to his former line of work, despite his limitations and heavy work history. *Id.*

281. WSI’s Notice of Intent to Discontinue Disability Benefits did not advise Brockel that benefits were terminated lacked medical verification of disability under North Dakota Century Code section 65-05-08.1. WSI had never sought a new medical verification of disability from

disabled,” which is not a defined term under the Act. The decision took no cognizance of Brockel’s heavy work history and completely ignored the vocational factors that make up every disability determination.²⁸² The case is illustrative of the agency’s win at all costs litigation posture, arguing a legal theory on appeal that it had not proffered at the hearing.

V. WSI’S ADVERSARIAL LITIGATION STRATEGY

WSI’s litigation strategy relying on IMEs is in stark contrast to *Satrom*, where the court undertook rigorous review and WSI relied on the treating physician. WSI’s own medical director reported in 2012 that he had been pressured to change his medical opinions²⁸³ and in 2014 that “the legal process overrides medical opinions” in the review of injured worker’s claims.²⁸⁴ WSI’s aggressive litigation posture and the poor compensation for claimant’s counsel have created a dearth of attorneys practicing workers’ compensation law. Claimants are losing access to counsel, which absent systemic change in the system, will only worsen over time. It cannot be contested that legal services have value; according to the Office of Administrative Hearings, pro se claimants prevail about 19% of the time and represented workers about 33% of the time.²⁸⁵

A. CLAIMANTS LACK ACCESS TO LEGAL COUNSEL

The practice of workers’ compensation law is impeded not only by an unnecessarily adversarial litigation strategy, but also by the fact that most injured workers cannot afford to retain counsel, and WSI’s compensation of

Brockel as is required under the statute. See *Frohlich v. N.D. Workers Comp. Bureau*, 556 N.W.2d 297, 302 (N.D. 1996) (holding specific notice of intent to discontinue benefits for lack of medical verification of disability is required); see also *Flink v. N.D. Workers Comp. Bureau*, 1998 ND 11, 574 N.W.2d 784.

282. The court recognized that “[t]he ‘essence’ of the concept of disability under workers compensation law is the ‘proper balancing of the medical and the wage-loss factors.’” *Brockel*, ¶ 22, 843 N.W.2d at 24 (quoting 4 LARSON, *supra* note 7, at § 80.02). As Professor Larson explains:

The two ingredients usually occur together; but each may be found without the other. A claimant may be, in a medical sense, utterly shattered and ruined, but may by sheer determination and ingenuity contrive to make a living. Conversely, a claimant may be able to work, in both the claimant’s and the doctor’s opinion, but awareness of the injury may lead employers to refuse employment. These two illustrations will expose at once the error that results from an uncompromising preoccupation with either the medical or the actual wage-loss aspect of disability.

4 LARSON, *supra* note 7, at § 80.02.

283. Pat Springer, *WSI doctor says he was pressured on claims*, FARGO FORUM, Feb. 26, 2012, <http://www.inforum.com/event/article/id/352186/>.

284. Pat Springer, *North Dakota workers’ comp doctor says opinions repeatedly bypassed*, FARGO FORUM, Mar. 16, 2014, <http://www.prairiebizmag.com/event/article/id/18387/group/Health%20Care/>.

285. Letter from Allen C. Hoberg to Nancy J. Morris (Dec. 2, 2013) (on file with author).

attorneys is exceedingly low. Additionally, WSI has recently announced its intent to increase the hourly rate from \$135 per hour to \$140 per hour, with accordingly miniscule changes to the caps on fees, which apply at every stage of the proceeding, from hearing to appeal.²⁸⁶

Unfortunately, the court has upheld the sufficiency of whatever fee caps WSI wishes to set.²⁸⁷ However, the majority noted that the claimant's attorney's arguments "are perhaps valid criticisms of the attorney fee payment scheme,"²⁸⁸ but upheld the rule under the extremely deferential standard of review. The court acknowledged that:

The fee restrictions may discourage some attorneys from representing workers compensation claimants. If that is the case, they have identified a problem properly the concern of the Legislature We offer no opinion on the wisdom of the legislative mandate to the Bureau, but conclude only the record of this rulemaking proceeding is adequate under the Act, and the Bureau's promulgation of the maximum hourly rate and the fee caps was not an arbitrary or capricious application of its statutory authority.²⁸⁹

Of course, WSI has the authority to change the caps to a reasonable level, but has simply refused to exercise it, enjoying its significant resource advantages. In reply to the proposed changes to the rates and caps, claimants' attorneys have noted that the new rate of \$140 per hour is certainly not competitive in the current legal environment. Moreover, these low hourly fees are entirely contingent. While the claimants' bar does dedicate a large amount of uncompensated time, no attorney can operate a practice representing WSI clients without charging the bulk of the fee to the injured worker.²⁹⁰ The "add-on" fee paid by WSI is almost a de-minimis benefit at this point. As was argued in *Little v. Traynor*, the "insufficiency of fees paid to an employee's attorney is evidenced by the fact that defense counsel are paid the same hourly rate, but on a non-contingent basis, with no fee caps."²⁹¹ No doubt egregious low caps on fees preclude many injured workers from finding legal counsel. Moreover, North Dakota is

286. N.D. ADMIN. CODE § 92-01-02-11.1 (2013). The fee cap for all representation through the hearing is a paltry \$5,500.00. See N.D. ADMIN. CODE § 92-01-02-11.1(3)(c) (2013).

287. See *Little v. Traynor*, 1997 ND 128, ¶ 42, 565 N.W.2d 766, 777.

288. *Id.* ¶ 24, 565 N.W.2d at 774.

289. *Id.* ¶ 6, 565 N.W.2d at 775.

290. In *Ash v. Traynor*, the court held that the attorney may obtain a fee from the client and bill WSI to reduce the client's legal bill. 2000 ND 75, ¶ 11, 609 N.W.2d 96, 100. The claimant's attorney does not receive a duplicate fee, but simply shifts part of the fee to WSI. *Id.*

291. 1997 ND 128, ¶ 19, 565 N.W.2d 766, 773.

probably alone in forbidding use of an attorney's lien to secure payment.²⁹² Just as unavailability of a mortgage would retard home ownership, the inability to place a lien on a recovery limits access to legal counsel.

By contrast, WSI brings to bear enormous resources, including claims adjusters, investigators, legal assistants, in-house counsel, medical consultants, and outside counsel, against which formidable resources the claimant's attorney stands alone. While WSI pays to call its IME expert to testify, claimants are left to fend for themselves with no resources to call the claimant's treating doctor to testify. At one time, when commissioners heard these cases and the agency was represented by the attorney general, the treating physician was examined in the vast majority of cases. Now, the playing field is completely tilted to a defense strategy, which would be fine if the agency was simply an insurer that appears before an independent commission charged with the duty to be impartial.

The claimant, moreover, has the burden of proof.²⁹³ It is astounding that WSI has set fee caps so much lower than the statistics show is required to present an adequate case, which for the hearing is limited to just \$5,500.00.²⁹⁴ According to WSI's annual reports, the agency paid its own lawyers well over three times what was paid to claimant's counsel in 2011 and 2012.²⁹⁵ WSI has paid more money to the Office of Administrative Hearings for the cost of judges than to claimant's counsel.²⁹⁶

The question for WSI is whether injured workers should have access to counsel. From 1919 until the mid-1990's the value of legal representation was little questioned. Such inadequacies indicate that WSI acts in an adversarial position to injured workers, and most individuals denied benefits absolutely need counsel. WSI's use of outside counsel and IMEs illustrates, starkly, this adversarial attitude.

Professor Larson notes that the majority of states provide an "add-on" fee precisely because benefit levels are not sufficient to provide a living for the claimant and his or her family. "Once legal representation of the claimant is recognized to be one of the given facts of present compensation practice, the legislative treatment of the problem—allowance of fees above the basic award—would seem to follow as a matter of course."²⁹⁷

292. N.D. CENT. CODE § 65-05-29 (2013) (stating that except for child support obligations or claims by Job Service or WSI for repayment, "[a]ny assignment of a claim for compensation under this title is void.>").

293. N.D. CENT. CODE § 65-01-11 (2013).

294. N.D. ADMIN. CODE § 92-01-02-11.1(3)(c) (2013).

295. WORKFORCE SAFETY AND INSURANCE, 2011 AND 2012 WORKFORCE SAFETY AND INSURANCE FINANCIAL STATEMENTS 35 (2012), http://www.nd.gov/auditor/reports/WSI_12.pdf.

296. *Id.*

297. 8 LARSON, *supra* note 7, at § 133.07.

Crucially, Professor Larson observes that “some administrators feel that legal fees unnecessarily cut down the worker’s net recovery, that the worker would frequently do just as well without the lawyers *since the board will always look after the workers’ interests*.”²⁹⁸ However, North Dakota does not have an independent overseer, such as a commission. Rather, North Dakota commingles the insurance and oversight function in one agency. Since WSI now uses outside counsel and IMEs to fight nearly every contested case, the idea that this agency “will always look after the workers’ interests” mocks truth and justice.

The Colorado Supreme Court has noted that it could not have been the legislative intent to allow a fee on “such a low and unreasonable level as would foreclose a claimant from obtaining competent counsel,” for this may well deny due process.²⁹⁹ Professor Larson notes that some policy makers “carry restrictions on fees to the point where they may well injure claimants as a class both by hindering the growth of an able compensation bar and by making it economically impossible for claimant’s lawyers to give the necessary time to the preparation of each case.”³⁰⁰ This is the case now in North Dakota. The claimants’ bar has been decimated, and the few lawyers who take any cases are aging.

North Dakota policymakers, legislators, administrators, and courts must examine workers compensation down to its roots. Among the essential questions: does WSI think it protects injured workers so they do not need counsel? What is the evidence? Is this not belied by the aggressive use of IMEs rather than fairly examining the opinion of the treating doctor as it once did? Does WSI believe that attorneys are adequately compensated? Then why are most attorneys unwilling to represent injured workers? Do attorneys serve a purpose, or is WSI satisfied with the eventual demise of the claimant’s bar in our state? Should injured workers have access to legal services? If rates and caps are not raised, how will access be assured?

Such questions starkly answer themselves. As to IMEs, WSI claims it does not use them outside of the industry standard.³⁰¹ But North Dakota

298. *Id.* at § 133.05 (emphasis added).

299. *Cline v. Warrenberg*, 126 P.2d 1030, 1031 (Colo. 1942).

300. 8 LARSON, *supra* note 7, at § 133.07.

301. Sedgwick, who conducted WSI’s 2014 performance evaluation, said in its report issued that WSI does not use IMEs more often than is the case in other states. N.D. WORKFORCE SAFETY AND INSURANCE, 2014 PERFORMANCE EVALUATION OF NORTH DAKOTA WORKFORCE SAFETY AND INSURANCE 29 (2014), http://www.nd.gov/auditor/reports/wsi_pe_14.pdf. What Sedgwick misses is that while WSI may use IMEs rather rarely out of the universe of all claims filed, it uses them in nearly every case litigated by a claimant represented by legal counsel. North Dakota has a low incidence of IMEs only because it has squeezed the life out of the claimants’ bar.

has much less litigation given the paucity of attorney representation, and WSI uses an IME in nearly every contested case that involves causation. Access to counsel simply cannot be improved without significant changes to reimbursement. As the fees will remain contingent, the unfairness of the drastic fee caps—so that even winning cases are taken at a loss—is not sustainable. The fee caps should be at least doubled. Additionally, North Dakota should consider amending the statutes to provide for an attorney’s lien—much like the justification for creation of a purchase money security interest, the claimant would not be enjoying receipt of benefits without the legal representation.

B. WSI RELIES ON IMES ABOVE TREATING PHYSICIANS

WSI’s adversarial litigation posture is front-and-center in the proliferation of IMEs. WSI’s use of IMEs in litigation is highlighted in the 2014 performance audit. The auditor said “[i]t is noteworthy that no North Dakota licensed physician performed any of the examinations in our claim review sample.”³⁰² WSI apparently made no concerted effort to recruit North Dakota medical providers to conduct IME’s since 2010.³⁰³ According to the audit of the IME process, “[s]eventy-five percent of the IME decisions in the evaluation group of 75 claims/80 evaluations were made in favor of WSI. Only 23% of the IME decisions agreed with the treating physician in the North Dakota sample.”³⁰⁴ Remarkably, in the other five jurisdictions used for comparison purposes, the IME’s disagreed with the treating physician only 43% of the time, rather than 75% of the time, as in North Dakota.³⁰⁵

Just the prior legislative session, two Senators with inside knowledge of WSI matters, Senator Kilzer and Senator Carlisle,³⁰⁶ introduced a bill to address WSI’s excessive reliance on independent medical examinations to deny legitimate claims.³⁰⁷ Section 1 of the bill was intended to strengthen the “treating doctor statute,”³⁰⁸ which at the time gave “controlling weight” to the opinions of the employee’s treating doctor over the opinion provided by a doctor in an IME. It is self-evident that the doctor who treats his or her patient and sees the results of treatment is better equipped to answer

302. *Id.* at 9.

303. *Id.*

304. *Id.* at 24.

305. *Id.* at 24-25.

306. Senator Carlisle was a Commissioner at the Bureau in the early 1980s. Senator Kilzer was a medical consultant at the Bureau in the 1990s.

307. S.B. 2298, 63d. Leg. Assemb., Reg. Sess. (N.D. 2013).

308. N.D. CENT. CODE § 65-05-08.3 (2009). As ultimately enacted, S.B. 2298 struck this language from the statute.

questions about the patient than a one-time IME examiner. So it makes simple sense that greater weight is due the treating physician than a hired-gun IME.³⁰⁹ In *Albright v. North Dakota Workforce Safety & Insurance*,³¹⁰ the court, relying upon legislative history rather than the actual language of the “treating doctor statute,” held that the purpose of the statute had simply been to codify existing caselaw that WSI has an obligation to consider the entire record, clarify inconsistencies, and adequately explain its reasons for disregarding medical evidence favorable to the claimant. So long as the ALJ explains why the IME is more persuasive—which claimants’ attorneys have found can be nearly anything—the opinion of the treating doctor is easily disregarded.

At one time, WSI relied on IMEs only in unique or complicated cases and otherwise would elect to examine the treating doctor under oath.³¹¹ In prior years, the Fund had a relationship with the Bismarck Assessment Team, which was composed of a psychiatrist, a neurologist, an orthopedist, and a physiatrist, to perform a joint IME. Unlike now, there was little disagreement between the IME assessment team and the treating doctors. Once rare, IMEs are now routine for the litigator. There is simply no reason to avoid listening closely to the treating doctor who knows so much more about the patient and injury. A treating physician’s opinion all too briefly summarized in a letter can be explored in very good detail at the hearing.

In the past, the opinion of the treating doctor given under oath at the hearing satisfied everyone, even WSI. Many times, the complete and full-bodied opinions of the treating doctor were nuanced to the extent that they actually favor WSI in substantial ways. In order to recover this essential input of treating physicians that alone ensures basic fairness of opportunity and levels the playing field, section 2 of S.B. 2298 would have required

309. According to WSI’s 2008 Performance Evaluation Report, 82% of all of the IMEs were performed by Minnesota physicians and only 18% by North Dakota physicians. 2008 PERFORMANCE EVALUATION REPORT, *supra* note 60, at 92. It is also clear that the IME doctors are paid to render adverse medical opinions. According to WSI’s 2008 Performance Evaluation, the IME reviewer disagreed with the treating doctor most of the time—65% in frank disagreement. *Id.*

310. 2013 ND 97, ¶¶ 21-27, 833 N.W.2d 1, 7-9. The court normally resorts to legislative history only if the language of the statute is ambiguous. See N.D. CENT. CODE § 1-02-39 (2013). The statute uses the nearly identical wording as the social security regulation, 20 C.F.R. § 404.1527 (2012), which provides that the Social Security Administration will generally defer to the opinion of the treating doctor over that of the consultant. See *Rogers v. Comm’r of Soc. Sec.*, 486 F.3d 234, 242 (6th Cir. 2007).

311. For example, in *Satrom v. North Dakota Workmen’s Compensation Bureau*, the court reversed the Bureau’s denial of benefits to a hairdresser who alleged her acute disc syndrome was caused by her repetitive bending, twisting, and turning of the low back based on the testimony of her treating physician, which the court quoted at length. 328 N.W.2d 824, 825-30 (N.D. 1982).

WSI to fund the cost of the taking of the claimant's doctor's testimony at hearing, but only if WSI was relying upon an IME examiner to rebut the claimant's case.³¹² Despite the hyperbole about potential financial impact, this did not preclude WSI from using IMEs and calling the IME examiner to testify. In fact, because the employee has the burden of proof, the IME would have the final rebuttal.

The funding provision in the bill would help ensure that our state's outstanding treating doctors are honored for the service they perform and that their professional integrity is not brought into question simply because they think their patient was hurt at work, requires medical care, and may need protective work restrictions during recovery. The Legislature altered the intent of this bill by striking the funding of treating physician opinions from the legislation, and it ensured that the "treating physician rule" only requires WSI to set out its reasoning in accepting the opinion of a treating doctor or the WSI paid IME examiner.³¹³

As noted, *Satrom* illustrates the previous reliance on treating physicians to provide the expert testimony. The North Dakota Supreme Court also considered WSI's argument that "as the finder of facts, it is not required to adopt per se the testimony or opinion of any witness,"³¹⁴ holding that because North Dakota Century Code chapter 28-32 "requires that the Bureau's findings of fact be supported by a preponderance of the evidence," there is need for real judicial review whether the decision denying benefits is based on clear and competent medical evidence in the record.³¹⁵ The court explained:

The adversary concept has only limited application to claims for workmen's compensation benefits and the Bureau, in carrying out its statutory duties, acts in a quasi-judicial capacity and should be primarily concerned with the proper, fair, and just determination of any claim submitted. Accordingly, it is inappropriate for the Bureau to rely only upon that part of an inconsistent medical

312. S.B. 2298, as introduced, provided in section two: "Notwithstanding section 65-05-28, if the organization obtains an independent medical examination or independent medical review, the employee may call the treating doctor to testify at the administrative hearing at the expense of the organization." S.B. 2298, 63d Leg. Assemb., Reg. Sess. (N.D. 2013) (introduced version 13.0754.01000), <http://www.legis.nd.gov/assembly/63-2013/documents/13-0754-01000.pdf?20140912111749>.

313. S.B. 2298 amended North Dakota Century Code section 65-05-08.3(1) to provide that a "presumption may not be established in favor of any doctor's opinion." 2013 N.D. Laws 504, § 1. However, two of the seven factors identified to weigh the competing expert opinions still relate directly to the treating relationship.

314. *Satrom*, 328 N.W.2d at 831.

315. *Id.*

report which is favorable to the Bureau's position without attempting to clarify the inconsistency.³¹⁶

This review of the ALJ's findings and the record does not require the court to re-weigh the facts or substitute its determination for that of the ALJ. Rather, the court must not abdicate its review function. Reflective review should recognize that the opinion of an IME or its medical consultant not supported by the history and evidence of record is not supported by a preponderance of the evidence and must be rejected in favor of a fully supported opinion supplied by the treating physician. Moreover, unless there is clear reason to reject credibility, WSI must not attempt to sew up the claimant's case with guess-work credibility determinations.³¹⁷

C. THE SAME "BUMP RULE" APPLICABLE IN THE DISTRICT COURT SHOULD APPLY IN ADMINISTRATIVE HEARINGS SEEKING COMPENSATION BENEFITS.

Claimants counsel advocate adoption of a bump rule that would allow a demand for change of the ALJ. While the Office of Administrative Hearings replied that a bump rule may reduce the diversity of the members deciding cases, this is no answer in administrative cases. Unlike a reviewing court on appeal, the ALJ makes all fact-findings and presides alone. In contrast to many other kinds of hearings over which Office of Administrative Proceedings presides, the North Dakota Supreme Court has held that workers' compensation benefits constitute an important substantive right under equal protection, because such benefits are for personal injury and "for which the injured workers give up the right to sue" ³¹⁸ Individuals seeking worker's compensation benefits are often in dire economic peril, which explains their inability to afford legal counsel. The critical nature of these benefits to sustain their very life-blood is strong argument that additional protections are necessary in workers compensation proceedings compared to other proceedings, such as unemployment and driving privilege cases. Perhaps recognizing that the workers' compensation remedy has already been adulterated to the extent the court has questioned whether those benefits provide the "sure and certain relief" required by the Act.³¹⁹ The problem is compounded by the huge disparity in resources and an unnecessarily adversarial system.

316. *Id.* at 831-32 (quoting *Roberts v. N.D. Workmen's Comp. Bureau*, 326 N.W.2d 702, 706 (N.D. 1982)).

317. *Id.* at 832 (citing *Inglis v. N.D. Workmen's Comp. Bureau*, 312 N.W.2d 318, 323 (N.D. 1981)).

318. *Lee v. Job Service North Dakota*, 440 N.W.2d 518, 519 (N.D. 1989).

319. *Baldock v. N.D. Workmen's Comp. Bureau*, 554 N.W.2d 441, 446 n.4 (N.D. 1996).

As previously noted, to most injured workers, the most disturbing aspect of administrative law is that there is no right to a trial by his peers; this frustration is compounded by understanding the power of the ALJ to alone decide her fate, with no right to demand a change of judge, as would be available in the district court.³²⁰ “Scholars and judges consistently characterize provision of a neutral decision maker as one of . . . core requirements of a system of fair adjudicatory decision making.”³²¹ Regarding this most crucial factor to afford due process—an impartial decision-maker—North Dakota’s APA allows a party to seek disqualification of an ALJ if there is good cause, which is interpreted as showing actual bias.³²²

On its surface, the procedural safeguards in the APA ensure the right to due process of law. But, if the decision-maker is shown statistically more prone to judge cases in favor of a certain party, the procedural safeguards become immaterial. Of course, the only time the injured worker has an opportunity to present evidence is at the administrative hearing, as the reviewing court does not take additional evidence or review the record *de novo*. Instead, the courts simply review the administrative tribunal’s findings to determine if there is evidence in the record to support the findings.³²³ A party appealing an agency’s factual determinations will find that the determinations are not easily reversed, because in reviewing the agency’s findings of fact, the court does not make independent findings or substitute its judgment for the ALJs.³²⁴ The bar is a low one: “whether a reasoning mind reasonably could have determined the findings were proven by the weight of the evidence from the entire record.”³²⁵

320. See N.D. CENT. CODE § 29-15-21 (2013) (allowing a party to demand a change of judge of the district court). This right had been enshrined in North Dakota law since 1877. See Traynor v. Leclerc, 1997 ND 47, ¶ 9, 561 N.W.2d 644, 648.

321. II PIERCE, *supra* note 148, at § 9.8.

322. N.D. CENT. CODE § 28-32-27 (2013). While North Dakota’s APA allows a party to challenge the ALJ for good cause, proving actual bias is a heavy burden and presents serious practical considerations. Bias is typically thought to consist of: (1) prejudgment of issues in controversy; (2) personal prejudice toward a party; (3) conflict of interest and *ex parte* communications; and (4) appearance of impropriety. Personal bias or prejudice for or against a party will almost always require disqualification. Personal bias, sometimes referred to as actual bias, is an attitude toward a person, as distinguished from an attitude about an issue. KENNETH DAVIS, ADMINISTRATIVE LAW § 19:5, at 389-92. A clear case of personal bias is rarely established, precisely because decision-makers simply do not make statements expressing either preference for or distaste against a party: almost no-one makes the blatant mistake of admitting impartiality. Rather, personal bias can only be revealed by repeated and consistent rulings made by a hearing examiner in favor of one side; this should constitute grounds for disqualification. *Id.*

323. N.D. CENT. CODE § 28-32-46 (2013).

324. Workforce Safety & Ins. v. Auck, 2010 ND 126, ¶ 9, 785 N.W.2d 186, 190.

325. *Id.*

In the midst of the explosion of cases determined in administrative proceedings and the tremendous deference given to agency decisions, a party's due process rights to a fair and impartial tribunal loom critical. The administrative code should be amended to provide for disqualification of ALJs on the same grounds as available to demand a change of district court judge. If a duly elected district judge, whose only duty in an administrative case is to conduct judicial review, can be disqualified upon demand, justice and common sense demands that the right to disqualify an ALJ also be provided on demand. After all, the rights affected in an administrative hearing are as significant as the rights decided in the courts.

As noted, the APA limits the right to demand a change of ALJ to good cause.³²⁶ Nothing in the APA, however, limits the authority of the Office of Administrative Hearings to set a higher standard and allow a party an unfettered right to demand a change in the administrative law judge on the same terms as may be had in the district court.³²⁷ The 1981 Model APA allows disqualification of a presiding officer for the same causes for which a judge can be disqualified.³²⁸ Requiring proof of actual bias places too high a burden on the challenger.

Initiated Measure No. 4 (approved Nov. 4, 2008), made the findings of an Independent Administrative Law Judge in Workforce Safety and Insurance matters final, subject only to appeal by WSI.³²⁹ Incorporating the requirements of the measure, North Dakota Century Code section 65-02-22.1 provides that the Office of Administrative Hearings shall issue the final findings of fact, conclusions of law and order. Consequently, it is apparent that Office of Administrative Hearings has ample authority to promulgate a rule authorizing change of the ALJ in WSI matters on the same terms as demand for change of judge in the district court.

D. IT IS TIME TO CONSIDER ALLOWING PRIVATE INSURANCE

Clearly, reform is desperately needed. Coverage and benefits should be expanded, not continually retracted. Oddly—at least for a truly independent agency without its hands on the scale—WSI's legislative initiatives are nearly always to reduce coverage or benefits, rarely to expand them. Rather than extend coverage or improve benefits, WSI has refunded to employers over \$774 million since 2005.³³⁰ Perhaps political

326. N.D. CENT. CODE § 28-32-27(2) (2013).

327. See N.D. CENT. CODE § 29-15-21 (2013).

328. MODEL STATE ADMIN. PROC. ACT § 4-202(c) (1981).

329. See *Auck*, ¶ 4, 785 N.W.2d at 188.

330. See Forum News Service, *supra* note 4.

accountability will be improved if the Legislature allows private insurance to compete for premium dollars and separates WSI's regulatory and insurance functions. For if WSI is simply one of the insurers, rather than also serving as the regulator, perhaps its influence in the Legislature will be reduced. Make no mistake, WSI lobbies hard, session after session, for benefit and coverage limitations. And, as noted, WSI has taken an aggressive litigation posture relying on IMEs and outside counsel with little or no institutional knowledge and the simple goal to win. A neutral regulator is more likely to consider basic workers' compensation principles in its lobbying, rather than relying predominantly on cost considerations. North Dakota is one of the few states that commingle the insurance and regulatory functions.

The splitting of WSI into two entities has been needed for some time. Moreover, the Legislature should reinstate political accountability in the state's elected officials³³¹ by eliminating the part-time board that controlled WSI from 1997 until the people of our state voted to vest control of WSI in the Governor in 2008.³³² While the Governor appoints the Director, the part-time board continues to determine WSI's legislative initiatives.³³³ Clearly, a full time director and staff can persuade part-time board members to recommend any policy they choose to advocate.³³⁴ The Governor, rather than this part-time board that advocates for WSI staff, should assert this direct control over legislative initiatives. This is especially important in a state in which the lobbying insurance regulator is also the insurance company that pays the claims. The very nature of an insurer is to advocate policies that reduce payments, or increase revenue.

Only North Dakota, Ohio, Washington, and Wyoming continue to have a monopolist system where the state is the sole provider of workers'

331. Perhaps the surmise that political accountability would result in a more balanced approach between favoring employers versus employees interests has been proven incorrect over time.

332. North Dakota Century Code section 65-02-01.3 implements the people's approval of Initiated Measure No. 4, providing that the governor must appoint WSI's director. N.D. CENT. CODE § 65-01-01.3 (2013). WSI opposed the measure. Moreover, in December 2007, it was discovered that WSI had paid private investigators \$774 to put Jean Wanner, the primary sponsor of this ballot initiative, under surveillance. See Dale Wetzel, *Leader of WSI initiative followed by investigators*, BISMARCK TRIBUNE, Dec. 14, 2007, http://bismarcktribune.com/news/state-and-regional/leader-of-wsi-initiative-followed-by-investigators/article_9309c5cb-861e-51fe-8bc5-2cf8259375d2.html.

333. The duties of the board include providing "formal recommendations to the governor regarding legislation that affect the organization." N.D. CENT. CODE § 65-02-03.3(5) (2013).

334. See generally WORKFORCE SAFETY & INSURANCE, 2013 WORKFORCE SAFETY & INSURANCE (WSI) LEGISLATIVE QUICK GUIDE (2013), <http://www.workforcesafety.com/library/documents/other/LegislativeGuide2013.pdf>.

compensation insurance.³³⁵ The current reform method of choice is toward privatization and open competitive markets. In an open market environment, competition determines pricing. Nevada converted from a monopolistic state fund to allow competition in 1999.³³⁶ The 2003 Legislature rejected a bill that would have allowed private workers' compensation insurance in North Dakota.³³⁷ The bill did not address the need to create an oversight agency for all insurers, including the State Fund. Allowing other carriers to compete for business is an alluring idea; basic economic theory suggests that competition improves efficiency. However, the renowned workers' compensation author John Burton indicates that while deregulation of insurance with real competition among insurers for business may reduce costs, the data is not clear-cut.³³⁸ Nevertheless, allowing private insurance will not only provide competition, but also require the Legislature to vest the oversight function in a neutral regulator that does not also benefit from its decisions to deny payment.

Whether or not the Legislature eventually elects to allow private insurance, it is time for the Legislature to untangle WSI's insurance function from its oversight function and create a separate politically accountable state agency as regulator to oversee the insurer, WSI. The benefit to be derived from this conversion is substantial justice and political accountability and is in conformity with recommendations of the 1972 National Commission.³³⁹ Put it this way: who among us would be satisfied if the insurance company we were fighting with to receive compensation for an automobile accident not only wrote the policy, but also controlled the evidentiary hearing. And this problem is only compounded when that insurer has predominance in the Legislature to advocate coverage exclusions and benefit limitations. In essence, that is North Dakota's workers' compensation system as it exists now.

VI. CONCLUSION

The workers' compensation bargain presupposes the equality of employers and workers. But employers control the workplace and have primary responsibility for safety. Injured employees find that the promise

335. *Help Protect Your Business and Employees with Workers Compensation Insurance*, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, <https://www.statefarm.com/small-business-solutions/insurance/employee-benefits-coverage/workers-compensation>.

336. S.B. 37, 70th Leg. Assemb., Reg. Sess. (Nev. 1999).

337. H. JOURNAL, 58th Leg. Assemb., Reg. Sess. 389 (N.D. 2003).

338. See generally JOHN F. BURTON ET AL., WORKERS' COMPENSATION: BENEFITS, COSTS, AND SAFETY UNDER ALTERNATIVE INSURANCE ARRANGEMENTS (2001).

339. Haas, *supra* note 18, at 272-81.

of sure and certain relief is often illusory, as coverage and benefits are rolled back. Claimants have little access to legal services. North Dakota's legislative reforms and court cases have shown a clear trend to provide the benefits of the bargain to employers, immunizing them from suit while employees receive lesser coverage of injury and increasingly harder rules to get and keep benefits. This has allowed employers to escape legal responsibility for accidents and provides a license to ignore moral obligations by viewing injury as inevitable. Injured employees often remark that they have not only lost the ability to earn a living, but feel devalued by the system. As the North Dakota Supreme Court said, the burden of noncoverage "still rests entirely upon the injured . . . if not economically, surely in the loss of dignity."³⁴⁰ The Act contains high ideals and lofty prose, boldly declaring that "the prosperity of the state depends in a large measure upon the well-being of its wageworkers" and promises both the injured and their dependents "sure and certain relief."³⁴¹ It is time to restore what has been lost in the post-1995 reforms.

The Legislature has, session after session, listened to WSI whisper that nothing is wrong that a bit more tightening cannot fix. If WSI will not sign on to any of these concrete steps to address coverage and benefits, such as improving access to counsel and reducing reliance on IMEs over treating physicians, perhaps we have to wait for the wheels of justice to simply break under the strain as catalyst to action to bring the Act back into balance. If that occurs, the demand will be to allow free market principles to operate and permit other insurance companies to write policies with creation of an independent entity to perform the oversight function. The status quo is not working, and the eyes of the nation are upon us.

340. *Benson v. N.D. Workmen's Comp. Bureau*, 283 N.W.2d 96, 107 (N.D. 1979).

341. N.D. CENT. CODE § 65-01-01 (2013). The Act, adopted in 1919, "exhibited a socialist bent," as progressives also created the State Mill and Elevator and State Bank. See Anderson and Deloss, *supra* note 38, at 352.