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Business and Labor Committee  
October 19, 2012

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[LR569 LR581]

The Committee on Business and Labor met at 9:00 a.m. on Friday, October 19, 2012, in Room 1524 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LR581 and LR569. Senators present: Steve Lathrop, Chairperson; Tom Carlson; Jim Smith; and Norm Wallman. Senators absent: Tanya Cook, Vice Chairperson; Brad Ashford; and Burke Harr.

SENATOR LATHROP: But I'll introduce myself anyway. Steve Lathrop. I'm the Chair of the Business and Labor Committee. And today we have two interim studies: Senator Lautenbaugh's LR581 and Senator Fulton's LR569. And we're...oh, there's Senator Carlson. So before we start, I think I'll take a minute just to kind of explain what this process is and what it isn't. It's a little bit different than when he have a bill in front of us. When we have a bill and we take up a bill in a committee hearing, what we do...there are people that are "for," and there are people that are "against," right? And then there's the folks that might come in "neutral" that really...don't really have a position on a particular bill but they see some things that need to be changed to improve the legislation. When we do an interim study, it really is an opportunity for witnesses, you all, to come forward and to educate the committee on the subject. And I appreciate that you may have a position or a thought which way this ought to go if it becomes legislation, and that's fair, part of our discussion today. But we're not going to have opponents and proponents and those in a neutral capacity. We're going to open up the hearing with an introduction. The first one is Senator Lautenbaugh's bill. Brent Smoyer from his office is going to introduce the resolution. And once he's introduced the resolution, then we'll hear from those who want to be heard. It doesn't look, from the crowd, like I need to enforce the time clock. Okay? Usually, as most of you know, we turn the lights on and you get three minutes, and after two the light turns yellow, and then it turns red and you need to stop talking. Today I'm not going to do that. I am going to ask you to try to limit your remarks to somewhere in the three- to five-minute range, just so that we can move through. I've allocated an hour and a half for each of the two

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

resolutions. I suspect that will be more than enough time. The other thing, I'll just say, I see, for example, a lot of vocational rehabilitationists...if somebody has already made your point, you don't need to make it again, because we get it. And let me start also, and before we get going, introducing the folks that are up here. To my right is Senator Carlson, who's been on the committee two years? Four?

SENATOR CARLSON: Good night. Time flies when you're having fun. It's four years.

SENATOR LATHROP: Four years. It does fly by. Molly Burton is legal counsel, and she is to my right. And then we have Senator Wallman and Senator Smith to my left and then committee clerk, Kate Wolfe, and she is the one that keeps track of the time. Do we have sheets to sign in today? Do we need to do that?

KATE WOLFE: Yeah, they're by the door.

SENATOR LATHROP: Okay, so when you come up, please sign in on a sheet and hand that to Kate before you begin your testimony. And with that, I think we'll start with Mr. Smoyer and Senator Lautenbaugh's LR581. [LR581]

BRENT SMOYER: Good morning... [LR581]

SENATOR LATHROP: Good morning. [LR581]

BRENT SMOYER: ...Mr. Chair, members of the committee. Senator Lautenbaugh sends his apologies for not being able to attend this morning. I don't know, I guess this would be a good time to put in a plug for the senator pay raise maybe because he's got to work his day job and couldn't be here. My name is Brent Smoyer, B-r-e-n-t S-m-o-y-e-r, here to represent Scott Lautenbaugh and LR581. Basically, under Nebraska worker compensation laws, when an employee is unable to perform suitable work for which he or she has previous training or experience due to a compensable

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

injury, the employee is entitled to vocational rehabilitation services, including job placement and retraining as may be reasonably necessary to return them to suitable employment. The goal of vocational rehabilitation--voc rehab, in short, vocational rehab--is to assist the employee to return to suitable employment as soon as possible. The return to work is ideally with the previous employer or to employment for which the employee has been trained or has work experience--that is emphasized--and a direct job placement and on-the-job training is given first consideration. Vocational rehabilitation plans are to be designed so that, ideally, the injured employee can return to the previous job with the same employer. That's the perfect scenario. If that's not possible, then the plan is to look for the following outcomes: modification of the previous job with the same employer, a new job with the same employer, a job with a new employer, or a period of formal training which is designed to lead to employment in another career field. LR581 was introduced to determine the effectiveness of vocational rehabilitation by examining the outcomes of those persons in the system who receive vocational rehabilitation. We have received some material from the court and it has been less than clear as to providing insight as to the overall effectiveness of vocational rehabilitation. In one report given to us, it appears as though only 81 out of 304 workers were known to be back at work or released for work after their vocational rehabilitation case was closed. In a separate report set to be released later this year--I believe it was actually put out this morning, if the folks back here are correct--there were a total of 710 vocational rehabilitation cases closed during the fiscal year of 2012. Of those cases, only 66 workers had returned to work or been released to work and only 13 with their original employer. When looked at the cost of vocational rehabilitation, it costs employers over \$1 million each year, with \$1,257,611 being spent in 2011. Glenn Morton told us that the accuracy of their data was, quote, suspect, in part due to the limitations of our current method of reporting and capturing data, end quote. He further stated that they were in the process of improving the reporting and capture of data, and it would seem that a minimum of better data collection of outcomes is necessary. One area we believe clearly shows an ineffective use of resources in the area of ESL training is that as of May 2010 there were 47 cases which involved 66 different plans, as some

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

cases had more than 1 plan. Twenty-eight of those 47 cases were closed. Closure information revealed that 2 individuals out of the 28 were reported to be working at the time of the closure. Ten cases were closed by lump-sum settlement or release of liability. And 1 person was determined to be permanently totally disabled. Three cases were closed after a plan was denied, including a plan for nine more months of ESL denied by the court, a plan for three and a half months of additional ESL denied by the carrier, and a plan for an additional year of ESL denied by the court. Total costs to the Workers' Compensation Trust Fund for these ESL cases through mid-May were \$217,089.57. So, in a nutshell, it appears as though only 2 out of 47 actually were able to return to work, the main goal of vocational rehabilitation. In a simple cost/benefit analysis this would appear to be a failed system. Because of this, we believe the state should take a much closer look at the overall effectiveness of vocational rehabilitation and make sure that employees are receiving the most beneficial assistance while focusing on the goal of getting them back to work as quickly and safely as possible. There may be other solutions that may help to serve the employee better in the long run. And that's why we wish to have this examination. I would offer to take questions, but I have to admit that anybody who went to law school with me is going to tell you that workers' comp probably wasn't necessarily my bailiwick. There are a number of experts who will be following. [LR581]

SENATOR LATHROP: Okay. Thanks for the introduction of the resolution. I think it's going to be beneficial...this is going to...I'm going to invoke the prerogative of the Chair. I think, to give the committee some perspective on where vocational rehabilitation is in the work comp scheme and to try to give us some background, I'm going to call on...it looks like I have two members of the court and one former member. And maybe what I'll do is see if Judge Brown wants to come up. I don't even know if he wanted to testify or if he just came down to watch, but...I'd like to have somebody...and, Judge, if you would, did you come down to testify today, by the way? Okay. If you would, why don't you take the witness chair, and I'm going to ask you, before whatever remarks you came down here to provide us with, if you would explain the work comp system, too, because we

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

have three lay members on this committee who may not necessarily understand work comp like I do. Can you begin your remarks by explaining where...a little bit about, an overview of work comp and where vocational rehabilitation fits in that work comp scheme so that we have an idea of what we're talking about in relationship to work comp generally. [LR581]

RONALD BROWN: Yeah, I'd be happy to. And I guess I probably need to indicate before I get into the substance of my remarks that I'm not speaking on behalf of the court at this point any longer because I retired from the court in August of this year but had served on the court for 18.5 years prior to that. If you look at the statute...if you look at Chapter 48, which is the Workers' Compensation Act, the statute that addresses vocational rehabilitation and creates the right of an injured worker to voc rehab indicates that one of the primary purposes of the Workers' Compensation Act is the restoration of an injured worker to return to suitable employment. The Workers' Compensation Act basically provides rights for indemnity, which are weekly benefits when that worker is unable to work or--having reached maximum medical improvement, has lost a portion of his earning capacity--medical benefits for treatment of the work-related injury, and vocational rehabilitation. [LR581]

SENATOR LATHROP: Those are the benefits. I apologize for interrupting you. But those are the...that's a general overview. Walk us through: a construction worker is working, has a high school education, and has a bad, you know, falls from scaffolding and has a very significant back injury and can't go back to doing... [LR581]

RONALD BROWN: All right. [LR581]

SENATOR LATHROP: Walk through a time line of that person's work comp claim and the benefits that they would get, if you would, so that we know where the voc rehab fits in the process. [LR581]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

RONALD BROWN: All right. The injured worker, first of all, would probably be entitled to medical services for the injury, and... [LR581]

SENATOR LATHROP: And what does that get him? [LR581]

RONALD BROWN: He is entitled to go see his family physician, if he has a history of treating with a particular physician. He is free to select the doctor for treatment of his injury. And that family physician has the right to refer the injured worker to a specialist, if necessary. If the man has a very serious injury, a spinal injury, he might be referred to either a neurosurgeon or an orthopedic surgeon. [LR581]

SENATOR LATHROP: The cost of that care is paid 100 percent by work comp, with no deductibles and no copays. [LR581]

RONALD BROWN: That's correct. [LR581]

SENATOR LATHROP: Okay. So he is getting care. What if he can't work? What benefit does he get if he can't work while he is getting treated for his injury? [LR581]

RONALD BROWN: If he cannot work, he is entitled to weekly indemnity benefits, which are calculated to be two-thirds of the wage he earned for the 26-week period preceding the date of the injury. You go back and...for the six-month period prior to the date of injury and try to calculate what his average weekly wage was; he is paid two-thirds of that amount during the period he is unable to work. [LR581]

SENATOR LATHROP: And that's generally referred to as temporary total disability benefits. [LR581]

RONALD BROWN: That's right. [LR581]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR LATHROP: Okay. In addition to the medical care and the temporary total disability benefits while they can't work and they're convalescing, what are the remaining benefits? [LR581]

RONALD BROWN: Well, when he...he continues treatment until he reaches a point where the physicians indicate that he has reached what they call maximum medical improvement: you're as good as you're going to be; you've got permanent functional impairment because maybe you've undergone a spinal surgery and the anatomy of your spine has been modified by a fusion. And the doctor will assign permanent physical restrictions and, for instance, would say, if you've got somebody who has had a two-level lumbar fusion, you can only lift 50 pounds occasionally, you can lift 25 pounds regularly. If you're a construction worker, that probably ends your career in construction, because there are not a lot of construction jobs out there where you can only lift up to 25 pounds regularly. At that point, with maximum medical improvement having been reached, permanent physical restrictions assigned, vocational rehabilitation comes into play. And a vocational counselor is appointed by the court to assess what transferable skills this man may have, based upon his education, his past employment history. And they will often do some aptitude testing to see what other vocation they might be able to move them into that's within the physical restrictions that they have. And then they may do anything from on-the-job training to attending a community college to obtain a certificate, which may take a few months; they may obtain a two-year degree. And the cost of that is borne by the employer for whom the worker was employed at the time of his injury. [LR581]

SENATOR LATHROP: If I can interrupt, Judge, just for this maybe sidebar, if I can. If the person has no permanent impairment, they sprain something, they're back to work... [LR581]

RONALD BROWN: Right. [LR581]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR LATHROP: ...they're done with benefits. [LR581]

RONALD BROWN: Right. [LR581]

SENATOR LATHROP: They get the medical care, and they get the disability benefit while they can't work. The person who has...our hypothetical construction worker that can't go back to doing construction, that person then has an opportunity of vocational rehabilitation if they go from making \$16 an hour to little or no earnings ability. [LR581]

RONALD BROWN: And...and... [LR581]

SENATOR LATHROP: I mean, it doesn't have to be that drastic, but that's... [LR581]

RONALD BROWN: Right. [LR581]

SENATOR LATHROP: ...the classic case. [LR581]

RONALD BROWN: Right. [LR581]

SENATOR LATHROP: Does the statute currently or does the law currently set a hierarchy for the vocational rehabilitation? In other words, see if we can get him back to his former position? [LR581]

RONALD BROWN: I just turned to the statute that does provide that hierarchy. And the first priority is: return to your previous job with the same employer. The second priority is: return to your same job with modification. If the employer has employment available to you that's within your physical restrictions, you do that. The next statutory priority is: a job with a new employer, a job that you may have skills for that's within the physical restrictions that the physicians have provided. And you don't get to formal retraining...that's the fourth priority. So you try to return the injured employee to suitable



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

employment, in accordance with these priorities, and you don't get to a formal retraining situation until all the other possibilities have been exhausted. [LR581]

SENATOR SMITH: And is the burden on compensation, to get them to the...to where they were in compensation prior to the injury, and including if vocational rehabilitation is necessary? Is there some type of a measurement there? [LR581]

RONALD BROWN: Well, suitable employment is defined to be employment at a comparable wage but within the physical restrictions that you have. And sometimes you cannot get them to a comparable wage within these restrictions they might have unless you provide training to them. For instance, the construction worker may have very little in the way of computer skills. And, you know, if you're going to transfer somebody from a job where they were doing heavy lifting, maybe regularly lifting 50 to 100 pounds during the workday, to a situation where now they can only regularly lift up to 25 pounds, you have to substitute that loss of physical function with a skill in order to return them to employment. And so the question becomes, who is going to pay for that? My view is that the employer is responsible for that cost; otherwise, you're going to shift it to the taxpayers. You're going to shift it...if the vocational rehabilitation is not provided within the workers' compensation system, there is vocational rehabilitation services provided by the state through the Department of Labor. Most of those services are provided in instances where an employer closes, and those people need to be placed in other employment. The Department of Labor will come in there. And that's paid for by General Fund dollars. If you're going to shift...if you're going to eliminate vocational rehabilitation in the workers' compensation setting, all of those people who are not able to return to employment have one place left to go. And that's to vocational rehabilitation provided by the state at the expense of the General Fund. [LR581]

SENATOR SMITH: And, Senator, if I could just be very specific... [LR581]

SENATOR LATHROP: Sure. [LR581]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR SMITH: ...I'm going to use an example here and...and because I may not know as much as you do from the work comp side, on the legal side of it, but as an employer we deal with this all the time. And so if you have a worker who's making--let's say they're a very good construction worker, welding experience, more senior--maybe they're making \$60,000 a year, and they're injured, and they're not able to return to that job. You're not going to be able to get the education in a short period of time, whether it's in computer skills or whether it's going back to become an accountant...I know accountants certainly don't make that kind of money at an entry level. I mean, so you're going to have this separation between where they were earning and where their potential is, even with education. [LR581]

RONALD BROWN: Correct. [LR581]

SENATOR SMITH: So how do you close that gap? And who's responsible for closing that gap? And is there an expectation that that gap is actually closed? [LR581]

RONALD BROWN: Well, if...they're entitled then to compensation for permanent loss of earning power. If it's established that their access to the job market generally has been diminished, they're not able to return to the employment they had at the time of injury or former employment that they've had in the past, their loss of earning power may be reduced 30 percent, 40 percent, and they're paid for that loss of earning power on that basis but only up to a maximum period of 300 weeks. So you've got a worker who may... [LR581]

SENATOR SMITH: How many weeks? [LR581]

RONALD BROWN: Three hundred. You have a worker that has a permanent loss of earning power for the remainder of their work life. Their earning capacity may have been diminished by half, but they're only going to be compensated for a 300-week

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

period; it's an arbitrary limitation provided for by statute. And that's why vocational rehabilitation is important. Because if you have a man that has 25 years of work life left, and his earning capacity has been diminished by 50 percent due to an injury, you're going to have to train him so that he can do the best he can to reach his former earning level for the remainder of that 25-year work-life period. [LR581]

SENATOR LATHROP: If I can go back to our overview for just a second--and it may go straight to the question Senator Smith had--you said that after a person reaches maximum medical improvement--that's a determination made by the treating doctor, typically a specialist, like an orthopedic guy--that doctor then assigns permanent restrictions, and you have the hierarchy of job retraining. It is the vocational rehabilitationist, which is a specialty--and I see a bunch of them here and we'll hear from them shortly--but it's the vocational rehabilitationist who is the specialist in understanding transferable job skills, what somebody who has a particular education and a particular work experience can do, given the physical limitations set by the doc. [LR581]

RONALD BROWN: Correct. [LR581]

SENATOR LATHROP: That's what they do. Their role in work comp is to try to determine in that hierarchy, once they've been engaged by the court, in that hierarchy: Do we find this guy a job at his former...doing the same work? Can we plug him in doing the same work with an accommodation? Can we plug him into the same employer doing different work? Or do we need to do job retraining? That's essentially the role... [LR581]

RONALD BROWN: That's their function. [LR581]

SENATOR LATHROP: ...of the vocational rehabilitationist. I'm simplifying it, but that's essentially it. [LR581]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

RONALD BROWN: Yes, sir. [LR581]

SENATOR LATHROP: Whatever plan is ultimately put together by the vocational rehabilitationist and presented to the court and the court approves, while they're undergoing that, which may be as simple as just helping them find a job, they receive total disability benefits during the period of time that they are going through an approved plan. [LR581]

RONALD BROWN: Correct. [LR581]

SENATOR LATHROP: Once they've completed the plan, then another assessment is made about what their loss of earnings ability is. [LR581]

RONALD BROWN: Yes. [LR581]

SENATOR LATHROP: And we call the benefit you get for that permanent partial disability benefit...the "permanent" is the disability and not the duration of the benefit. [LR581]

RONALD BROWN: That's right. [LR581]

SENATOR LATHROP: You said the maximum you can get, unless you're totally disabled for the rest of your life, the maximum you can get is 300 weeks. [LR581]

RONALD BROWN: That's right. [LR581]

SENATOR LATHROP: So if a guy has a 25 percent loss of earnings ability--they were making \$60,000, and now they can make something significantly less than that--the court then determines or the parties can agree that they have a 25 percent permanent partial disability benefit, and then they are paid--and I'm simplifying it--two thirds of their

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

average weekly wage times 25 percent for the balance of 300 weeks. [LR581]

RONALD BROWN: That's right. [LR581]

SENATOR LATHROP: Those are the benefits they get. And that's sort of my overview or my understanding of work comp. The role of the vocational rehabilitationist is that job retraining piece. Right? [LR581]

RONALD BROWN: Yes. [LR581]

SENATOR LATHROP: And that only comes into play if a person has a significant permanent injury that impairs their earning capacity. Typically it doesn't come into play if they can go back to their old job. And so the person with a back strain that becomes a chronic sore back but they can still go back to doing desk work or being an estimator, whatever their job was before they got hurt, that person usually doesn't invoke the services of the vocational rehabilitationist. [LR581]

RONALD BROWN: That's right. [LR581]

SENATOR LATHROP: It's only the person that has a significant permanent injury that has impaired their ability to earn. [LR581]

RONALD BROWN: Only the people that have the most serious injuries, that are not able to return to employment that they had at the time of injury or to employment that they've had in the past qualify to receive vocational rehabilitation services and get these training programs. [LR581]

SENATOR LATHROP: Okay. The study...the purpose of our study here today and what brings us here on LR581 is: Should we have vocational rehabilitation? [LR581]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

RONALD BROWN: I...I...my personal opinion is that vocational rehabilitation is essential. If you do not have vocational rehabilitation and you have people with serious injuries who are not able to return to their former employment, those people are going to become the chronically unemployed. And, again, that becomes a burden on the General Fund and the taxpayers of the state, because they're going to be collecting long-term unemployment, they're going to be Medicaid eligible. The ramifications of that, you know, spread to the family, and those costs, I think, accelerate quickly and become the responsibility of the taxpayers generally, in the absence of training to return that injured worker to a suitable job. So I think that the vocational dollars are a tremendous investment for the people of Nebraska generally, to get people retrained to return to employment so they do not become chronically unemployed and their families don't become eligible for Medicaid and ADC and all the host of other benefits that are out there for people who are not able to work. [LR581]

SENATOR LATHROP: I appreciate your willingness to provide the background or at least to engage in an exchange with me so that we can kind of give the background about work comp and where the vocational rehabilitationist fits in, where that fits in, in the process. And I'll see if any of the committee has any questions. Senator Carlson. [LR581]

SENATOR CARLSON: Thank you, Senator Lathrop. Judge Brown, from someone who doesn't have a good knowledge in this area at all, if everything works like it's supposed to work, this seems like an essential and a reasonable approach to rehabilitation as a result of an injury at work. But...and I don't know if you can answer this, but as I'm sitting here listening I think of a couple of things. We have the possibility of a careless, I'll use the word "careless" rather than "gross negligent," but a careless employer that doesn't provide an environment that's conducive to staying away from accidents. If that's the case, the employer can't get off the hook. Would that be true? [LR581]

RONALD BROWN: That's true. [LR581]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR CARLSON: Okay. We have also the possibility that we have a careless employee that doesn't follow the rules that the employer asks them to follow, because they're young and they're tough and they're not going to get hurt. And they end up through carelessness being injured. There's no relief for the employer in that case, is there, unless it's so obvious? And even if it is so obvious, the employer is stuck. Is that correct? [LR581]

RONALD BROWN: The...there is a trade-off. Workers' compensation historically represents trade-offs between employers and employees. One of the benefits under the Workers' Compensation Act is an employer cannot be sued for their negligence. The recovery to the employee is limited to workers' compensation. On the other side, even if the employee was the one that was negligent, even if the employee was careless himself or the injury was due to the carelessness of a co-employee, the employer is going to be responsible for the payment of workers' compensation benefits. [LR581]

SENATOR CARLSON: And so as we discuss this, and even if we come to some kind of an agreeable result or recommendation, it's never going to answer those situations, is it? [LR581]

RONALD BROWN: Well, I think that the answers to those situations were provided decades ago when workers' compensation was adopted. And the employers were able to provide workers' compensation in exchange for not being sued in situations where they were clearly negligent and the injured employee might be entitled to those kind of benefits that are available in a negligence lawsuit, for pain and suffering, for a lifetime recovery of lost wages. That's kind of the balance that was struck. And now, you know, I think this proposal wants to reweigh that balance. If you're going to take away vocational rehabilitation rights, what trade-off is going to be had on the other side? So I think that if you're going to eliminate vocational rehabilitation from workers' compensation, you're kind of opening up the whole Pandora's box again for reweighing

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

the relationship between employers and employees. [LR581]

SENATOR CARLSON: Okay. Yeah. Thank you. [LR581]

SENATOR LATHROP: I might go into this with you just a little bit more, and you tell me if I've got this right. Back in the Industrial Revolution, the history of this country, workers and employers, before the advent of workers' compensation, if you were an employee working in a factory and the employer didn't put in a safety device and you cut your hand off, you could sue your employer in a third-party action or a tort action, and you could recover pain and suffering, you could recover significantly more than work comp pays today. [LR581]

RONALD BROWN: Absolutely. If you could establish that the loss of that member, loss of the hand, was going to reduce your earning capacity 50 percent for the rest of your work life, you were entitled to recover those lost wages for the remainder of your work life. [LR581]

SENATOR LATHROP: In a...what we call a tort action... [LR581]

RONALD BROWN: Correct. [LR581]

SENATOR LATHROP: ...or a lawsuit, not unlike a car accident... [LR581]

RONALD BROWN: Right. [LR581]

SENATOR LATHROP: ...kind of a case. Those were very, very expensive to employers. [LR581]

RONALD BROWN: Correct. [LR581]



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR LATHROP: It was...there were also employees who were getting hurt through no fault of the employer, that were getting nothing. [LR581]

RONALD BROWN: Right. [LR581]

SENATOR LATHROP: And what work comp was, was sort of an agreement between employers and employees, or it was at least legislatively imposed, where we said employers can never be sued for one of those more expensive-type cases where they are at fault. In exchange, they're going to cover everybody that gets hurt at work but they don't have to pay as much as what the guy gets who was hurt through a coworker's carelessness. [LR581]

RONALD BROWN: That was kind of the historical balance that was struck. [LR581]

SENATOR LATHROP: And when we struck that balance, it included vocational rehabilitation as one of its...one of the "gives" to employees at the time. [LR581]

RONALD BROWN: True. [LR581]

SENATOR LATHROP: There was a question that Senator Carlson asked about carelessness. If an employer has six OSHA violations and a person gets hurt, the employee can't sue the employer for pain and suffering, that tort action; all they can do is make a claim for work comp. [LR581]

RONALD BROWN: The Nebraska Supreme Court has decided half a dozen times in the last 50 years that the exclusive remedy that the employee has is workers' compensation. [LR581]

SENATOR LATHROP: No matter how careless the employer was or how much the employer disregarded OSHA safety regulations, the only thing an employee can get is

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

work comp benefits. [LR581]

RONALD BROWN: That's called the exclusive remedy doctrine. [LR581]

SENATOR LATHROP: By contrast, the employee, if they're careless, say the boss says you need to wear a lift belt, and you're working at Home Depot and you lift a bag of concrete mix and you blow a disk out, the employer has to cover that guy too. [LR581]

RONALD BROWN: True. [LR581]

SENATOR LATHROP: There is an exception to coverage for work comp for an employee who is intoxicated, am I right? [LR581]

RONALD BROWN: Yes. [LR581]

SENATOR LATHROP: So if a guy is drinking on the job and hurts himself, that's a defense. [LR581]

RONALD BROWN: If they're intoxicated by drugs or alcohol and fall off the scaffolding, your example earlier... [LR581]

SENATOR LATHROP: No benefits. [LR581]

RONALD BROWN: No benefits. [LR581]

SENATOR LATHROP: Is there also one for willful reckless...am I remembering that right? [LR581]

RONALD BROWN: There is one. [LR581]

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Business and Labor Committee  
October 19, 2012

---

SENATOR LATHROP: I don't know that I've seen the defense, but... [LR581]

RONALD BROWN: Willful reckless...I had a guy that was a delivery driver for an outfit called Speedy Delivery, which is like FedEx or UPS. And he...the work rules required that he wear a seat belt when he was operating the truck, that he close the sliding door, and that he obey the speed limits. This guy did not have a seat belt on, had the sliding door open, ran a red light, got T-boned in the intersection, got tossed out the open door, predictably. That's an example of willful negligence, and he did not make a recovery in Workers' Compensation Court. [LR581]

SENATOR LATHROP: Okay. I appreciate your testimony and the historical perspective on work comp. [LR581]

SENATOR SMITH: And there's also the preexisting, though. There's a little bit of a gray area if an employee has a preexisting condition that is aggravated by some type of on-the-job injury. Then the gray area is that you have to return them to where they were prior to the accident. But it does not take in consideration the preexisting condition. So if they have a lifetime back ailment and they do something on the job in which they aggravate that situation, then the employer is still responsible for any type of rehabilitation. And then there has to be some type of a determination, I think by the physician, as to where they were prior to that accident. Right? Am I correct with that? [LR581]

RONALD BROWN: Well, preexisting conditions are often an issue in workers' compensation claims. I mean, I don't know if there's any doctors here today to testify on this other legislative resolution, but they'll tell you that all of you presently have some degenerative joint disease in your back. It may not be symptomatic, but if you were to go get an MRI, they would find that you've got a protruding disk. If you have that condition and you're working construction or you're working at the Home Depot and you lift a 70-pound bag of premix and that disk blows out, that is a compensable injury under

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

the Workers' Compensation Act. [LR581]

SENATOR SMITH: And so that preexisting condition is not taken in consideration with that work comp ruling. [LR581]

RONALD BROWN: Not unless the employee has been previously paid for that condition. If they've had a prior workers' compensation injury and they've previously been compensated for that preexisting condition, they don't get paid twice for it. They get...if your loss of earning power is greater after the second accident, you get the difference between what you were previously paid for and the additional loss of earning power you experienced due to the second accident. [LR581]

SENATOR SMITH: Yeah. And I think the points you're making, Senator Lathrop, are valid, in that I think there is a balance that's trying to be struck out there. It seems as if the work comp laws that we have now, they tend to, for lack of a better term, give a pass to bad employers that are negligent, and they seem to be overly burdensome, I believe, on good employers. And many of these employers are small businesses; they're not large corporations that can bear the burden of increasing costs in work comp claims. And so you have some very good employers out there that are just being heavily burdened by some of these things. So, I mean, we need to have policies and practices in place that address where the negligence falls. And for those employers that are trying to do the right thing, to try to strike a balance there and maybe the balance here is finding more, I guess, efficient vocational rehabilitation practices. This strikes me a little bit that there's a...it's not clearly defined as to what vocational rehabilitation practice is necessary to return that employee to full compensation and who makes that determination. I'd like to hear more out of this hearing today as to who's making the determination as to whether it's a proper vocational rehabilitation plan and whether it really drives that, getting that employee back to full wages or if it's spending money where we're never really going to gain that benefit. [LR581]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR LATHROP: Senator Smith, I think you've got the right guy here to answer that question. [LR581]

RONALD BROWN: Well... [LR581]

SENATOR LATHROP: Who makes the decision, and how effective is it? [LR581]

RONALD BROWN: The vocational rehabilitation counselor is either agreed upon by the parties or appointed by the court in the absence of an agreement. That counselor evaluates the individual circumstances of that injured employee and makes a recommendation regarding a vocational rehabilitation plan. It's submitted to both the employee and the employer. Before the plan is implemented, it has to be signed off on by a representative of the employer and the employee. If either side objects to the proposed plan, that party can go out and retain a voc counselor to look at the circumstances of the employee and propose an alternative plan. Oftentimes, at that point, the parties are able to agree to some compromise. If they can't, then the parties come to court and the judges of the Workers' Compensation Court look at the entirety of the evidence, listen to the testimony of the court-appointed vocational rehabilitation counselor, the counselor retained by the employer or the employee, whoever is objecting to it, and makes a decision. [LR581]

SENATOR LATHROP: And that criteria is set out in statute, that you--or I should not say "you" because you're not there anymore--but the court uses a criteria set out in statute which was the result of some reform that was done 12 years ago? [LR581]

RONALD BROWN: Well, it was this LB757 compromise that...you know, due to term limits, nobody serves in the Legislature anymore when this big compromise was struck probably 20 years ago. [LR581]

SENATOR LATHROP: But that compromise, which was a bill that, like you say, passed

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

20 years ago, that was supposed to be comprehensive reform and sets out the criteria the court uses to decide what's appropriate rehabilitation. [LR581]

RONALD BROWN: That's right. I know it was shortly before I was appointed to the court, so I'm going to say it was 20 years ago. [LR581]

SENATOR LATHROP: Okay. Doesn't seem like that long ago to me, but... [LR581]

SENATOR SMITH: So, for example, and maybe this is an extreme case, but if you have a laborer who's earning quite a bit of money, and they're more at a senior level like I was describing it before, now they are...they're injured, they're not going to be able to return to that profession. They say, "I want to become an accountant; I want a four-year college education and become an accountant." That is a possibility, right? So if they say, "That's my plan," if the employer says, "That's good with me as well," then they can move down that path. [LR581]

RONALD BROWN: Correct. [LR581]

SENATOR SMITH: And all of the costs associated with that re-education would be covered under that plan. [LR581]

RONALD BROWN: The weekly benefits would be paid by the employer; the educational costs would be paid by the vocational rehabilitation fund. [LR581]

SENATOR SMITH: Okay. And then they graduate and they're earning half the amount; they're still eligible for that 300 weeks. [LR581]

RONALD BROWN: Well, they're entitled to benefits for 300 weeks, but all of the weeks of temporary total disability that they received while they were going through recuperation, while they were going through the voc plan are deducted from the 300

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

weeks. So in your case, if you've gone through a four-year plan, that's 210 weeks; you've got 90 weeks of benefits left. [LR581]

SENATOR SMITH: But now in...so that's if everything works well and everyone is in agreement. But let's say the employer says, you know, that's not really reasonable, in my opinion, in that paying for four years of education and your earning power is still not going to be there; is that really getting you back to where you wanted to be in terms of compensation and wages? And so there's a dispute there. Tell me how that dispute would play out, so... [LR581]

RONALD BROWN: The employer would go out and retain a vocational counselor. They would look at, you know, the same employment history, educational history factors that the court-appointed counselor looked at and indicate: I think that we can send this injured employee through a two-year plan. And at the end of a two-year plan the salary range for placement would be \$40,000 to \$50,000; a four-year degree may allow them employment in the \$50,000 to \$60,000 range. So you have to make a judgment whether the expense of the additional two years of education is worth the increased earning capacity they may have if they get a four-year degree versus a two-year degree. If the parties are not able to agree on one of the alternative plans, then the parties come to court, they make their case to the judge to whom the case is assigned, and you make a decision. [LR581]

SENATOR SMITH: Okay. And then all the cost associated with that process as follow to remedy an impasse there, all that cost is borne by the employer, right? [LR581]

RONALD BROWN: Well, the employer is going to pay the cost for the rebuttal opinion from the vocational counselor that they retain. And it's a business decision on their part. Is it, you know, am I going to spend the additional dollars to obtain this second opinion, or am I going to pay the cost of the four-year plan? [LR581]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR SMITH: Um-hum. And, once again, I think it's a fair process, and I think, in theory, it's good. And with a large corporation or a large business they can absorb those costs relatively easy. But many of these laborers are in small businesses, and so now we're looking at the fairness of the cost that is being borne by the businesses. So that's a point that I have. [LR581]

RONALD BROWN: Well... [LR581]

SENATOR LATHROP: Two points I want to make. One is that the four-year college education is a rare vocational rehabilitation plan, wouldn't you agree? [LR581]

RONALD BROWN: I would say that in 18.5 years I probably approved four or five. [LR581]

SENATOR LATHROP: Okay. So most of the time we try to find...and I think of a guy I represented once who lifted an air conditioner, blew his back out. With a little bit of computer training, the guy can become an estimator. And that's the typical voc rehab plan, isn't it? [LR581]

RONALD BROWN: The typical voc rehab plan is a return to employment in an accommodated position. I'm sure that there are people here that can give you statistics on all of this, but I can tell you that during the 18 years I was there, I think there were four or five four-year plans that I approved. The overwhelming number of vocational plans is job placement, taking transferable skills that they retain from their past education and work experience and putting them in a new job with a different employer. [LR581]

SENATOR LATHROP: Using some of the knowledge that they've acquired during the course of their lifetime. [LR581]



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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

RONALD BROWN: Correct. [LR581]

SENATOR LATHROP: And maybe to get to Senator Smith's point, if we got rid of work comp entirely, including the exclusive remedy, then the employer is going to be looking at increased premiums in their liability coverage, because the employee now...the one that gets hurt because the employer did something careless or the coworker backed over him or hit him with a forklift, that guy is going to get sued for much more than work comp would have paid. And that's the, I mean, you can pay it in the liability side where a few people get a lot, or spread it out over work comp where everybody gets a little. [LR581]

RONALD BROWN: True. [LR581]

SENATOR LATHROP: Okay. [LR581]

SENATOR SMITH: And that is not at all what I would be...you know, I would much rather see, you know, the work comp process than to face you in court, Senator, but... [LR581]

SENATOR LATHROP: No. I mean, the point is...the point is, though, that, you're right, it does penalize the careful employer... [LR581]

SENATOR SMITH: Yeah. [LR581]

SENATOR LATHROP: ...who would have no claims if we had a liability system. But, at the same time, you never know when that's going to happen. [LR581]

SENATOR SMITH: And the verdict is out for me in terms of, you know, the proposal and the basis for what we're hearing today, in terms of getting rid of the vocational rehabilitation. I don't think that that's the answer. But I do think there's inefficiencies in

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

this process that are burdensome to the employer. And I think that's what we need to work on. [LR581]

SENATOR LATHROP: And that's a perfect segue into other witnesses. [LR581]

RONALD BROWN: Workers' compensation spreads the risk among all employers. It's just like having liability insurance driving a car. There are some good drivers that never have claims, and there are some poor drivers that cause serious accidents. And the cost of that is just spread system-wide across all employers. That's the balance that was made. [LR581]

SENATOR LATHROP: Okay. Thank you for your background and your testimony. I am going to say that I hope it's pretty clear that I used Judge Brown to establish some background and try to educate everybody on the committee and develop a baseline for the rest of the witnesses that are going to come along, so that we have some context for your testimony. And given that that took an awful long time, I'm going to tell you not everybody gets to talk that long. So we will have witnesses come up. You might want to move to the front row if you intend to testify, so we can keep track of who still wants to speak and that sort of thing and move the hearing along. And with that, Korby Gilbertson. [LR581]

KORBY GILBERTSON: Good morning. [LR581]

SENATOR LATHROP: Good morning. [LR581]

KORBY GILBERTSON: Chairman Lathrop, members of the committee, for the record, my name is Korby Gilbertson, K-o-r-b-y G-i-l-b-e-r-t-s-o-n. I'm appearing today as a registered lobbyist on behalf of Tyson Foods. First of all I'd like to thank Senator Lautenbaugh for introducing LR581. This was introduced, first of all, not to try to say that we need to eliminate workers' compensation law here in Nebraska. It was not

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

introduced to say that vocational rehabilitation cannot be effective. And it is definitely not an attack on vocational rehabilitation specialists or counselors or the employees who get injured. I know all too well what it is like to have a spinal fusion, being the recipient of a four-level cervical spine fusion this summer, so...but what we want to talk about, and I think...I know you said don't repeat people, but I want to repeat something that you said, is that the role of vocational rehabilitation specialists is to do job retraining and that the number one goal...or at least when you look at the statute, all four levels of the reason for doing vocational rehabilitation is job replacement. And I think the judge talked very well about how...that it can be very valuable and he doesn't want to get rid of it. The problem lies in the fact that when you look at the numbers...there was a report that I'm sure will be handed out to you later, because I did not do it, but it's from the Nebraska Chapter of the International Association of Rehabilitation Professionals, and it's dated today. Based on the outcomes...and we used some of the numbers that Glenn Morton gave us, and I believe your legal counsel received those too. I didn't...I decided not to hand you a pile of paper because I know that you don't enjoy that. So...but when you look at the numbers in the report that was released today, their statement says that the outcomes of the analysis are that 90 percent of injured Nebraska employees available for voc rehab received a positive outcome, based on the 2012 case closure data. When you look closer at their case closure data, what they count as positive outcomes include a loss of earning power report that led to a lump-sum settlement and release of liability. So let's look at that figure. Those are people that we don't know if they went back to work, we don't know if they got any vocational training, we don't know what they're doing now; they got a settlement. That would be 26 percent of the total number of cases. Then you look at their next two listings, which are Return to Work through Job Placement Services and/or Training for a New Occupation and Completed Training to Enable Them to Return to Work in a New Occupation. This is a number, I think, that we can all agree on. Based on the criteria in the statute, this should be the goal of vocational rehabilitation. This number in their report is 12 percent: 12 percent of 710 cases. But then when you look a little further into that 12 percent, you find out that--and that 12 percent equals 88 cases--the 12 percent...out of that 88 cases, 25 of

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

those 88 cases, the people aren't working. They completed the training, but they did not go back to work. So if you're looking at the role of vocational rehabilitation and its effectiveness on getting people back to work, which is the primary goal of workers' compensation, I think it's hard to say that this is a great success story, because I would argue that more than 10 percent of the people that have closed cases should probably be back to work. And that's why we ask that the Legislature take a look at this and perhaps look at other alternatives, look at the total numbers of weeks that are available for permanent disability payments. We think we should open the door to any other alternatives or look at what we are doing in vocational rehabilitation so that we can perhaps get better outcomes insofar as actually getting people back to work. With that, I'd be happy to try to take any questions. [LR581]

SENATOR LATHROP: Any questions for Korby? I see none. Thanks... [LR581]

KORBY GILBERTSON: Thank you. [LR581]

SENATOR LATHROP: ...for your testimony, Korby. Good morning. [LR581]

JOSH SCHAUER: Good morning, everybody. My name is Josh Schauer, S-c-h-a-u-e-r. I'm not here on behalf of anybody in particular. I'm with a law firm here in Lincoln, and we do a lot of workers' compensation defense. We represent a fair number of self-insured entities; that's pretty much what it sounds like: they don't have insurance through Liberty Mutual or anything like that. They essentially bear the cost themselves, have the adjusters make the payments out of their own account. They determined that's a better way to handle the process than having a third party or other insurer do that. We do represent those as well. [LR581]

SENATOR LATHROP: Who did you say you're with? [LR581]

JOSH SCHAUER: I'm with the Perry law firm here in Lincoln. [LR581]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR LATHROP: Perry? [LR581]

JOSH SCHAUER: Perry, Guthery. [LR581]

SENATOR LATHROP: Okay. [LR581]

JOSH SCHAUER: Yes, sir. Thank you. And I just want to echo some of what Korby said. I'm certainly not here to criticize any of the vocational counselors. I see a number of them here that I work with, that I greatly respect, that I call when I have questions or concerns about a case. But I'm here to highlight some, I think, specific issues or some concerns that have arisen in specific cases, to kind of show how this has impacted employers and that it's just perhaps, more than anything, not the most efficient allocation of resources. I recently had one case where we had a 30-day job search. And, again, that's something pretty much what it sounds like, that both parties agree to let's have this person look for jobs, and the counselor found open jobs, helped the person with the employment application questions, things along those lines. And we said, all right, that's fine, let's do that, let's see if we can help this person find a job. And he had a 30-day job search. And we ended up...it was a 5-to-1 travel-to-meeting ratio, in other words, five hours of windshield time for every one hour the person spent in person with the employee that was trying to be helped. [LR581]

SENATOR LATHROP: You're talking about the vocational rehabilitationist. [LR581]

JOSH SCHAUER: Yes, sir. [LR581]

SENATOR LATHROP: Okay. [LR581]

JOSH SCHAUER: The employee received approximately \$1,200 in temporary total disability benefits, which was fine; that was kind of the cost we had anticipated. The

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

search did not result in the person finding a job, which, obviously, we knew was a risk. But then we got the bill for the counselor, and it was over \$4,700 for the 30-day job search, and that was kind of an unpleasant surprise. And again, it's not a personal attack; I understand they've got jobs to do. But it was a seemingly very high cost for what was a, you know, anticipated by both sides to be a relatively quick and easy way to help this person get back to a job. Another way...another recent incident, where I get an employee, an English-speaking individual, who had almost completed the 12th grade but not quite, had an injury at work, applied for vocational rehabilitation counseling. The sides agree to a counselor--a good counselor, he does excellent work. But despite having no prior history in the field whatsoever, this person decided that she wanted to work in office administration. And we were presented with a three-year plan: one year for this person to obtain a GED and then two years for the person to obtain her associate's degree. And there's no guarantee, of course, at the end of those three years that the person will find a job in that field. And setting aside the costs that will be paid to the vocational rehabilitation counselor, the temporary total disability costs alone in that case are going to be around \$47,000. So those are weekly checks that the employer is paying out over a three-year period for this person to obtain a GED, obtain, you know, in the best-case scenario, an associate's degree, and then perhaps find a job. That's \$47,000, of course, that the employer is not getting back, regardless of whether this person finds a job--again, a pretty significant risk. And I'll close here with one example--and happy to take any questions, of course--but this one is from a few years ago where the individual was awarded a yearlong rehabilitation plan with the focus on ESL training, okay. And so a full year, that's it; unless...you know, there's really no way to go back on that unless the person completely neglects to follow through on the plan; we can move the court to terminate the plan, but, you know, it's a long row to hoe. At the start of the plan, the person had a "best score"--it's a kind of way of measuring English proficiency--of 465. And I don't know exactly the scale or anything like that; it's kind of an intermediate level. Six months into the plan, the person had a "best score" of 466, 1 point higher after six months. Again, I don't know the full scale, but I assume if it's, you know, somewhere at 465, moving up to 466 is not significant. So that's six

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

months in; the plan goes on for another six months after that. At the end of the year, the person, I think, is somewhere in the high 400s perhaps, still not sufficient English abilities to find a job. So we've gone through a year of paying the expenses of a counselor, of paying TTD; we have a person whose English abilities aren't that much greater, and the person is no closer to finding a job than she was when the plan started. So, again, it just wasn't a good allocation of resources. That's not to say that vocational rehabilitation is bad in total; it's just that the way that it's set up now is just not effective, in our experience, in returning a lot of folks to work. And one other thing I wanted to mention as well, it doesn't always have to be a serious injury, as perhaps most people would think about it, to trigger vocational rehabilitation. It could be a construction worker who, instead of lifting 50 pounds, which would put him in the medium work category, has a back injury and all of a sudden the most he can lift is 40 pounds. Okay, that disqualifies him from that 50-pound job. But, looking at him, you or I or most people wouldn't know the difference that a person can lift 50 pounds versus 40 pounds. But it takes him from the medium work category to medium-light or puts him into something where voc rehab would be at issue over a 10-pound restriction. So again, it's not always the most serious injuries, but it's difficulties like that where it goes from 50 pounds of lifting to 40 pounds of lifting that can place significant burdens on an employer. And I would note, finally, that not all states have vocational rehabilitation. I'm licensed to practice in Iowa, and they don't have a system like Nebraska does, certainly not as comprehensive. So other states have made the decision to forgo this type of benefit for employees. [LR581]

SENATOR LATHROP: Iowa does pay 500 weeks' worth of benefits, however, do they not? [LR581]

JOSH SCHAUER: Yes, sir. [LR581]

SENATOR LATHROP: Okay. Any other questions for this witness? [LR581]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR SMITH: Yeah. Can you expand just a bit on that Iowa? And so...so what does Iowa not have, then? [LR581]

JOSH SCHAUER: They don't have vocational rehabilitation as it's understood in Nebraska. [LR581]

SENATOR SMITH: All right. With your...the clients you work with, give me a general idea, what is the range of costs associated with vocational rehabilitation that they've incurred? [LR581]

JOSH SCHAUER: Well, it just kind of depends, you know. From a 90-day job search, perhaps, you know, you're looking at \$5,000 to \$10,000, maybe. And then it also depends on how much does the employee earn. If it's a high-earning employee, the temporary total disability benefits are higher as well. If it's a lower-paid individual, those benefits are different. But generally you're looking at thousands of dollars for a simple plan like that. And when you get into the yearlong plans, the retraining type of programs, you're looking at, you know, five figures generally. [LR581]

SENATOR SMITH: So that three-year example that you gave, that three-year program, how much did that one cost, do you think? [LR581]

JOSH SCHAUER: Well, it's hard to say. I can calculate the temporary total disability down to almost the dollar, somewhere around \$47,000. Then there are the costs of paying the vocational rehabilitation counselor to follow up, to do the reports, do the job they do very well. They do excellent work in preparing their reports and keeping up with the employee, but those are costs borne by the employer as well. And, you know, that differs from firm to firm when you're dealing with the different voc counselors as well. But figure anywhere from perhaps, you know, \$60 an hour to \$100 an hour to pay that vocational rehabilitation counselor--I'm just guessing on that; I don't know the exact amount--but somewhere in that range, I would guess. [LR581]



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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR SMITH: So in that case, that person went from a field type of a job to where they want to become an office administration-type person. They took three years of education; at the end of that three years, there's no guarantee that they would even like that profession. And so at that point the cost is still incurred by the employer. And then going forward there's going to be an ongoing benefit... [LR581]

JOSH SCHAUER: Yes. [LR581]

SENATOR SMITH: ...up to the maximum number of weeks. [LR581]

JOSH SCHAUER: Yes, sir. [LR581]

SENATOR SMITH: Okay. Thank you. [LR581]

SENATOR LATHROP: Senator Carlson has a question for you. [LR581]

SENATOR CARLSON: Thank you, Senator Lathrop. Go back to the first illustration you gave. You talked about five hours of windshield time for an hour of consultation, was that it? [LR581]

JOSH SCHAUER: Yes, sir. [LR581]

SENATOR CARLSON: And that went on how long? [LR581]

JOSH SCHAUER: Five trips. [LR581]

SENATOR CARLSON: Five trips. So five...how long were the sessions? [LR581]

JOSH SCHAUER: One hour. [LR581]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR CARLSON: So five hours? [LR581]

JOSH SCHAUER: Yes. Yes, sir. [LR581]

SENATOR CARLSON: And what was the cost of the five hours? [LR581]

JOSH SCHAUER: The cost of the five hours was around \$500. I think it was \$90-\$95 an hour. [LR581]

SENATOR CARLSON: Oh, okay. I thought you said \$4,700. [LR581]

JOSH SCHAUER: That was the total of costs for the vocational rehabilitation services. [LR581]

SENATOR CARLSON: Which includes the cost of the driving for five hours. [LR581]

JOSH SCHAUER: Yes, sir. [LR581]

SENATOR CARLSON: Okay. All right. Thank you. [LR581]

SENATOR LATHROP: That driving is a function of having somebody out in a remote area where there isn't a voc rehab person. [LR581]

JOSH SCHAUER: Yes, sir. [LR581]

SENATOR LATHROP: Okay. Very good. Thank you for your testimony. [LR581]

JOSH SCHAUER: Thank you. [LR581]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

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SENATOR LATHROP: Okay, somebody else. Who else intends to testify on this bill? One, two...keep your hand up for just one more second. Two more? Three? [LR581]

\_\_\_\_\_: Four. [LR581]

SENATOR LATHROP: Okay, four. All right. Very good. Looks like I'll make my hour and a half. Welcome. [LR581]

JACK GREENE: Thank you. My name is Jack Greene, G-r-e-e-n-e. I am a sole proprietor; I have two staff; my company is called Work in Progress. I'm a private vocational rehabilitation counselor. Just a little background, I worked for about eight years with the state vocational rehabilitation agency here in Omaha after completing my graduate studies and then have been in private vocational rehabilitation services for close to 30 years. The International Association of Rehabilitation Professionals, the Nebraska Chapter, did take the information that was put out by the court on the closures for 2012, and we did prepare this report. Did these get distributed to the senators? I can leave these if they did not. [LR581]

SENATOR LATHROP: Oh, yes. [LR581]

JACK GREENE: Okay. What we tried to do was address the questions in LR581. And the court's statistics had 31 different categories. We tried to condense those so that they were more useful or more comprehensive, down to 11. And, as you heard in previous testimony, some of those were available for vocational services, some were not. We estimated about 80 percent of those that were reported to the rehabilitation section were available or accessible to vocational services. Of those, 90 percent had some positive impact. We're not claiming that we, you know, successfully resolved the case ourselves, but we had some positive impact on the case, because we provide really three separate services; one of those leads to employment. But we do a vocational evaluation to determine whether the injured employee is actually eligible for any vocational services

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Transcriber's Office  
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Business and Labor Committee  
October 19, 2012

---

and can benefit, and that may or may not lead to a plan proposal for returning back to work. The second service we provide is development of a vocational plan proposal. And then the third is a loss of earning capacity. So two of those three services may never lead to return to work but yet have some positive impact. So if we do a loss of earnings and we never do a plan proposal, we may really facilitate the settlement of a case so that both sides have an idea of what the loss of earning capacity is. If we do the vocational evaluation and don't do a return-to-work plan proposal, we may also facilitate the settlement of a case in a lump-sum settlement. Or the individual employee themselves may decide that they don't want a benefit from vocational services. They may be within a certain number of years of retirement. They may have alternative family resources. They may determine through visiting with a counselor that their prospects of getting back into another position of employment are just too high, it would take too long, they really don't want to participate in that. They may not have enough skills, they may not have done well in school before, were a high-wage-earner and they need some job-skills training. They may just decide, okay, now I know what the whole system involves, and they just don't want to go through that. Quickly, back to this report, some of the services that you can see on the second page, when you get to that report, the plurality of what we do if we have a vocational plan developed...and, as I say, a lot of the cases don't get that far even though we've been asked to provide some services, but the plurality of those are job placements. So we try and utilize the existing resource of the individual and get them back to work. Previous testimony talked about a 30-day job placement plan. That probably was destined to fail from the beginning, unfortunately. Thirty days...if you take your typical unemployed worker who doesn't have the burden of an injury, they're going to take more than 30 days to find a job, and that's if they're motivated and they have some skills and get out there in the market. This recession has taken many years longer than most recessions since I've been alive. So it's the longest one I've dealt with. And here in Lincoln I have good information because we do a lot of labor market surveys, contacting employers, finding out who's eligible, would a plan have any chance of success, sometimes evaluating their loss of earning capacity. On one of those here in the last couple of months, my office...I have a job

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Rough Draft

Business and Labor Committee  
October 19, 2012

---

placement person hired in my office, and she spoke with the director of the Workforce Development Office here in town. The market here in Lincoln has just become extremely difficult. One example was for a temporary entry-level clerical position that was advertised. They got, oh, I think 50 or 60 different applications for that. The majority of them had advanced education ranging anywhere from doctorate degrees down to baccalaureate and associate degrees. And this is just for a low-skilled, entry-level clerical position that was never going to be permanent. So that's the level of competition that our injured employees that we're working with are facing. And Omaha and Lincoln are better labor markets. They have, you know, a lower unemployment rate than the rest of the state. But as the director of the Workforce Development Office indicated, that number is kind of deceptive because it isn't really so much the unemployment rate, it's the underemployment rate. And that was illustrated by the quality of the applicants that are going into these pools for all kinds of jobs that are available. So if an injured worker is hurt in Nebraska, and the, you know, maybe they were a marginal high school student and they really don't know how to search for employment and they don't have a lot of other skills, they weren't in sales, they don't have computer skills, and they're knocked down from heavy work down to light or between light and medium, which a lot of our folks are, their ability to go out and get other jobs that will pay anything above minimum wage, sometimes even at that, is really problematical. So a big part of what we do is evaluating what their ability and skills are: can we get you back into the labor market; can we get as close as possible to your prior level of wages? If not, can we do some short-term training? Or if we can't do that, can we get into some longer-term training? Short-term training...one of the things I like to do, because I have a very effective job placement specialist in my office, is try and do on-the-job training. We got a commercial heating and air-conditioning installer, got hurt, was his back, couldn't do that anymore. That's heavy work; even though it involves a lot of cranes, you're still manipulating 300- and 400-pound units. And so we set up with a company in Grand Island to do estimating and project managing because he had a lot of background, knew a big part of the refrigeration aspect. He didn't know as much about other aspects that this company did. And so we were very successful in getting him through. We added

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Rough Draft

Business and Labor Committee  
October 19, 2012

---

some software estimating training that was done in Arizona, and that cost, you know, a few hundred dollars to do that, plus about a six-month on-the-job training. So he was making in that \$50,000 to \$60,000 range. At the end of the training, he ended up doing something else. He had a friend who offered him insurance sales; that was very lucrative for him. And he ended up leaving that and going to an unrelated job, but he didn't know about that at the beginning. But we were estimating probably between \$30,000 and \$40,000; otherwise, he probably would have been in the \$20,000s. So it isn't so much that, are we going to get him back to \$60,000? We're not always going to be able to do that. And a lot of times we're not. But are we going to do much better than the \$20,000 that he could have done? And so we were projecting \$30,000 to \$40,000. Now as a successful sales agent, he may well get up to \$50,000-\$60,000. So those are parts of what we're trying to do as vocational rehabilitation specialists. [LR581]

SENATOR LATHROP: Very good. Very good. We appreciate the explanation of the role and some of the work that you do. Are there any questions? Senator Carlson. [LR581]

SENATOR CARLSON: Thank you, Senator Lathrop. This isn't a question. But it looks like a positive indication of what you're facing is that we still have a degree of good in most people in our society that would like to find work; they're trying. That's a good part. [LR581]

JACK GREENE: The far majority of the people that I work with are motivated. They may be scared, and they may have a lot of things that perhaps are creating some difficulties: challenges at home, financial problems. But, yes, they're motivated and they're trying to get back to work. [LR581]

SENATOR CARLSON: So we need more jobs available. [LR581]

JACK GREENE: That would help a lot. One indication of that is...prior testimony talked about placement and getting people back to work. In the past, before the recession, it

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Rough Draft

Business and Labor Committee  
October 19, 2012

---

was much more likely if I proposed a training plan of 6 months, 12 months, or a year and a half, that once the training plan was done, they had the skills to go back to work, my role was done. I didn't know whether they really went back to work or not. So the statistics didn't really measure whether they actually got back to work, because part of approval of the plan from the rehabilitation unit was, did we help them develop the skills they needed to support themselves? And once they successfully completed an approved training plan and it was, you know, certified by the Department of Education and approved by the rehabilitation section, they were deemed as successful and able to go back to work. With the recession, I probably add some additional job placement, more than...not probably, I do. So I request job placement in addition to training more now, just because it has become so difficult to access the labor market, even with a good, successful retraining plan. [LR581]

SENATOR CARLSON: Okay. Thank you. [LR581]

SENATOR LATHROP: Very good. Thanks for coming down. We appreciate your testimony. Next we'll hear from Glenn Morton. [LR581]

GLENN MORTON: (Exhibit 1) Senator Lathrop, members of the committee, my name is Glenn Morton. I'm the administrator of the Workers' Compensation Court. I do have a little bit of paper for you, if I could. It's... [LR581]

SENATOR LATHROP: It wouldn't be an appearance without it. [LR581]

GLENN MORTON: Wouldn't be an appearance with me without a little paper. No. What it is, basically, is an information sheet from our Web site describing voc rehab in our system, in case you'd care to look at that. If I'd known Judge Brown was going to do such a good job with that, I wouldn't have bothered, but that's...there you have it in case you'd want to look at that. First of all, I agree with Judge Brown, as well, that I think vocational rehabilitation is an essential and a fundamental part of our system, of any

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

good work comp system. I think we have one of the best programs in the country. I know that from my own experience. I know that it's a very...it's very comprehensive, and it's a very progressive program. So I'll say that up-front. I also think Mr. Greene did a good job in his report, in the report of the counselors, the IARP counselors, to show that the value of the program is not just looking at whether there's return to work at the end of the plan. I think that's an important point to make. Nevertheless, the whole goal of the program is return to work; I'll admit that, and there's no debate about that. And I think there can be some improvements made to the system. I think Korby Gilbertson is right and other testifiers are right, with that. And I think, quite frankly, the most significant of those is that the system we currently have really isn't set up to focus on timely return to work. All right. That's part of the interim study, to look at the timeliness of return to work. As has been mentioned, we have five priorities listed in the system. And I'll just repeat those. First is return to the previous job with the same employer. Second is a modification of the previous job with the same employer. Third is a new job with the same employer. And it's not till you get to the end, with job placement--a job with a new employer or a period of formal retraining to go into another career field--that's where you get to voc rehab, not the first three. And our whole system, including the statutory system and the actual voc rehab plans...there's focus on that back end, right? It's not focused on the front end. And the front end, from all the research and what other states are doing, the front end, the return to the same employer or even stay at work with that same employer, instead of being off in the first place, is where the early return-to-work gains come in. Our system doesn't do that, and it's not designed to do that. So that's a big shortcoming in our system. There are other states that have built-in incentives, if you would, for employers, to assist employers in taking employees back to work, to encourage them to take employees back to work, etcetera. So that's...and that's lacking in ours. Our counselors...the private counselors do a great job. We certify those counselors; they do a very good job. And Senator Smith was talking about the employee who wants to have a four-year degree. The private counselors who develop these plans are not going to automatically give someone a four-year degree or any other degree or any other training just because they want it. They're going to make



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Rough Draft

Business and Labor Committee  
October 19, 2012

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sure...and it's their professional job to go to the least costly, the least extensive, if you would, plan based on those priorities. All right. So our counselors don't get involved until the back end. And under the case law, a vocational rehabilitation plan cannot begin until the employee has reached maximum medical improvement. All right. That often doesn't occur till later on in the process. So our counselors don't get involved with these employees early on, when they really could have an impact on that early return to work. All right. It's the back end. And by that time... [LR581]

SENATOR LATHROP: I think that's a great point. And somebody was up here with an example about the English as a second language or the GED person. And I've often wondered, because I do a little bit of work comp, why, when I'm sitting there with a guy in my office who I know is never going to go back to construction and who doesn't have a GED, why we don't start working on the GED while he's still in physical therapy or something like that. [LR581]

GLENN MORTON: Exactly. And that's been my feeling as well. Now there are some...the maximum medical improvement requirement is in the appellate case law. And there's some rationality to really support that. Until an employee is back to their maximum level of improvement, you can't tell necessarily what kind of impairment they're going to have, what kind of disability they're going to have, what their capabilities might be. So it's difficult to tell what the right plan might be. But on the other hand, you sometimes have employees, like you said, who you know are not going to be able to get a job with the education they have, any kind of a job, because they don't even have a GED. So there could be training that could be done. But under the current system, we're limited there. So that's an improvement that could be made, as well as other things to focus more on that early return to work. Another point to make there is I want to stress how important that is, where there's a delay between when the actual work starts with the client or with the employee. There's a whole number of studies, and I don't have them before me, but it's amazing and striking that they say the longer the employee is off work, the greater the likelihood of them never returning to work, and I don't

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

have...wish I had the statistics. But my recollection is, if it's, like, six months at least, then the chance of them returning to work are almost nil at that point. It's sometimes a year or more after the injury before our counselors become involved in the process. And by that time, they're fighting an uphill battle; there's often emotional issues, mind-set kind of problems, that they have to deal with in addition to just their physical disability. So I've kind of made that point, I think, as strong as I could, and I think it's a critical point, that we're just not getting involved with the employees quickly enough after their date of injury. You mentioned the English as a second language. I just mention briefly that, you know, there are some impediments to what we're trying to do in getting employees back to work. One of the most critical has been English language deficiency. And that's a huge problem around the country, not just Nebraska. Of course, meat processing is a major area where employees often don't speak English. They're low...they're little...often little education; they're doing physical, manual labor work; and when they can't do that any longer, we're in a real mess. The traditional way in Nebraska of handling that has been through what's been called English as a second language plan, or ESL plans. Those plans often drug on and on; there were no job goals, no training plan or no target career field. And the, I think, the rationale behind that was, well, if, you know, until you can teach them English, you really don't know what they're capable of doing. All right. The problem again, as I said, is those plans sometimes drug on for years, there were multiple plans, very little chance of success. And I think if you talk to the counselors who deal with these things, they will agree...and you, probably, Senator, from your own experience and your cases. So the private counselors, the Nebraska IARP group, and others, and I have been meeting quarterly for the last ten years to deal with issues that come up. And this problem of what to do about these ESL plans has been a tremendous issue for years. Finally, as a group, myself, the private counselors, and our specialists at the court, who are also master's-level counselors, decided that we're simply administratively not going to approve those plans any longer. All right. Now, under the process, as Judge Brown said, a case can ultimately...if there's a dispute, it ultimately can go to court, and the parties can get their own evaluations and make their decisions. But before that

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

happens, the private counselors, who are certified by the court, either agreed to or appointed, they develop these recommendations that come to the court specialists, who review them, and they do an independent-level review. And that can be approved. And if that's approved voluntarily, nothing ever goes to court. And the vast majority of these plans are actually handled administratively, not through litigation. But we decided, since we have to make that initial decision, that we're simply not going to approve a traditional ESL plan. [LR581]

SENATOR LATHROP: And the policy that you have administratively--whether you can or you can't, you are--is you're not going to do GEDs or ESLs standing alone. [LR581]

GLENN MORTON: Bingo. [LR581]

SENATOR LATHROP: It has to be done in conjunction... [LR581]

GLENN MORTON: That's right. [LR581]

SENATOR LATHROP: ...with a plan to get somebody a specific type of job. [LR581]

GLENN MORTON: Absolutely. That's the point. [LR581]

SENATOR LATHROP: Okay. [LR581]

GLENN MORTON: We're not going to ignore those problems, because they are big problems. But we're going to, instead of approving them as some open-ended plan by themselves, stand-alone, with no job goal, with no targeted training, we're going to treat them as what we call supportive services within either a job placement plan or a formal training plan, which do require job goals and do require an identified either type of job within the employee's limitations or a training plan that the employee is capable of completing. And the idea is they need English language training, that will be treated as

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

a supportive service, we call it... [LR581]

SENATOR LATHROP: Right. [LR581]

GLENN MORTON: ...within one of those other plans, same as a GED. [LR581]

SENATOR LATHROP: Very good. [LR581]

GLENN MORTON: And since that time, we've...since we made that decision, in early 2011, we've approved about a dozen what we're calling ELL, to distinguish them from ESL--English language learning plans, supportive services plans--approved about a dozen of those plans, compared to about the same amount of ESL plans in the same period before. Now since we did that in early 2011, there's been only one ESL plan approved, and that was approved by a judge of the court. But that case was filed prior to when we made our administrative decision. So I think that...I know that that's had a huge impact on the cost and the delays relating to English language learning while putting more structure and more monitoring, if you would, and more incentives for the employee. The employee knows that if they have a certain length's plan and they have that time to do it, there's a whole lot more incentive to get something done than in an open-ended plan. So... [LR581]

SENATOR LATHROP: Okay. [LR581]

GLENN MORTON: Lastly, then, very quickly, there's been just a lot of talk about the numbers from the court and what those mean or don't mean in terms of success and return to work, etcetera. No one has misquoted the numbers that we gave them to look at. But I can tell you that those numbers don't reflect the true picture of return to work, actual return to work, or employability as a result of our program. The reason they don't is, well, two or three reasons, but one reason is the numbers only reflect a snapshot. The counselors, when they close a case, either because of voc rehab completed or for

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

another reason, they file a case closure report. And one of those things on there is: Has the employee returned to work? That case closure report--that's the snapshot--that's the only numbers we have. [LR581]

SENATOR LATHROP: He might get a job the day after the case closure... [LR581]

GLENN MORTON: The day after, right, or a week after or whenever, but we don't know that. And there's no real good way for us to know it, because our counselors aren't involved, we're not involved with that case any longer. The other point is it doesn't--and this is the critical one, I believe, that may take some looking into, as far as one of those things that could be done to improve the system--is it doesn't take into account the impact of the legal process. All right. I know anecdotally, but I don't know otherwise, that some employees and some attorneys for employees are reluctant to have the employee go back to work for fear of impacting the settlement in their case. All right. And I bet...and I don't know this, I'm speculating, but I would love to be able to see the numbers of return to work after the settlement is actually completed. All right. I suspect they would be different than the numbers we have in our system. Another point that may be looked at is, I think because...and I'm not...and I think the temporary disability while an employee is engaged in a plan is critical, because otherwise these employees have no way to support themselves while they're going through training. But that type of a weekly temporary disability is the same dollars but different from the indemnity they would receive while they were temporarily totally disabled. It's the same dollars. There is an incentive to stay in a plan as long as possible to keep that going sometimes, simply to keep the income coming in. Now our private counselors who monitor these plans and work with these employees watch that very closely, they don't allow that to happen, but still there is that incentive that can have an impact. And that concludes my testimony. [LR581]

SENATOR LATHROP: Very good. I think that...I understood every bit of it. [LR581]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

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GLENN MORTON: Thank you, sir. [LR581]

SENATOR LATHROP: Any questions from...okay. I appreciate it. Thanks. [LR581]

STEVE HOWARD: Good morning. I... [LR581]

SENATOR LATHROP: Just one second, Steve. I appreciate that it looks like we're going to be going a little bit longer than the hour and a half. But since I used a lot of time with Judge Brown to kind of give us sort of the background on work comp, I think it will...that was time well spent in my judgment. And so we're going to go...it looks like we have two witnesses left. Is that right? Okay. So we'll go ahead and hear from Steve Howard and Judge Fitzgerald. [LR581]

STEVE HOWARD: Thank you. Steve Howard, H-o-w-a-r-d. Our law firm is Dowd Howard and Corrigan, and we represent the Nebraska state AFL-CIO. It seems that there's an overarching theme today that there's a need for accurate data because some of the anecdotal stories and recollection of events aren't consistent with our experience. I suspect that if a bill is put forward in the next session or after that, that you'll hear from many individual injured workers coming forward telling you about their success and how voc rehab was the only thing that got them back in the work force contributing to the tax base, getting their children on private group health plans rather than Medicare and Medicaid and things like that. So the need for accurate data I just would emphasize and we're hopeful that labor may be able to play a role in that. I'm not going to rehash everything, but a few things that were brought up: Senator Carlson, you talked about the negligence of the employee, negligence of the employer. The Nebraska state AFL-CIO is absolutely in favor of safety programs. We wish there were less injuries. We don't want our workers or any workers hurt. To the extent that safety program may drive down the need for voc rehab, I think that's worth mentioning. Senator Smith mentioned a phrase, full wages, return to work, full wages. A lot of times that's not very realistic. If we have someone that we can get back to 75 percent, 80 percent of what they had

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

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beforehand, many times that's a success. And the point that needs to be made is that no judge of the court ever has the power to command an employer to take a person back. The judge cannot say, I think you've got light duty there. I think I'm going to, you know, order this construction company or this packinghouse to put this person back to work. That's not a power that the court has. Now the judge can take into account what was done with respect to return to work, but the judge can't order an employer to give someone a job. So I wanted to make that point. There have been so many good points made and I know you want to move on, Mr. Chair. But I would just say that, you know, labor has some ideas about how to improve and we'd like to have a voice and a role in this process. I will pick up where Mr. Morton left off about...and, Mr. Chair, about starting it earlier. And you might wonder, well, how does that save money. Well, while that person is recovering and going through therapy, they have to reach maximum medical improvement to get the vocational services. There has to be a big bright line there, and they're being paid those temporary benefits to recover and then temporary benefits afterwards for voc rehab. Well, why not merge the two in a case where it's really clear that vocational services are going to be necessary? So they go to therapy in the morning, school in the afternoon. They get back in the work force quicker, and the dollars that are paid for vocational rehabilitation in the weekly checks might be less. Now that's going to take some cooperation and some agreement, but there are cases where it's very clear this person is going to need those services. Also, there's no such thing as a retroactive approval of a voc plan. If an injured worker says, you know, I'm tired of being off work. I know I'm not going to go back to that company. I'm going to get into school. Well, they do it on their own until they reach maximum medical improvement. And the court doesn't have the power to go back and say, you know what, that was a good idea. We're going to reimburse you for those tuition dollars and we're going to pay you for those books you had to buy. If there was some incentive to be able to empower the court to retroactively approve a plan and say what you did while you were trying to rehab yourself, you're going to get paid for that and it's going to be recognized. That's another thing. And the last one is, and I don't know whether when the person goes to school there's any grants or private funds, you know, scholarships,

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

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things like that. Someone else in the room could speak to that. I've just not seen it in my experience. So if there are dollars that are out there, you know, when you have children that go to college, they talk about, you know, Pell Grants and, well, there's student loans, but things like that. I guess I don't know, but I don't believe that there is a sort of a system by which those private dollars that come from nonprofit corporations that universities or schools have and maybe use to help with tuition, so. Those are just some of the ideas. And I think it all starts with getting accurate numbers. I have clients that say, you know what, I'm going to quit my plan because in my school, I met this person and there's an entry-level job. And I'm tired of getting this two-thirds and I'm just going to go back in the work force. That should count as a success. And I don't know that it's always reduced to writing, to the statistics. So thank you. That's all I've really got this morning. [LR581]

SENATOR LATHROP: Very good. Any questions for Mr. Howard? Oh, Senator Smith. [LR581]

SENATOR SMITH: Maybe it's more of a comment than a question. And I do appreciate, you know, you coming in and speaking as part of this and providing your perspective. And I recognize that labor has a vested interest in the well-being of the employee and in safety. But so does, and I'd say in...I think in most cases more so the employer feels the same way. Without healthy and safe work practices and without good employees, they can't grow their businesses. And I think what we're hearing here today is that there are some concerns out there as to whether we have an efficient process that gets at what the ultimate goal is. And that is to retain employees in the workplace. Right? And I think it's good to have this discussion, this debate, and I think it's good to listen to both sides of this because there's probably some ways in which we can make improvements because the ultimate goal on both sides of both business and on labor is to create more jobs and have more employees in the workplace. Right? And if there are burdensome costs out there and inefficiencies, those are things that are dragging down our economy and dragging down the decisions of employers and job creators from adding to the work



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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

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force. So I think this is good to have this discussion, and I don't think anyone is suggesting that we get rid of vocational rehabilitation. Maybe there are. I don't think that's the majority of what I'm hearing. I just think we need to work to find efficiencies and make certain it's achieving the goals. [LR581]

STEVE HOWARD: Agreed. [LR581]

SENATOR LATHROP: Senator Carlson. [LR581]

SENATOR CARLSON: Thank you, Senator Lathrop. And I'm following up a little bit in a different way of what Senator Smith has said because you mentioned what about an approach where somebody has rehab in the morning and school in the afternoon. And let's maybe agree upon that and right from the start get into it. And I...and that sounds good. Now if a person is employed, completely employed, they're only paid as they complete a successful task. They're paid weekly. They're going to get their paycheck as they...or they're successful in what they do. So if we have an agreement to go to school in the afternoon, and after a little while the individual decides I don't like this and I'm not going anymore, it can't be success. So then what can we do? What are the possibilities? The other thing you mentioned was that if there's some education taking place, and in the process an individual has an opportunity to go right to work during the process without completing it, that sounds okay. But on the other hand when we start out on some kind of an educational process, success is generally measured when we complete it. So the concept I think of putting the two together, the rehab and the education, is good and it's right. But I can certainly see some areas where in the middle of it there's a change in attitude and it's not working, so we'd have to figure out some way we could address that. And I like your concept, but we don't have the answer to how do we address those circumstances. [LR581]

STEVE HOWARD: How about a bonus on graduation? I'm sorry. Something like that, some incentive at the end of the line. [LR581]

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Business and Labor Committee  
October 19, 2012

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SENATOR CARLSON: Well, you were mentioning grants and so forth to take care of maybe tuition and books. Well, that shouldn't be there unless there's successful completion I think. [LR581]

STEVE HOWARD: The school will get paid one way or the other it seems like. But one thing I want to point out, I wasn't going to get anecdotal here, but this has happened with a client of ours earlier this year, going to school, off-the-job injury, the man breaks his leg and he starts missing some classes. The vocational rehabilitation division of the court unilaterally canceled his plan and the checks stopped coming. I mean it ended right there. It isn't like he gets those dollars throughout the end of his education. It was unfortunate. Broke his leg. And without notice to him, without the opportunity to come in and say, you know, I'm going to make up these classes, it was canceled. He was terminated. So the other thing is this, there are thousands of first reports of injury filed in Nebraska, all the way from something that requires a little stitch, all the way up to someone in a coma. It is not a circumstance where someone has a mild injury and all of a sudden they get voc rehab. This is a small percentage. I wish it were more. I wish more folks could take advantage of it. [LR581]

SENATOR CARLSON: Okay. Thank you. [LR581]

SENATOR LATHROP: Okay. Thanks, Steve. [LR581]

STEVE HOWARD: Thank you. [LR581]

SENATOR LATHROP: Good morning, Your Honor. [LR581]

JAMES MICHAEL FITZGERALD: I'm James Michael Fitzgerald, a judge on the Workers' Compensation Court. And I've read lots of old cases in the 15 years I've been on the bench. And one of the purposes of workers' comp is to transfer to industry the

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Rough Draft

Business and Labor Committee  
October 19, 2012

---

cost of on-the-job injuries. That's the purpose if it. And the other purpose in an old case said, the purpose of workers' compensation is to keep an injured employee and their families from being public charges, which mean welfare. That's the purpose of it. And so when I look at our job as judges, I say, well, number one, we got to get the medical done, we've got to get them fixed, got to get them good, got to get them going so that they can get taken care of and get back to work. The next thing I do, get them back to work and keep them there. And one of the tools in my toolbox to get them back to work and keep them there is voc rehab. Now I understand there's some complaints about how efficient it is. And I'm one of the guys...I'm an activist judge. I'm not afraid to stand up and say what I think. And I will write in opinions, this employee is not going back to work at his old job. Start rehab now. Because interviews can be done and lots of things can be done early, let's get moving. And there was another comment in here about if you're going to work hard in the morning, why not something going on in the afternoon if we can train them? Why not have something going on? Why wait? Why wait? You know, we get these things, well, can he lift 50 pounds or can he lift 45 pounds? I could care less. I could look at the guy and tell you if he's going back to work or not and so can most of these voc people too. We can tell if he's going to go back to work. Start something now, soon as possible. And that's one thing you could do to the legislation is voc rehab can start as soon as somebody is injured. Start it now. That's one thing that we really could use. Because that way when they come to see me, they've got some plans because they come to see me and they're as good as they're going to get and then they want to talk about lost earning power and then I order the voc rehab. Well, you know, we're down the line so doggone far. What are we going to do? [LR581]

SENATOR LATHROP: Yeah. Let me just for a second if I can... [LR581]

JAMES MICHAEL FITZGERALD: Okay. [LR581]

SENATOR LATHROP: ...put that...put what you just said in context. A guy gets hurt right now. They get total disability benefits, which is two-thirds of their average weekly

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

wage, until they're at maximum medical...well, until they're released from care. And we don't do anything about the vocational rehabilitation until they're at maximum medical improvement. And what you're suggesting...and then once they get an improved plan, they go back on the two-thirds of their average weekly wage. And what you and others have said is if they're hurt and we know they're not going back to their old job and they're going to need some voc rehab, why don't we start it before they get to maximum medical improvement? [LR581]

JAMES MICHAEL FITZGERALD: I agree. [LR581]

SENATOR LATHROP: And right now the law doesn't permit you to do that because apparently it's the... [LR581]

JAMES MICHAEL FITZGERALD: Appellate courts have come down and said that we have to... [LR581]

SENATOR LATHROP: Appellate courts have said you have to wait until somebody is at maximum medical improvement. So if that's the case, Judge, tell us as a practical matter what criteria change can we make in the statute? What should be the standard? Because if some guy sprains his back, you don't know, I don't know, and the doctor doesn't know early on if that guy is going to have a 100 percent recovery or if he's going to have a chronic bad back and never be able to lift more than 30 pounds. So if we're going to legislate in that area to try to make some of that voc rehab overlap with a convalescence, what's the standard? [LR581]

JAMES MICHAEL FITZGERALD: Or why wouldn't you have a standard? Here's what I'm saying is, if...just if you wrote in the statute voc rehabilitation service may start as soon there's an injury or immediately thereafter. All right? Now the insurance company and/or Mr. Employer, Ms. Employer, are going to look at him and say, wait a minute, can we get him back to work or not? You know, they're going to have an idea. Insurance

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

adjusters deal with this every day. You know, if...I like to sit down and read medical reports, I can kind of tell you early on what's going to happen because I've read them now for 15 years. And I...you see the process, that a lot of them read the same. If the fellow has got pain going down his leg, guess what? He's getting a surgery. He's getting a surgery, bottom line. We know and he's not going to go back to heavy lifting. We know that. And that's early on. It doesn't really have to start the day after, but within a reasonable period of time. But we need to have in the law something that says vocational rehabilitation service can start the day after he's hurt or immediately thereafter. That's really all. We don't need a standard because somebody can apply to the judge. [LR581]

SENATOR LATHROP: But here's the question: What about the guy with the...50 years old, he has preexisting degenerative changes, his disks are bulging because he's 50 years old, lifts something, hurts his back. It's not a herniated disk, and he applies for vocational rehabilitation. He may not need anything and he may be going back to work as soon as he goes through the physical therapy and maybe a couple of shots. [LR581]

JAMES MICHAEL FITZGERALD: Well, of course we don't have to worry. That's what judges are for really. That's what judges are for. [LR581]

SENATOR LATHROP: I just wonder if we start the voc rehab early what the standard is for giving it to them or saying, wait, I'm going to wait until we see a little longer how your injuries are going to resolve. [LR581]

JAMES MICHAEL FITZGERALD: Well, one of the things... [LR581]

SENATOR LATHROP: You're right, with a herniated disk you know. [LR581]

JAMES MICHAEL FITZGERALD: One of the things we find out real quick is, was this employer thinking about putting him back to work? What's their position? Find that out

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

early. And if that employer comes in and says, well, he's got this strained back, we have all these guys with strained backs, we can take care of him. Don't worry about it, Judge. And so then we just say, okay, no voc rehab now. That's what judges do. [LR581]

SENATOR LATHROP: Okay. [LR581]

JAMES MICHAEL FITZGERALD: It is personal. These things are all personal. You just can't really say, well, you know, this applies to everybody. Everybody is a little different. You know, I can look at guys and I can say, this guy is going back to work. He'd walked through a brick wall. And some people, they're not going to do it. I don't care what I do. I can bark at them and everything else, but they're not going back to work. Well, I wanted to tell Dr....tell Senator Smith something. We had here...you talked about preexisting conditions, we had Section 48-128, which was the Second Injury Fund. When somebody had a preexisting condition that equaled a 25 percent loss of earning power, the permanent benefits were apportioned between the Second Injury Fund and the current employer so that if somebody had an 80 or 90 percent loss of earning power prior to the time they got hurt, the second employer, the employer at the time he got hurt, only pays 10 percent of the permanent benefits. In 1997, employers came to this court and said...or came to the Legislature, I'm sorry, came to the Legislature and said, if you do away with the Second Injury Fund, the employer at the time of the injury will have to pay all the benefits. There will be no reduction in benefits, no apportionment, we'll just pay it all. Now that was...you see, you need to have somebody go back and read the legislative histories, and I've read a lot of them, and that's one of the things, you know. We hear a lot about preexisting conditions and he's worse because he had a preexisting condition. Why should we have to pay for it? Guess what? The law was in the books and employers came in and did away with it. And, you know, I just wanted to tell you that that's something that happened in the past. If you want to start the Second Injury Fund back up, be glad to do it. [LR581]

SENATOR SMITH: I know the source of it, but, yes. [LR581]

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Business and Labor Committee  
October 19, 2012

---

JAMES MICHAEL FITZGERALD: Okay. Now another thing is, let's assume we say that a person gets temporary benefits while they are in vocational rehabilitation services. I've had a case where the fellow comes in and they say, well, he's getting done and he's got to go one more semester. They didn't want to pay for one more semester and they didn't want to pay...they didn't want to pay the temporary benefits. All right? He's got three hours to go. So here's what you do. You say, okay, 12 hours of school time. Right? Your payment is now 25 percent. You get 25 percent partial disability. Go to work in the afternoon. That's what you tell people. I mean, there are ways to balance it out, but you've got to come see the judge. And this judge here will sit down with anybody and hash it out for half an hour or an hour, as you well know, and come to some decision that I think is fair to everybody. But I think there's two things you do. Number one, don't, don't, please don't, do away with vocational rehabilitation because that's a tool in my toolbox that I can use. And I stick my nose in the vocational rehabilitation, as you just kind of see from listening to me that if somebody wants to...if they've got a problem, if the fellow doesn't live it up to his program, he's going to hear from me and he's going to come back every month and see this guy and he's going to tell me how he's doing. I got a guy who got hurt in Scottsbluff, bilateral elbow injuries and a knee injury, wife, two kids, 45 years old, bilingual. Ninety-eight hours he's had already in college. He's not going back to work anywhere. Nobody is going to hire this guys. So I say, okay, you're going to school. He goes to school. He graduates, two and a half years. He goes to Western Nebraska Community College. He goes to Chadron State. Graduates from Chadron State, and now he runs a YMCA making about \$50,000, \$60,000 a year. If we hadn't have done that for him, guess what? You get him, his wife, and two kids on the dole. They're not going to work. This guy was unable to work anymore because he was just physically shot. And yet now we've got a guy who's pay taxes. That's what we want. And that's what I want. I want to get people back to work. So, you know, make some changes. Oh, I would tell you this. We got videoconferences, we got videoconference capabilities all over the place. Now I'm not going to do videoconference trials unless I got somebody that can't show up and they live in

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

Oregon. But rehab counselors could make arrangements even through the court. I mean, the court has spent a lot of money on this video stuff. Why not do a videoconference from the Omaha court or from the Lincoln court and send the person to a videoconference station within 50-60 miles or 20 miles of his physician and visit over the videoconference? One hour and 15 and one hour and a half rather than five hours. There are ways that we can be more efficient, and you've got to plow some new ground on that. And one of the problems is that the judges don't meet enough on this and we don't talk enough about it. But any questions? [LR581]

SENATOR LATHROP: Senator Carlson. [LR581]

SENATOR CARLSON: Yes, thank you, Senator Lathrop. Now sitting here it sounds to me like maybe there is recommendation for some kind of additional legislation, and some others sitting in the audience may think, whoa, well, we don't want that. But you get this idea of rehab early and back to work earlier. With legislation to address that, we're always concerned about unintended consequences. So on your suggestion, what would be an unintended possible consequence? [LR581]

JAMES MICHAEL FITZGERALD: I think if you start the process to get somebody back earlier, obviously there's a cost to starting the process and the process cost. And sometimes it's not successful. So that's an unintended consequence. [LR581]

SENATOR CARLSON: Okay. [LR581]

JAMES MICHAEL FITZGERALD: But, I mean, I don't really see anything wrong with starting the rehab earlier. I just don't. I mean, of course I haven't seen it, so I haven't seen any mistakes. I don't know. [LR581]

SENATOR CARLSON: Okay. Thank you. [LR581]



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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR LATHROP: I think that's it. [LR581]

JAMES MICHAEL FITZGERALD: Thanks. [LR581]

SENATOR LATHROP: Thanks, Judge. We always appreciate hearing from you. Is there anyone else here to testify on LR581? Seeing no one raising their hand or coming forward, that will close our hearing on LR581. I want to thank those of you who have come down, who have expressed an interest, and who have testified today for your input. I think it was very informative. And as oftentimes happens with these interim studies, it's given us some ideas and some suggestions to work with before January. So thank you once again. And with that, we'll move to Senator Fulton's resolution, and that's LR569. Senator Fulton, you're up. Good to see you again, my friend. [LR581]

SENATOR FULTON: You too. Well, except you. (Laugh)

SENATOR LATHROP: You know, can we do this...Tony, if we...can we take five minutes just...

SENATOR FULTON: Yeah, that's fine. Sure.

SENATOR LATHROP: ...to provide the staff with a chance to...or me. I'll be back in a couple of minutes.

SENATOR FULTON: Thank you. Thank you, by the way.

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SENATOR LATHROP: Molly has had a chance to use the rest room, so I think we're good to go. [LR569]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR FULTON: You look good. [LR569]

SENATOR LATHROP: Yeah, you do too. Nearing retirement. [LR569]

SENATOR FULTON: I'm old. I turned 40 a couple of weeks ago. [LR569]

SENATOR LATHROP: Did you? Yeah, I wish I was that old. [LR569]

SENATOR FULTON: No, my kids pointed out that I'm old. They call me old whenever they come home. [LR569]

SENATOR LATHROP: Yeah. If you would, we're going to start the hearing on LR569. If you are going to participate or listen to this hearing, you're welcome to stay. And if you want to chat, you can step outside so that we can proceed. Senator Fulton, you're good to open on LR569. [LR569]

SENATOR FULTON: Okay. Thank you, Mr. Chairman and members of the committee. For the record, my name is Tony Fulton, T-o-n-y F-u-l-t-o-n, and I represent District 29 here in Lincoln. I am opening on LR569 which would study, or propose to study, evidence-based utilization and treatment guidelines for medical services with respect to workers' compensation. Utilization and treatment guidelines for workers' compensation cases are currently in place in at least 23 states. These states have adopted a variety of approaches, including the establishment of state-specific guidelines to define treatment standards and ranges for specific injuries or disabilities, as well as adoption of external guidelines, including the Work Loss Data Institute's Official Disability Guidelines treatment in workers' compensation and the American College of Occupational and Environmental Medicine Practice Guidelines. From the experience of other states, it appears that adoption of evidence-based treatment guidelines may better ensure that injured workers receive appropriate medical care in a timely fashion and can serve to control costs by reducing unexplained variations in care and ineffective services. So I'll

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

deviate from the script here and just tell you that I took some interest in this late in the session and it was introduced in the form of LB1008, and I think I expressed that at the time. A couple of the arguments that were raised against that bill at the time and I suspect are probably still lingering because I never did have an opportunity to put forward any rationale to militate against those arguments. But one argument was that the utilization of guidelines may impair or abridge the judgments or ability to exercise judgment on...by doctors. And the second I think similarly would abridge judgment in the case of judges. So I want to make it clear that in the event some type of legislation is introduced with respect to this resolution or within this realm, that indeed they ought to be guidelines for state senators or policymakers or bureaucrats or what have you shouldn't interfere with the judgment of doctors nor judges. So guidelines, hopefully that addresses that argument. Guidelines should only be guidelines. There are other states that draw some experience from, but ultimately the reason why I decided to continue to pursue this or at least to continue to move this forward, perhaps some other senator will take it up, either we do have guidelines or we...we should have guidelines or we shouldn't have guidelines with respect to practices in workers' compensation. What I have seen in my research is that just generally within the practice of medicine there is interest...I wrote it down, there's interest in the medical community in evidence-based practices and evidence-based protocols. And I assume that's the case because the medical profession is looking for efficiencies with which to deliver their care. Of course, with the talk of the Obamacare, sorry for lack of a better term, what they call that...

[LR569]

SENATOR LATHROP: I don't think anybody is offended by that term anymore. [LR569]

SENATOR FULTON: Okay. Okay. Good. I think there's a lot of interest and focus on efficiency and delivery of care. And so that's what I've seen on the medical side of things. And so if there is that interest within the medical community generally, then I'm proposing that we put forward the same type of interest with respect to guidelines, protocols, best practices as they relate to workers' compensation. [LR569]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR LATHROP: Okay. Fair enough. Well, it should make for an interesting study and an interesting hearing, so we appreciate that. Are you going to stay to close?  
[LR569]

SENATOR FULTON: I'll stick around, yeah. [LR569]

SENATOR LATHROP: Okay. Good. Good. [LR569]

SENATOR FULTON: Thank you. [LR569]

SENATOR LATHROP: All right. Look forward to hearing from you again. All right. If you intend to testify, you're welcome to come up as the line allows. We lost our page it looks like. [LR569]

ROBERT J. HALLSTROM: (Exhibits 1 and 2) Chairman Lathrop, members of the Business and Labor Committee, my name is Robert J. Hallstrom. I appear before you today as a registered lobbyist for the Nebraskans for Workers' Compensation Equity and Fairness and the National Federal of Independent Business to testify with respect to LR569. Utilization and treatment guidelines are designed to enhance the quality and timeliness of medical care provided to injured workers by providing the best treatment practices and to reduce disputes regarding the treatment that is necessary to address work-related injuries. The guidelines provide a framework for consistent and reliable decision making regarding the diagnosis, management, and treatment of injuries sustained in the workplace, but are not designed to serve as absolute prescriptions for care or to replace the judgment of individual healthcare providers. Senator Fulton in his opening has addressed the states that have adopted some form of utilization and treatment guidelines. He mentioned that there are at least 23 states. I have a chart attached to my information or my testimony that identifies the states that have adopted some form of utilization and treatment guidelines. I also have attached to my testimony

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

a chart from the National Council of Compensation Insurers which reflects that Nebraska's medical cost component in workers' compensation cases is significantly higher than both the regional and the national average. When we look at medical costs associated with workers' compensation cases, there are two ways to control medical costs. The Legislature has taken some significant steps in one area, which is the medical fee schedule. We've made changes over about the last five, six, seven years for physician services for in-hospital...inpatient hospital and inpatient trauma services in hospitals. That's the medical fee schedule that applies to the level of reimbursement. The second area is to address utilization and treatment guidelines to address the frequency of charges and the appropriateness of services, which is what is at the goal or objective of LR569. In my testimony, I talk about evidence-based medicine. The guidelines generally address evidence-based medicine. They represent healthcare based on clinical studies of what works best and what does not. It is not healthcare based upon opinion, consensus, personal observation, or tradition. Also attached to my testimony, I probably won't spend a lot of time going into the particulars since I've given the committee that information, but the ODG, the Official Disability Guidelines, have been adopted in a number of states more recently. Ohio was one state. And at the top of page 5, I show medical costs having been reduced by 64 percent, lost days reduced by 69 percent, treatment delays reduced by 77 percent. Texas has similarly adopted on an ODG disability guidelines for nonnetwork cases. In the first year, they experienced a 26.2 percent decrease in average medical costs per claim in those outside networks compared to a 7.1 percent increase in average medical costs where ODG was not required. They also indicate that days off work were reduced by 13 percent in the initial year and an additional 34 percent in the second year showing the impact on return-to-work policies, which a number of witnesses in the last resolution interim study hearing had indicated was a worthy goal. Another area where the guidelines have come into vogue more recently is with respect to the prescribing of pain medications. It's become a national epidemic in terms of excessive utilization of pain medications. Texas most recently has approved a drug formulary to address that very issue. And at the bottom of page 5 and the top of page 6, we show the areas in which nonrecommended

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

prescription drugs have been avoided because of the formulary and the costs that have been saved or reduced by having that drug formulary in Texas. I have a quote from the Kansas Medical Treatment Guidelines schedule on the next page of my testimony, page 6. The thing I want to note on that is down at the bottom with respect to Senator Fulton saying there were some concerns expressed in opposition when LB1008 was introduced last session with respect to interjecting with the opinions and the judgment of the medical care providers. And it says, "Note that medical treatment guidelines are not requirements nor are they mandates or standards; they simply provide advice by identifying the care most likely to benefit injured workers." [LR569]

SENATOR LATHROP: Can I ask a question, Bob? [LR569]

ROBERT J. HALLSTROM: Yes. [LR569]

SENATOR LATHROP: This is an interesting subject but it's...since we don't have guidelines right now and generally the care is decided between the physician and the patient, here's the question I have. Can you take me through...and I'm going to use a hypothetical worker that has a herniated disk, tell me, if we put guidelines in place, what would that look like? And then if they're only guidelines, what's their purpose? [LR569]

ROBERT J. HALLSTROM: Okay. [LR569]

SENATOR LATHROP: Because what incentive does a doctor have to observe the guidelines or go on using their judgment just like they are right now? Otherwise, I guess you could hand out guidelines to all the orthopedic surgeons in the state and see if they follow them. [LR569]

ROBERT J. HALLSTROM: Yeah. [LR569]

SENATOR LATHROP: There must be something legislatively that provides an incentive

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

and what does that look like? [LR569]

ROBERT J. HALLSTROM: What's at the end of the rainbow, Senator Lathrop, is in the states that have established guidelines, the general rule is if you follow the protocols that are recommended under the utilization and treatment guidelines, there's no dispute with regard to the payment for those services. And so the provider benefit is that it removes the contentiousness or the potential dispute with regard to payment for those services. If they fall within the parameters or the guidelines, they are approved and paid for, which benefits the providers. We also think on the other end of it, since these are evidence-based medical guidelines, that they provide better outcomes, there's more timely and appropriate care for the employee, which is a benefit. It gets them back to work more quickly, which is a benefit for the employee. And then at the back end, the employer community benefits either directly or indirectly, for example, from better return-to-work outcomes. [LR569]

SENATOR LATHROP: Okay. So let's go to the hypothetical guy who has a disk injury. He can have any job; herniates a lumbar disk. Is the...what would the treatment guidelines look like? For example, would they say you get three visits, start out with three visits with your family doctor. If you have radicular pain, then you can get an MRI, otherwise you don't. What would that look like? Can you just give us an example and assume a herniated disk? [LR569]

ROBERT J. HALLSTROM: That would typically be the type of option that would be available. There are multiple options depending on the injury for the treatment that's going to be recommended under the guidelines. Probably what's easier to approach is it may not include...and, you know, except in a case where there's a need to vary for doing the surgery that may be required. They may say that that would be the last alternative. It may be excessive. It may be inappropriate. There may be worse outcomes if you go to surgery in cases where they're not needed and things of that nature. [LR569]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR LATHROP: Does that guideline then create some kind of a presumption in court? For example, herniated disk, which I've done, go to Nebraska Spine, which I've done. And they say, you know what? You can have it now if you can't live with it, but we know that if you wait four years, you'll be right where you would be four years from now whether you have surgery or you don't. That's probably not an uncommon statement for a herniated disk. So if my doctor says this guy needs a discectomy now or my recommendation is, does that create some sort of presumption in terms of compensability of that care? [LR569]

ROBERT J. HALLSTROM: My understanding, Senator, would be it would not create any type of presumption other than if you had followed the guidelines, there would have been automatic approval and payment. But you certainly, since they are guidelines, you certainly can get preauthorization for anything that falls outside the scope of the guidelines to determine... [LR569]

SENATOR LATHROP: And where would Nebraska...I'm using them because I know some of those guys over there or they treated me, where would Nebraska Spine call if they think they need to do surgery on me and it's not...it doesn't fit in the guidelines? Do they call the insurance company? [LR569]

ROBERT J. HALLSTROM: I assume yes. [LR569]

SENATOR LATHROP: Or do we have a panel set up of federal bureaucrats, state bureaucrats? [LR569]

ROBERT J. HALLSTROM: Well, there are different ways that that could be taken care of, Senator. The most logical or the most direct way would be that it would be between the provider and the insurer in determining whether or not anything that falls outside of the guidelines should be preauthorized, if you will. I've talked with Glenn Morton. Glenn



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Business and Labor Committee  
October 19, 2012

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Morton obviously wants to have some type of system in place even though this is designed to minimize the likelihood of disputes of nonpayment for those cases in which there may be some disputes. He wants to make sure that whatever is put together if we move forward on this does provide the court with the mechanisms to address those types of cases that fall outside the guidelines, perhaps they're not granted... [LR569]

SENATOR LATHROP: And that would be a process that happens in two days and not six, eight months. [LR569]

ROBERT J. HALLSTROM: I would assume it should be a streamlined process. [LR569]

SENATOR LATHROP: Would the guidelines or--see, I've not studied this at all, so I'm asking these questions not to make my own point but to learn more about it--would they, for example for a back strain, tell somebody how many physical therapy visits they would get? Is that an example of what the guidelines would rein in and where they'd save money? [LR569]

ROBERT J. HALLSTROM: In some states they may depending upon whether it was a state-specific developed guideline which happened early on before the ODG and ACOEM external guidelines came about. They may have put in specific limitations, whether it's for PT or chiropractic. But, again, keeping in mind that they're guidelines. There's nothing that says if it says eight visits, that's what's recommended. The provider would then prove through preauthorization that I'm six visits in; eight isn't going to do it. Here's the reason we need to do X, Y, or Z differently than what the guidelines provide. [LR569]

SENATOR LATHROP: Okay. Do we...if we were to do something legislatively, is there a resource that we would then legislatively make the standard for best practices or whatever evidence-based? [LR569]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

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ROBERT J. HALLSTROM: Yeah. Again, some states have developed their own. In some states, the legislation provides for a blue ribbon medical provider panel, if you will, that both develops the guidelines and then updates them periodically as it moves on and there's new evidence-based guidelines that are developed and applicable to Nebraska. What's happened more recently though is that the private ODG and ACOEM guidelines have come out that have been put together, they're packaged up, put together based on evidence and so forth. And so a lot of states I believe that have looked at this have decided we shouldn't need to reinvent the wheel by starting from scratch when we've got these guidelines. But a lot of smart people have put a lot of time into crafting and putting together... [LR569]

SENATOR LATHROP: I've got another question for you. Do we get into an unconstitutional delegation if we say the Legislature now blesses some organization that creates these standards and they will become the standards? [LR569]

ROBERT J. HALLSTROM: You could potentially, Senator. But what's traditionally been done is that you adopt them as of a certain time, and then you can always update that or have a mechanism set in for a medical review panel if they were there to update and review and add and subtract from them. So I assume there's any number of ways around avoiding any potential for an unconstitutional delegation. [LR569]

SENATOR LATHROP: Okay. And my take is or my hunch is that you're at the front of this or a group that you represent, whether it's the NFIB or the work comp equity group. [LR569]

ROBERT J. HALLSTROM: Yes. [LR569]

SENATOR LATHROP: Have you been doing work with the medical community? And what's been their response or how receptive...how broad-based is your involvement...has been the involvement of the medical community? And what's their

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

response? [LR569]

ROBERT J. HALLSTROM: We've had preliminary meetings with representatives of the Nebraska Medical Association, a number of surgeons and physicians, along with the head of the NMA have had conference calls and meetings with us. We're kind of moving down that path slowly to make sure that they understand and appreciate. The medical association has checked with other states where guidelines have been adopted, most notably in Kansas most recently where I think they found out that the NMA counterpart in Kansas had suggested that the transition had gone smoothly. They were working well and had been relatively well received by the medical community. I think the NMA members, they haven't formally requested any type of vote or position to be taken. But I think in general they're taking it slowly. They're looking at it, making sure they understand and appreciate how the guidelines would be implemented, what that would mean for their practice. Most of the surgeons that we're talking to say, well, that's what we already do. We already follow those guidelines in essence. And so, you know, while they're talking about other issues regarding certification and credentialing of providers, which are a little bit outside the scope of what we were originally interested in, we're certainly willing and will entertain those types of discussions. But for now, we're focussing on what seems to have worked in other states. [LR569]

SENATOR LATHROP: And that explanation mentions slow or slowly two or three times. And so my next question is, is this something you expect to have a bill introduced in this session or are we a year out from a legislative proposal? [LR569]

ROBERT J. HALLSTROM: I think, Senator, we're probably likely to have something introduced, depending on how quickly the NMA and other stakeholders or interested parties come to the table and express either their support or concerns as to either heck no or how can we revise it to make it work for everybody so that it's a win-win for employees, employers and the medical community alike. So I wouldn't say we're going to rush to judgment by any means. We want to make sure that those that have an

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

interest in making the system work properly are at the table, number one, and then embrace whatever it is that we decide to move forward with. [LR569]

SENATOR LATHROP: Okay. Senator Carlson. I'm sorry. [LR569]

SENATOR CARLSON: Thank you, Senator Lathrop. Bob, when you talk about going to something like this and ODG, and I think I'm hearing that from a management viewpoint it would reduce cost and allow for quicker back to work, workers get back to work more quickly. That's the way you feel from a management standpoint. [LR569]

ROBERT J. HALLSTROM: Um-hum. [LR569]

SENATOR CARLSON: Now I'm going to ask you two other questions because we have several people from labor that will be testifying and they may look at this differently, I don't know. What do you see as an advantage for labor? [LR569]

ROBERT J. HALLSTROM: Well, what we've seen as the results in other states have been that the guiding principle is to get timely and appropriate care, which the guidelines assist with, and to have outcomes that return the employee to work more quickly. I think those are two definite benefits of the guidelines as we've seen in other states. [LR569]

SENATOR CARLSON: Okay. And then the second question would be, again reiterate what you feel is the advantage to the medical community. [LR569]

ROBERT J. HALLSTROM: Well, I think the basic one is that we've had a number of things that I guess the first one that I alluded to earlier is the removal of a great number of potential disputes by having automatic payment for services and treatment that is within the guidelines. In my testimony, Senator, there's some information from the ODG where they have tracked every one of the CPTC codes, and they've shown that 78

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

percent of the services and treatment are paid without any element of dispute, and of the remaining 14...22 percent, 14 percent of those for some reason require a manual reading and application of the guidelines, and they are approved. So you've got 92 percent at least with regard to the ODG experience in the particular state that I cited in my testimony that are effectively paid without having to go through preauthorization, without having to have disputes, etcetera. [LR569]

SENATOR CARLSON: Could I boil that down to satisfactory payment more quickly? [LR569]

ROBERT J. HALLSTROM: Yes. [LR569]

SENATOR CARLSON: Okay. All right. Thank you. [LR569]

SENATOR LATHROP: Senator Wallman. [LR569]

SENATOR WALLMAN: Thank you, Chairman Lathrop. Thank you, Bob, for being here. And I've just looked at Ohio's data. And do you feel that, did they have voc rehab right away after the injury, do you know? [LR569]

ROBERT J. HALLSTROM: I don't know what the Ohio law is in that respect. [LR569]

SENATOR WALLMAN: Because I see they go back to work earlier and savings on the medical costs, so it's quite something. Thanks. [LR569]

ROBERT J. HALLSTROM: Yeah. [LR569]

SENATOR LATHROP: I do have two more questions for you, and that is do you have a state that...you said 23 states are doing it now, Bob. Do you have a state that you regard as sort of the model? [LR569]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

ROBERT J. HALLSTROM: I don't know that... [LR569]

SENATOR LATHROP: Or do you think that as you've studied this issue, you look at it and you say, Kansas is doing it right or... [LR569]

ROBERT J. HALLSTROM: I don't know that it boils down to that level of review, Senator. I think you either look at should Nebraska, if they're going to adopt guidelines, embark on their own path and re-create the wheel and do their own thing? I wouldn't recommend that. I think more commonly of recent vintage the ACOEM and the ODG guidelines that are out there and prepared are the way to go so that it's a question of doing the due diligence to look at those two alternatives to see which one maybe is a better fit for Nebraska. But once you get there, I would assume that all of the states that have adopted ODG on the one hand and ACOEM on the other are going to have similar results, although they may have different starting points. [LR569]

SENATOR LATHROP: And that was going to be my next question, which is, which guidelines would you point to, and it would be the two that you've just referenced. [LR569]

ROBERT J. HALLSTROM: Yes. [LR569]

SENATOR LATHROP: But I would assume from state to state there's a difference in how much weight they're given, whether there is incentives or disincentives to deviate from the guidelines. And that's a state-by-state thing. There is 23 states. [LR569]

ROBERT J. HALLSTROM: Well, I haven't... [LR569]

SENATOR LATHROP: Is one state doing it well in your judgment? [LR569]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

ROBERT J. HALLSTROM: I haven't necessarily gathered that, Senator. I think it boils down to, you know, it's not really a cookie cutter, but the general principle is you adopt your guidelines. If the treatment for the injury falls within the guidelines, you should remove the dispute for the medical provider in terms of getting payment. You should have the consistent, the reliable treatment for the patient, which hopefully gets them back to work more quickly, etcetera, etcetera. [LR569]

SENATOR LATHROP: Okay. [LR569]

ROBERT J. HALLSTROM: And I think one other thing I might add, Senator. I couldn't get it done today. But we certainly have representatives from either of the two external guideline groups that we could make arrangements and will make arrangements with regard to the medical association and any other stakeholders that can come in and give more specific information that maybe relates a little bit closer to the questions that you asked on... [LR569]

SENATOR LATHROP: Okay. [LR569]

ROBERT J. HALLSTROM: ...what's the particular treatment or protocol for this type of injury or a herniated disk. [LR569]

SENATOR LATHROP: One more, one last question. It does sound like you've done a lot of work on this. You've talked about the different meetings you've had with people and you're talking about the medical community and you're telling them they're going to get paid faster. Does this process involve the court and does it involve the employees? Do you have somebody sitting at the table that speaks for the employees and whether they see it's beneficial? Because, you know, when I heard you say they get done, it's cheaper, they have fewer doctor visits, less physical therapy, that tells us what it costs us and that we're saving money on the medical side. But it doesn't tell us that the guy got well or as well as he would have under the current system where doctors exercise

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

their own judgment. [LR569]

ROBERT J. HALLSTROM: Well, I would suggest, and some of the people that are probably in the room today, that we certainly have an open invitation to come to the table and meet with those folks to more clearly explain what it is that we're working on and what our objectives are. The court has been involved through Mr. Morton without establishing a position one way or the other, and I think he'll testify as to some particulars that he'd be interested in if we were to move forward. [LR569]

SENATOR LATHROP: Okay. [LR569]

ROBERT J. HALLSTROM: But with regard to the others, I think it's interesting last year when LB1008 came up, we had some ulterior and nefarious motives attributed to us for introducing the legislation, which quite frankly at that time we hadn't even had time to develop those motives. Since that time, we've had some time to look at some ulterior motives and we really don't find any that we've latched onto. We think it's a benefit for the employee, a benefit for the employer, and for the medical community, and we hope people will seriously take a look at it and hopefully it's good. [LR569]

SENATOR LATHROP: Okay, okay. Very good. [LR569]

ROBERT J. HALLSTROM: Thank you. [LR569]

SENATOR LATHROP: I appreciate it. Thanks, Bob. That's a pretty good introduction to the topic, and so we'll...that went a little longer than we might otherwise take with each of the other witnesses. But if you want, you can step up and be heard. [LR569]

ROD REHM: Good morning. My name is Rod Rehm. I'm an attorney here in Lincoln, and I'm speaking on behalf of the Nebraska Association of Trial Attorneys. We really want evidence-based medicine studied very closely and very objectively. We don't think



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

it's a good program for our clientele. I'm on the board of directors of the National Workers' Compensation Association and the former secretary of the Workplace Injury Law and Advocacy Group. We have issues in our magazines telling us how awful evidence-based medicine is for workers all across the United States. It's not evidence based. This ACOEM group admits they have no proof that the scientific proof is there that anything is more efficient. It's a program for all that we can see is designed just to save money for insurance companies and employers and not to give quality care and not to improve care and not to make workers better. And we will come with as much information as we can gather from different states, including experts, and explain what's wrong with evidence-based medicine as we understand it. That's the underlying basis for this whole care program. And they even admit they have no proof that it works. There's documents from the American Academy of Occupational and...or the ACOEM, I can't think of the exact name of it, where they say there's no studies that show that we're right, that what we do is more effective. That's their own words. That's out there. This is not going to benefit workers as we understand it. Now maybe we're wrong. But it's my understanding that in its extreme you could have a phone answerer in Bangladesh looking at the darn list and telling an orthopedic surgeon that had been to school for almost 30 years, if you want to get paid next week, you do these six things. And then if they don't agree with it, then the nurse case manager shows up who, under Supreme Court decisions, is not an authorized player in this system to tell the doctor, you're not going to get paid if you do this surgery. Meanwhile, the patient suffers. We don't need that kind of system in this state. [LR569]

SENATOR LATHROP: I'm going to make a suggestion, and that is if Mr. Hallstrom has made an open invitation, I would...if we have a bill that comes in here, I would like to have in the end a hearing that where we hear what the advantages are from the insurance carrier side of things, and that we hear specifically what's wrong with the specific plan from those who have a concern about the employees. Because what won't be beneficial in the end is if the two of you aren't talking... [LR569]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

ROD REHM: Right. [LR569]

SENATOR LATHROP: ...nobody talks to each other. They come up with a plan, and since you weren't there or part of it, then your objections are general and not specific to their plan. And then we're left to decide between a specific plan and general concerns. Are you tracking with me? [LR569]

ROD REHM: Yeah. I can tell you that I've had conversations with people from the equity and fairness group, and said, hey, you know, when are you going ask us to come and talk about this because we have a lot of thoughts on it. Nobody has ever asked us. Nobody has asked to set up a meeting with NATA or as far as I know the AFL-CIO. There's no dialogue going on here, other than with doctors and the court. And there's a lot of other people that are involved in this. I've been doing workers' comp for 30 years and I've probably by now 100,000 times told the worker, you don't want a good case, you want good health. You want the best doctors in the state to take care of your back, not somebody that wants to get paid in six weeks regardless of what they do. You don't want that kind of a system. You get this system, we have a system where workers are going to be treated worse than any other injured people in our society. That is not right. That's not to the benefit of the worker. I also think that there's some things happening that I have heard about that we can start to focus on what's cost...what is costing things. The NCCI is now, I understand, able to break down medical costs and show how much is being spent on prescriptions and how much is being spent on surgical procedures on something and maybe for the first time. I think, you know, before we rush into some system that hopefully would not be as bad as I fear, we should know the facts. I mean, is the reason that our costs are so high is that people are getting enormous amounts of medication as opposed to back surgeries and things like that? I mean, the facts are really important in all this stuff. And as I understand it, those facts are going to start to become available maybe this year for the first time or next year. So to just rush in and adopt some plans that are heavily criticized by workers and workers' representatives all over the United States in the name of saying that we want to make their healthcare

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

better, I mean, let's tell the truth. This is just a cost-cutting measure. [LR569]

SENATOR LATHROP: Well, that's a...and that's a fair... [LR569]

ROD REHM: That's our... [LR569]

SENATOR LATHROP: ...that's a very fair concern. [LR569]

ROD REHM: Right. [LR569]

SENATOR LATHROP: It's one that I would share. And if the...if we see a bill and if we have a hearing and you have evidence from or data from other states that have done this and all we're doing is eliminating care and the outcomes aren't as good under that sort of a process, I think that would be important information for this committee to consider. [LR569]

ROD REHM: Yeah. I mean, we sit...as lawyers that represent workers, I just sat across the table from a lady yesterday, 62 years old that had worked all her life in a packing plant that went out of business. And then the only thing she could find was being a housekeeper in a nursing home. She fell off the ladder and broke her wrist. The company picked the surgeon for her, who released her to go back to work two days after she had an invasive surgery with steel plates in her arm. She has only gotten worse since then. They picked the doctor to send her out to that said, oh, you have carpal tunnel. They picked it. She was never informed she could pick her own doctor. She had two more procedures. Now her hand is about 50 percent bigger than the unbroken hand. It's purple. Her hair is falling out of her arm. The physical therapist is saying she has complex regional pain syndrome, and the insurance company says keep working, we're not approving that care. I mean, where you let people that ignore symptoms and all they care about cost-control care, little people get run over. And that's the reason there's as many lawyers representing people as there are is because they

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

get bulldozed and run over by cost-containment measures every day of the week. And many of them are too fearful to stand up and fight because it does take a long time. And if you can set it up so that somebody at the insurance company makes the decision whether the doctor's treatment is getting paid for and it's limited to begin with, I mean, the whole process just gets extended, gets more complicated. I mean, we're talking about if you think just about that the statutes talk about being entitled to reasonable necessary medical care. That in the past has been decided by opinions from experts, not some written guideline developed by a committee whose members are largely made up of insurance industry people. The American Academy of Occupational and Environmental Medicine, one of the leaders of it is an executive of Liberty Mutual. They write the guidelines. Are they the ones that are supposed to tell doctors what to do? You know, I read something once that there's a golden rule that's different in the insurance world is that, he who has the gold writes the rules. They just want to make this a little...give them more ability to write the rules in more detail than they've ever had before with these guidelines. [LR569]

SENATOR LATHROP: Okay. Thanks, Rod. Senator Carlson. [LR569]

SENATOR CARLSON: Thank you, Senator Lathrop. My blood is boiling a little bit. [LR569]

ROD REHM: Mine was too. [LR569]

SENATOR CARLSON: Okay. And I can tell it. I serve on three committees in the Legislature. And there are many issues on those various committees that I have definite views on, and it's hard for me to be objective. It's hard for me to have an open mind. I ran into an individual a couple of weeks ago that 90 percent of the time we're on different sides of an issue. And I told that person that you have blasted me in public every chance you get, but if you come in front of our committee next session and if you want to talk about something I will listen to you. Now I think several times you've

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

contradicted yourself in what you say today. And I can do the same thing. I understand that. But is your objective...first of all, you talked about you want to be at the table. So if Bob Hallstrom, Senator Fulton, whoever wants to put a group together to thoroughly discuss this, would you say that you will go to that meeting with an open mind? [LR569]

ROD REHM: Yeah. I was on the Governor's task force in 1992 that wrote LB757 and I met every month for a year and a half. And we went through every line of that...every section of that statute and negotiated in good faith. And it was out in the Rotunda of the Capitol where we wrote the rules on the back of a napkin on modified physician's choice. And I was very open-minded. I've been doing this for 30 years. I know how the system works. And all I'm trying to do is be an advocate for the little guy. And, you know, I've been involved in efforts where I've been criticized by other trial lawyers for being too willing to compromise. I'm sorry. I didn't mean...I hope you didn't think I was attacking you personally. I don't even...I don't know you. [LR569]

SENATOR CARLSON: No, you're not attacking me. I'm listening to you. [LR569]

ROD REHM: You know, but, yeah, I think NATA has got a really good track record of sitting at the table and cooperating and being practical and sitting down and trying to deal with the problem. You know, we don't want to have medicine deprived from our clients because it cost too much and nobody wants to do it. You know, we want to have good doctors take care of our patients. That's my first criteria. When I have a hurt person, I want to give them the best doctor I can get them to so they get better, because they are going to be better off if they have good health as opposed to a good case. That's the truth. [LR569]

SENATOR CARLSON: And I don't think any of us would disagree with that. But you did make two or three different statements. I'll come to that meeting and I'll show you why it won't work. Well, if that's our attitude and we go to a meeting, it's not going to work. So I would hope there's an open mind. You also said that Liberty Mutual shouldn't be making

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

the decisions on medical care and who treats us. I spent 30 years in the insurance business and I don't disagree with that, but government shouldn't be making those decisions either. It should be the individual. [LR569]

ROD REHM: Yeah. And that might be...that's part of my problem with this what I'm hearing here today is if there's going to be some sort of a built-in review that's nonjudicial at the workers' comp administrative level, I...you know, I trust the court system where there's a record and there's an open decision and then there's judges above that to look at it and figure out whether something is reasonable and necessary. I mean, it's okay to want to expedite things and speed things up. But if we're going to have...we need to preserve judicial review. We need to preserve the right for people to have a hearing to present evidence, I think. You know, and then maybe that's my bias because I'm a lawyer. But I mean, the court systems are one of the big pluses of the United States of America is open court and judges. You know, so I don't think we disagree on that. You know, I also was trying to speak quickly so I could get out of here and have all of you get out of here. If we had the opportunity, and I don't know that I'd be the person from NATA on the committee, I might be, you know, there's several of us that tend to show up for stuff, we'd work to figure something out. You know, if there was some open-mindedness. In many states, the parties have worked out some guideline systems that work, but we want it to be fair to the little guy because they're really outresourced and outgunned in these disputes. [LR569]

SENATOR CARLSON: Okay. Just one other question then. If, because it's if, if Senator Lathrop decides to call a meeting and it includes Bob Hallstrom and other interested parties, are you saying that if you're there as a member of the trial attorneys you will come with an open mind? [LR569]

ROD REHM: Oh, sure. [LR569]

SENATOR CARLSON: And I would like to be in on that, too, and I would too. [LR569]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

ROD REHM: Yeah. [LR569]

SENATOR CARLSON: So appreciate it. [LR569]

ROD REHM: Look forward to it if we have that chance. [LR569]

SENATOR CARLSON: All right. Thank you. [LR569]

SENATOR LATHROP: Looks like I'm calling another meeting. [LR569]

ROD REHM: There you go. [LR569]

SENATOR LATHROP: (Laughter) Did you have a question, Jim? Senator Smith.  
[LR569]

SENATOR SMITH: Yeah. I just wanted to make a comment as well. And I appreciate you coming in and your advocacy for the worker. That's critical and that's a great perspective to bring. But you don't have the market cornered on care for the worker. All right? The employer does as well. And the good employers out there, they want to take care of their employees and keep them safe and keep them well. And I just wanted to make that point that we do have to control cost for the employer. Reducing cost, wasteful cost, is not a bad thing, because as employers can reduce cost in their businesses, wasteful costs, then they can grow their businesses and they can add jobs. And that's a goal as well in our economy. So there's this...I don't want to leave this meeting with the thought that the intent of reducing cost, wasteful cost, is a bad thing. It's a good thing. And I think the good employers out there are going to want to do the right thing by their employees. But we do need to have a fresh look at the way some of these things are done. And if we can reduce cost and we can make it more efficient, and I like the tone that's being struck here. And I would...it's not a second, it's a third I

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

guess, by Senator Lathrop and Senator Carlson, participation in this process and this discussion I think is really, really critical. [LR569]

ROD REHM: I also am a small businessman. I have a six-lawyer law firm with offices in Lincoln and Omaha, and we have 18 or 19 employees. And I understand wanting to grow a business and cost... [LR569]

SENATOR SMITH: When was the last time you had an issue like what's being discussed here today in your law firm? It's a...and... [LR569]

ROD REHM Oh, well, we've got it right now with...we don't have people get hurt, you know. We did have a young lady break her toe when she was wearing flip-flops in violation of company policy, but...and it was upsetting but we paid for her care. [LR569]

SENATOR SMITH: And I probably should not have made that statement. But I know all businesses are critical to the economy. They all face similar situations. But there are some companies out there that may be more adversely affected by some of the things you promote and your tone, and we want to try to address some of that. [LR569]

ROD REHM: I just...and I'll stop in just a second, but I agree with a lot of what you said. And I just last night looked at the Workers' Compensation Court's last annual report that there's like 50,000 reported injuries in the state of Nebraska in the last fiscal year. Only 1,500 of those resulted in lawsuits. That's where people were really fighting over it. So I mean in the global scheme of things, and I've said this almost every time I've ever testified in this Legislature, the system does work pretty well. There are way more good employers and good employees than there are the other kind, way more. You know, and we come in here as advocates and representatives of people that are having trouble. And so if we come across as too aggressive or if I have, I'm sorry. But I just wanted to make sure you understood that everybody doesn't think this nice sounding new bureaucracy for medical care is a good deal. [LR569]



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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR SMITH: I'd agree with that. [LR569]

ROD REHM: Okay. [LR569]

SENATOR LATHROP: Okay. Sounds like everybody agrees. [LR569]

ROD REHM: Yeah. There you go. Thank you. [LR569]

SENATOR LATHROP: Well done, Rod. Thank you. [LR569]

STEVE HOWARD: Steve Howard for the Nebraska state AFL-CIO. One of the problems is that a lot of this is hearsay. You know, when we see that there's a study out there that says that there are less lost work days with evidence-based medicine, what our friends around the country say is that those studies are skewed because the way they're done is for the entity conducting the study that has a financial interest in the outcome. Says, well, the doctor released the person on this date, so they're back to work, when in reality that doesn't track the day the person physically shows up and performs their duties and is productive and earns a wage. But, again, that's just hearsay. What we hear is that it's a rationing of care and that it results in reduced care. But why in the world wouldn't organized labor be in support of something that's truly better for the worker, so? And I know it's easy to say, you know, I'll keep an open mind. But I'm just...you know this, that any study, any bill that comes forward based upon a study will carry more credibility and will have more legitimacy and come with more balance and come with more bipartisan support if all of the parties and all of the interests that have a stake in the outcome are at the table, so. We are lucky to have the doctors that we have in Nebraska, and we just don't want to have doctors driven out of the marketplace because workers' comp is kind of a hassle. You have lawyers representing both sides, and you have a nurse case manager, and you may have the court asking questions and wanting reports and tugging back and forth. And it's different than when the bill is paid by Blue Cross Blue

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Rough Draft

Business and Labor Committee  
October 19, 2012

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Shield or someone. The other point that I would like to make just briefly is that if there's any notion that somehow the employer through the insurance company is held hostage by what the treating doctor says, that's not accurate. We have this statute, 48-134, that says that at any time, whether you're in litigation or not, whether you have lawyers, whether there's permanency or any of those things, at any time the employer can command the injured worker to show up for a defense examination with the doctor of their choosing and the person has to go. I mean, the unreasonable refusal to go results in termination of benefits. And we've had plenty of experiences where going in to court, three or four doctors all say generally the same thing, and the defense doctor will say something different, and the court just has to decide. And there's no penalty for refusing to pay for the treatment. There's no penalty for refusing to pay for benefits because the employer has the benefit of that defense exam. And, you know, there are two words in the resolution that jump out at me, and that is medical director. I won't do this, but I could name three off the top of my head, eight or ten doctors that we're just able to predict what their reports are going to say. When that letter comes in, says, you shall show up at this appointment. It's very predictable. And perhaps the insurance industry would say the same thing about certain doctors that are...they carry a reputation for supporting employees, so. But it's not a case where a person can just go endlessly to physical therapy without any improvement and just rack up thousands and thousands of dollars in chiropractic visits without it ever being challenged by the employer. So that's all I was going to say. Thank you. [LR569]

SENATOR LATHROP: Thanks, Steve. I see no...oh, yes, we do have a question for you or a point. [LR569]

SENATOR CARLSON: No, just...thank you, Senator Lathrop. But, Steve, I think if we've accomplished anything today, one of the things is the idea of coming to the table and having a part of the discussion and trying to have an open mind. And I think if you were to represent AFL-CIO at a meeting such as that, you would be willing to really attempt to come with an open mind. [LR569]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

STEVE HOWARD: Absolutely. [LR569]

SENATOR CARLSON: Okay. Thank you. [LR569]

STEVE HOWARD: Thank you. [LR569]

SENATOR LATHROP: Thanks, Steve. [LR569]

DENNIS BOZARTH: Good morning, Senator. [LR569]

SENATOR LATHROP: Good morning. [LR569]

DENNIS BOZARTH: Thank you for letting me come. My name is Dennis Bozarth. I'm an orthopedic surgeon here in Lincoln. [LR569]

SENATOR LATHROP: By the way, we didn't let you come. You're welcome here any time. (Laughter) Welcome to the Business and Labor Committee. [LR569]

DENNIS BOZARTH: For the past ten years, I've been interested primarily in workmen's compensation. For the past five years, that's my primary focus in my business is taking care of injured workers. I represent basically myself today. I don't represent anybody. I have informal conversations with other orthopedic surgeons in Nebraska, and we have met with the various groups and just discussed these things briefly. We're not totally convinced that guidelines is the best way or the only way to go. We think it's a possibility... [LR569]

SENATOR LATHROP: You're saying we now. [LR569]

DENNIS BOZARTH: My discussions with my friends. [LR569]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

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SENATOR LATHROP: Okay, okay. [LR569]

DENNIS BOZARTH: It's not a group. We're not organized for any purpose. [LR569]

SENATOR LATHROP: Okay. But you're representing some conversations you've had with other orthopedic guys... [LR569]

DENNIS BOZARTH: Just conversation. Yes, sir. [LR569]

SENATOR LATHROP: ...who treat probably a majority of the work come guys. [LR569]

DENNIS BOZARTH: Workers' compensation. Yes, sir. [LR569]

SENATOR LATHROP: Okay. [LR569]

DENNIS BOZARTH: And so we've proposed, as they've been mentioned, some kind of a criteria for physicians to meet certain education or experience levels to take care of these people as the business community has come to us and wanting certain consistency of care. And that's what they perceive they're not getting. And so they've moved to a guidelines base because then at least has some consistency, where we have gone to say, well, maybe we should meet...certain physicians should meet certain criteria to take care of workmen's comp, because it is more complex. The people have more issues, whether they're...they feel violated or they're not being listened to or they have attorneys. I mean, there's so many issues. And if you go to meetings, which I do at least two or three times a year, to learn these issues, then you can be more sympathetic and try to get people through this system. We know it is best for the health of the individual to get back into their normal life as quickly as possible. And whether...and part of that normal life is work. And so we do emphasize, return to work, stay at work, because it does keep their life more normal, keeps their physical, their financial life

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

more consistent, and leads to less complicated problems and gets them back over this system quicker. And so we have proposed as a possibility of having certain physicians have certain...you know, be qualified to take care of workmen's comp. Now I know that's not what the system is right now. They can pick their own physicians. But it is maybe not consistent enough with some of these systems. [LR569]

SENATOR LATHROP: Let me ask you a question in that respect. I didn't mean to interrupt you. [LR569]

DENNIS BOZARTH: That's all right. I don't have a prepared statement. [LR569]

SENATOR LATHROP: Okay. Is that going to eliminate some orthopedic people? In other words, your criteria wouldn't be if you're an orthopedic surgeon, you are now qualified to do knees on work comp guys. They'd have to go through some additional certification to be a work comp certified orthopedic surgeon. [LR569]

DENNIS BOZARTH: Yes, sir. [LR569]

SENATOR LATHROP: Do you think that we would eliminate...are there going to be some orthopedic doctors in Nebraska who will say, wait a minute? It's just turned into too big of a hassle. I'm not going to go through the certification. Perfect excuse for me to not have to treat those people anymore. I'm not getting the certification. And now we have it narrowed down to half the orthopedic surgeons instead of all of them. [LR569]

DENNIS BOZARTH: I think there is that potential. But I was recently at a meeting in the Boston area and did talk to people from Nevada. And they put those criteria where their physicians had to meet certain criteria to be qualified, and almost all of the orthopedic surgeons are qualified. They went through the addition. [LR569]

SENATOR LATHROP: Okay. Then that...which leads me to the next question which is,

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

what qualification...just...you've obviously thought about this, so just give me two things that you would add to the qualifications necessary to get this certification that every orthopedic surgeon in the state doesn't already have. [LR569]

DENNIS BOZARTH: Well, one is in our academy every year in November is a special course that is only designed for workmen's compensation and treatment of workmen's compensated injuries and liability claims to understand the system, so going to and taking special education in that. There's other courses... [LR569]

SENATOR LATHROP: So that's not about anything to do with treatment; it's just about understanding the legal process... [LR569]

DENNIS BOZARTH: The legal... [LR569]

SENATOR LATHROP: ...associated with tort claims and work comp. [LR569]

DENNIS BOZARTH: The whole system. [LR569]

SENATOR LATHROP: Okay. [LR569]

DENNIS BOZARTH: How to deal with case managers; how to deal with attorneys, plaintiffs, defense; how to do independent medical examinations. What is the criteria...or what is the evidence? You talk about guidelines and the guidelines are not technically evidence base since truly medicine, we don't have the evidence. They don't let us experiment on people to get the evidence. So we have to do studies and they try to compile all the best research and then glean from that and come to a consensus of what seems to be rational treatment and what seems to be irrational treatment. And so those guidelines could become part of a care, but I think it's not necessarily the primary thing that we would focus on. [LR569]

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

SENATOR LATHROP: Do I hear you not in support of treatment guidelines but in support of a different approach, which would be certification of physicians who would provide care to injured people? [LR569]

DENNIS BOZARTH: That's currently my thought, yes, sir. [LR569]

SENATOR LATHROP: Okay. Are there any other questions for this doctor? Yes, Senator Carlson. [LR569]

SENATOR CARLSON: Thank you, Senator Lathrop. [LR569]

SENATOR LATHROP: Thanks for coming too. [LR569]

SENATOR CARLSON: Doctor, is this your day off? [LR569]

DENNIS BOZARTH: I don't take a day off. (Laughter) [LR569]

SENATOR CARLSON: Well, we thank you for coming. And it's costing you a lot of money to come here this morning and we appreciate that. That's all. [LR569]

DENNIS BOZARTH: Thank you. [LR569]

SENATOR LATHROP: Yeah. I'm not going to go into what I have to pay to talk to one for an hour in front of a court reporter... [LR569]

DENNIS BOZARTH: As you should. No. [LR569]

SENATOR LATHROP: ...which is something we should probably talk about. (Laughter) Maybe not at this hearing. Okay. Judge Brown. While he's getting comfortable, how many people intend to speak on this? Is that just one more hand? Two? Okay.

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

Depending on what happens next. Good. Well, we appreciate the input. This is a helpful conversation. [LR569]

RONALD BROWN: I want to suggest to you from a historical perspective that something like this has been tried before. [LR569]

SENATOR LATHROP: Would you give us your name? We all know who you are, just so the record reflects. [LR569]

RONALD BROWN: Yes. Ron Brown, Ron Brown from Omaha. When LB757 was adopted, and I looked back at the date that it became effective and it was 1993, LB757 provided for managed-care plans and it's still in the statute. Managed-care plans are submitted to the Workers' Compensation Court for review and approval, and then these folks go out and enroll as many employers as they can in their managed-care plan. Managed-care plans can provide for medical treatment guidelines. This has been around since 1993. Initially, there were several managed-care plans that had been approved by the court. There are now fewer managed-care plans in place than there were when this started, and there are fewer employees enrolled in those managed-care plans than when they started because it doesn't work. It's a hassle. The employers drop out of it because they don't want to conform with the rules that were required. If this was effective and we still have a market economy, if this worked there would be more employers enrolled in these managed-care plans now than there were when it started, not fewer. There would be more employees covered by these managed-care plans now than when it started; there are fewer. That is the fact. And then just, you know, I don't...I've kind of been withdrawn from political activity during the years I was on the court, but it looks to me just observing everybody that's come up here that this bill has kind of turned the parties on their heads. Steve Howard represents organized labor which supports Obamacare. Obamacare is medical guidelines. The employers that have...that on a national level oppose Obamacare and think it's Satan are here in support of it. It's just an odd observation (laugh) that I would add to this. But I think most



Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

importantly this managed-care business has been something that's been tried in Nebraska, it has not grown, it's gotten smaller. And I would suggest to you that this is a good precedent to look at before you rush into what's proposed now. [LR569]

SENATOR LATHROP: Okay. I appreciate your testimony and I see no questions. Thanks once again. [LR569]

GLENN MORTON: Senator Lathrop, members of the committee, again, my name is Glenn Morton, M-o-r-t-o-n. I'm the administrator of the Workers' Compensation Court. I'll be very, very brief. The court's concerns on this topic relate to how the guidelines would be established and implemented, and rather than to substantive issues like which guidelines or how they should be adopted or who they should cover, that sort of thing. We'll leave that to the parties and, of course, the committee and the Legislature. But the court would request first that the substantive policy provisions that would govern this be addressed in the bill rather than by court rule as LB1008 would have done. Current law requires the court to adopt the medical fee schedule. There's no guidance whatsoever about how we should do that. The judges who have adopted our rules have struggled with that many years, and we simply would not want to re-create that situation with regard to treatment guidelines. So, again, please lay out the policy and give us the direction on that. Secondly, it's already been mentioned that I think how the dispute resolution will be handled and should be handled should also be addressed within the statute and pretty clearly lay that out because this is potentially, in my opinion, one of the biggest issues and the biggest snags and problem areas, if you would, in implementing something like this. First of all, it's a problem because of the potential increase in workload for the court. In some states from what little research that I've done and the articles I've read, it does work fine, it has worked fine. But in others, in New York, for example, the litigation system has been flooded with requests for variances. So the dispute resolution will be critical. It will also be critical because providers have no standing in our system. So they can't actually...a provider himself or herself can't file a petition with the court over a dispute over medical treatment. Of course, the employee

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

can do that. The employee can always do that. But will this put a burden on the employee? And where will the disputes fall and how will they be resolved? We have no...currently no administrative dispute resolution process other than an IME system...or an informal dispute resolution system, okay, within the court. We do have court staff who...attorneys who do IMEs, and sometimes they...or excuse me, who do informal dispute resolution, and sometimes they do that over disputed medical bills. We do have an IME system in the statute where the court appoints physicians to serve on an IME list. That's the private list of private physicians. Potentially that could be expanded. Some other states have physician panels. So there are ways to do this without involving the court administration. And I want to make it clear that this isn't an effort to automatically assume that the dispute resolution, the speeded up dispute resolution, would be done by the court administration or as part of the court staff. I don't think that necessarily has to be true and quite frankly that wouldn't be my preference. So that's an issue that I think really needs to be dealt with. And, lastly, there was a reference in LB1008 and again today about a medical director. If the court is expected to hire a medical director, there will be a fiscal note, a fairly substantial one. What that turns out to be will depend on what you want the medical director to do. From the research I've seen, there is a general consensus that for these treatment guidelines to work, there has to be someone who is...who can speak to the docs who treat work comp, explain the system to them, work with them, do the outreach, do the education, if you would. And that makes perfect sense to me. There would probably have to be a staff person to assist this doctor. But if that's the role, then perhaps even a part-time medical director would be sufficient, and I can see that as the legitimate role. But if you want that medical director to also get involved in dispute resolution or dealing with these denials from insurance companies about whether something falls or not under the guidelines, that's a completely different issue I think. And that could be at least a full-time medical director on that side. I've looked at this and I won't go on further, but I can see some real complexity on the dispute resolution issue. Like what sort of resolution of the dispute is appropriate? Is it simply a ruling that a variance from the guidelines is not appropriate? That may be one thing. Is a dispute whether this treatment is really

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

medically necessary or not? That's a completely different issue. But can those two be separated? I don't know. I don't think in LB1008 they were separated because under that bill it said if you're going to have reasonable care it's, first of all, what's under the guidelines or, secondly, what obtains preapproval. So I'll...that's more technicality than we needed to get into. But I think...I would try to emphasize that the dispute resolution piece could be even one of the biggest pieces of the legislation, the biggest issues. [LR569]

SENATOR LATHROP: Okay. I would certainly agree with that, and where the responsibility for dispute resolution lies I can appreciate that the court is not in a hurry to assume responsibility for all of that. [LR569]

GLENN MORTON: Thank you, thank you. [LR569]

SENATOR LATHROP: On the other hand, if it doesn't happen that often, and I can understand where the employees would say, why would I want an insurance company, it gets us into an ERISA situation where they make the call in the first place and then your appeal is back to the same people who... [LR569]

GLENN MORTON: Yeah. [LR569]

SENATOR LATHROP: ...denied it in the first instance. And that doesn't sound like an effective dispute resolution mechanism either. [LR569]

GLENN MORTON: I think there can be some intermediate process... [LR569]

SENATOR LATHROP: Okay. [LR569]

GLENN MORTON: ...and it could even be rebuttable...you know, it could even have a presumption based upon the report from that process, something of that nature. [LR569]

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Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

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SENATOR LATHROP: Okay. Very good. Thanks. Any questions for Glenn? I see none. Thanks. Anyone else besides Judge Fitzgerald? Okay. You're going to bat cleanup, Judge. [LR569]

JAMES MICHAEL FITZGERALD: James Michael Fitzgerald, judge on the Workers' Compensation Court. I don't see what the problem is. I mean, we have all these things in place today. If the insurance company doesn't want to pay for a procedure, then they say, we're not paying. And the doctor says, I'm not doing it. And then they come to court. That's it. We do that today. I don't even see what the problem is. Now you want to have guidelines and the doctor says I'm not going to go outside the guidelines or let's assume you've got the guidelines, the insurance company adjuster says, I'm not paying because it's not in the guidelines. So then you go back and you tell the doctor, Doctor, they're not paying. Doctor says, I'm not going to treat you anymore. So then the employee has to come to the court, file a petition, wait two weeks until we get an answer, wait another two weeks before we can even have a hearing, maybe one week. So where's the speed-up in the care? Where's the speed-up in the care? If somebody says two days, good night, I don't see how he could possibly get to court in two days after the doctor said I can't do it because I'm not going to get paid. Or...and the other thing is, is that what's wrong with our doctors in Nebraska? They are really, really good docs. Dr. Bozarth is an excellent doc. I see him regularly or at least see his reports. Where's the complaint? Are these doctors overtraining in Nebraska? Huh? Is there something going wrong? Where's the complaints about the doc? If the docs...if there was fraud in the system and people were taking advantage of the system, then maybe we ought to be doing something, not necessarily guidelines but we ought to be doing something. But where is the problem? Just say, well, we're going to cut costs. Well, insurance companies right now can cut the cost in a heartbeat by saying we ain't paying. And then they come to court, and then we decide whether or not the care is reasonable and necessary. And that's what we're going to do. We're going to adopt guidelines and then...and I would tell you this, no more administration in the court, you

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

---

come straight to the judge. Don't put any more stuff on the administrators and delay and delay. My gosh, we'll be six months down the road before he gets any treatment. Don't do that. You can come to the judge. If we've got to have another judge because we're too busy, then we'll come over and we'll see you. But I don't see where the problem is. Where's the problem? You know, if you want to do something with the doctors if they're charging too much, if they're making too much, we've got the fee schedule. And we negotiate...and the administrative section of the court negotiates that fee schedule every year with the insurance company; the doctors sit down, spend hours on it. And they come out and they work out a deal, and then they come in and they make some changes. This year we cut the physician's fees pretty significantly, especially for orthopedics and I think radiology too. We made some pretty significant cuts and those doctors were not at all happy with us, but we made the cuts. And...somebody tell me what the problem is. What's the solution? And the other thing is, is that in a state like Nebraska, like Judge Brown said, where the vast majority of the people are against Obamacare because--because--it puts the government between the patient and the doctor, why are we here even thinking about adopting guidelines by the government to put between the patient and the doctor? I don't understand it. You have a question. [LR569]

SENATOR CARLSON: No, no. I'm just interested in what you said. [LR569]

SENATOR LATHROP: The same thought occurred to me when the first witness sat down. But I appreciate your insight and your thoughts, and it doesn't look like we have any questions. [LR569]

JAMES MICHAEL FITZGERALD: I would tell you one thing. I would tell you one thing. No more administration in the court. If we're going to have guidelines or something and if there's a problem with the guidelines, get right to a judge. Get it done. Hurry up, because that's going to take two, three weeks. If we have an administrative process, you're going to get a month or more into it. And you're...ultimately, it's the judge's

Transcript Prepared By the Clerk of the Legislature  
Transcriber's Office  
Rough Draft

Business and Labor Committee  
October 19, 2012

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decision. That's our job. And I don't really want to give up any more things to administrators. I really want that stays with the court, and the court is the seven judges. Thank you. [LR569]

SENATOR LATHROP: Okay. Thanks, Judge. Senator Fulton has no close. We're out of witnesses. We went ten minutes longer than I thought, which isn't bad given how much time we had Judge Brown up here on the first hearing. So I appreciate everyone's input and thoughts. I think we've had two good hearings. And it looks like I may put a meeting together with some interested parties to talk about this a little bit more before the session starts. And with that, we'll conclude our hearing and wish everyone a happy, relaxing weekend. [LR569]