

Study of Nevada's Industrial Insurance Program



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NEVADA'S INDUSTRIAL INSURANCE PROGRAM

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SUMMARY OF RECOMMENDATIONS

Legislative Commission's Committee to Study Nevada's Industrial Insurance Program

(Senate Bill 292, Chapter 433, *Statutes of Nevada 2003*)

This summary presents the recommendations approved by the Legislative Commission's Committee to Study Nevada's Industrial Insurance Program (Senate Bill 292, Chapter 433, *Statutes of Nevada 2003*) at its July 6, 2004, meeting.

Permanent Total Disabilities

1. Draft legislation to provide a one-time payment to permanent total disability (PTD) claimants with dates of injury prior to January 1, 2004. This proposed legislation would be similar to Section 3 of Senate Bill 193 (Chapter 452, *Statutes of Nevada 2003*). In addition, provide for an interim study of how to provide for ongoing increases in compensation for permanently and totally disabled workers injured before January 1, 2004. **(BDR S-251)**
2. Send a letter to the Division of Industrial Relations (DIR), Nevada's Department of Business and Industry, requesting that DIR continue to gather information that could be used in considering a cost of living increase for PTD claimants with dates of injury prior to January 1, 2004.

Presumptive Benefits

3. Send a letter to DIR requesting assistance with a study of presumptive benefits that is being conducted by representatives of the Nevada Self Insurers Association and the Professional Firefighters of Nevada. The Committee would like DIR to send a questionnaire to self-insured public entities and compile the data.

Documentation on Checks

4. Draft legislation to amend Chapter 616C of *Nevada Revised Statutes* (NRS) to require that certain information be included on check stubs for recipients of PTD benefits. The information to be included on the check stub must identify the total amount of the benefit payment before deductions or offsets, the amount of any deductions or offsets (including a reference to the claim number in the case of a deduction to pay back a prior permanent partial disability [PPD] award), and the net amount of the current PTD payment. Additionally, the check stub must include the balance of all prior PPDs that are being paid back so that the claimant will know the current amount of any remaining offsets. **(BDR 53-249)**

Licensing of Claims Adjusters

5. Draft legislation to provide that adjusters who handle workers' compensation claims be licensed by the Division of Insurance, Nevada's Department of Business and Industry, in a manner similar to licensing requirements for non-attorney hearing representatives by the Department of Administration pursuant to NRS 616C.325. **(BDR 53-250)**

Automatic Claim Reopening

6. Draft legislation to amend Chapter 616C of NRS to provide that a claim can be automatically reopened for payment of a PPD award, if the claim previously had been closed without a PPD examination and the claimant can clearly show that he had a permanent impairment at the time the claim was closed. **(BDR 53-249)**

Mandatory Vocational Assessments

7. Draft legislation to amend NRS 616C.550, which currently provides that, under certain circumstances, if benefits for a temporary total disability will be paid to an injured employee for more than 90 days, a vocational rehabilitation counselor shall, within 30 days after being assigned to the claim, make a written assessment of the injured employee's ability or potential to return to gainful employment. Provide that vocational assessment is no longer mandatory, yet leave the insurer with the discretion to order an assessment and the injured worker the option to request one. **(BDR 53-249)**
8. Draft legislation to amend NRS 616C.550 to prohibit a vocational rehabilitation counselor who is an employee of an insurer from being assigned to provide vocational rehabilitation services on a case administered by his employer. **(BDR 53-249)**

Claims Acceptance

9. Send a letter to all workers' compensation insurers licensed to operate in Nevada encouraging them to process claims expeditiously.
10. Send a letter to DIR suggesting that the timeliness of claims acceptance be included in the audits of insurers that are conducted by DIR.

Compensation While Receiving Medical Treatment

11. Draft legislation to amend Chapter 616C of NRS to require that, in addition to any other benefits an injured worker is entitled to receive pursuant to Chapters 616A to 617, inclusive, of NRS, an injured worker also is entitled to payment of temporary

total disability benefits for each hour he is temporarily absent from work for the purpose of receiving medical treatment for his industrial injury or occupational disease after he has been released by his treating physician to return to work if he:

- a) Must travel more than 20 miles from his place of work to receive the medical treatment; and
- b) Is not paid by his employer for the time taken off to receive the medical treatment.

Provide that an injured employee may not be required to use sick leave, annual leave, compensatory leave or any other leave for his absence from work for the purpose of receiving the subsequent medical treatment. These provisions should apply only to medical treatment that an injured employee receives on or after the effective date of the bill, regardless of when the injury occurred. Also amend NRS 616C.400 to provide that the period prescribed in subsection 1 of NRS 616C.400 does not apply if the conditions outlined herein are met. **(BDR 53-250)**

Calculation of PPD Awards

12. Direct LCB staff to conduct research concerning how age affects the amount of a PPD award in Nevada and the Western states.

Consolidated Insurance Programs (CIPs)

13. Draft legislation to amend Chapter 616B of NRS concerning Consolidated Insurance Programs (CIP) to increase fines, and enhance regulatory authority for violations of safety requirements. **(BDR 53-252)**

REPORT TO THE 73rd SESSION OF THE NEVADA LEGISLATURE BY THE COMMITTEE TO STUDY NEVADA'S INDUSTRIAL INSURANCE PROGRAM

I. INTRODUCTION

The Legislative Commission's Committee to Study Nevada's Industrial Insurance Program was established as a result of Senate Bill 292, (Chapter 433, *Statutes of Nevada 2003*). Among other things, the bill directs the Legislative Commission to appoint a committee to study the impact of Nevada's industrial insurance program on injured workers, employers, and insurers. The measure requires that the study include, without limitation:

- An examination of the procedures for resolving contested industrial insurance claims filed by injured workers, the costs to injured workers, employers and insurers in litigating such claims, the effect of the benefit penalty on the resolution of such claims, and the timeliness of resolving such claims;
- Consideration of whether it is appropriate to reimburse injured workers for time off of work when they are receiving medical treatment for compensable industrial injuries or illnesses, including the cost of such reimbursement to employers and insurers and the impacts on injured workers of not making such reimbursement;
- Consideration of whether it is appropriate to increase benefits retroactively to a claimant or dependant of a claimant who is entitled to receive compensation pursuant to Chapters 616A to 617, inclusive, of *Nevada Revised Statutes* (NRS) for a permanent total disability (PTD) caused by an industrial injury or a disablement from an occupational disease that occurs before July 1, 2004, and if so, consideration of the sources for paying for such increased benefits; and
- A review of the impact of legislation enacted during the 2003 Legislative Session on injured workers, employers and insurers.

The Legislative Commission appointed the following six members to the Committee:

Senator Ann O'Connell, Chairwoman
Assemblyman John Oceguela, Vice Chairman
Senator Maggie Carlton
Senator Warren B. Hardy
Assemblyman Ron Knecht
Assemblyman David R. Parks

Legislative Counsel Bureau staff services were provided by Vance A. Hughey, Chief Principal Research Analyst, Research Division; Kevin C. Powers, Principal Deputy Legislative Counsel, Legal Division; William L. Keane, Principal Deputy Legislative Counsel, Legal Division; and Lucinda Benjamin, Senior Research Secretary, Research Division.

During the course of this study, the Committee reviewed existing laws and implementation of workers' compensation legislation enacted by the 2003 Legislature. It received comments and recommendations from employers, injured employees, insurers, claimants' attorneys, third-party administrators, state agency executives, and representatives of various self-insured employers, business groups, and labor organizations.

A great deal of information was gathered during the course of this study, and much of it was provided in the exhibits that became a part of the minutes of the Committee's meetings. All supporting documents and minutes are on file with the LCB Research Library. In addition, this report contains background information on Nevada's program and outlines recent legislative changes to the program.

II. SUMMARY OF COMMITTEE PROCEEDINGS

The Committee held four meetings to obtain expert and public testimony. Meetings were held on the following dates:

- November 13, 2003;
- February 20, 2004;
- April 30, 2004; and
- July 6, 2004.

All of the meetings were held at the Grant Sawyer State Office Building in Las Vegas and videoconferenced to the Legislative Building in Carson City.

November 13, 2003, Meeting

The initial meeting of the Committee included a presentation from Senator Michael A. Schneider who explained that he introduced Senate Bill 292 to explore means by which a greater share of industrial insurance benefits could be retained by injured workers, with a lesser share going to private attorneys. He noted that while there have been significant workers' compensation reforms implemented over the past several decades, many injured workers still have difficulty navigating through the complex system of laws and regulations. Out of frustration, many of these injured workers feel compelled to hire private attorneys who often take as their payment 30 to 40 percent of the benefits ultimately awarded to their clients.

Senator Schneider discussed the possibility of increasing the staff of the Nevada Attorney for Injured Workers (NAIW), an entity within the Department of Business and Industry with the responsibility for representing injured workers who appeal determinations on their claims. However, he was advised that the cost to provide the NAIW with enough additional staff to adequately address the problem was prohibitive. He suggested that an alternative that could be explored by the Committee would be to impose a limit on the amount attorneys could charge in certain workers' compensation cases, which is common practice in many other states. He expressed hope that the Committee might be able to come to an agreement on a way in which the workers' compensation system could be simplified, thereby reducing the need for injured workers to hire private attorneys.

The initial meeting also included presentations from representatives of various State agencies involved in the administration and regulation of the workers' compensation system. The following agencies gave presentations to the Committee:

- The Division of Industrial Relations (DIR), Department of Business and Industry;
- The Division of Insurance (DOI), Department of Business and Industry;

- The Nevada Attorney for Injured Workers (NAIW), Department of Business and Industry;
- The Hearings and Appeals Division, Department of Administration;
- The Office for Consumer Health Assistance, Office of the Governor; and
- The Fraud Control Unit for Industrial Insurance, Office of the Attorney General.

The roles of these agencies are discussed in the “Overview of Industrial Insurance” section of this report.

Under the public comment portion of the meeting, several injured workers provided testimonials concerning problems they envision with the current workers’ compensation system. Also, Donald E. Jayne, CPCU, and Leslie Bell, representing the Nevada Self Insurers Association (NSIA), discussed several topics for consideration by the Committee at future meetings. These topics included a review of Nevada’s impairment rating system, a study of the financial impact of Nevada’s presumptive benefit statutes¹, and a review of Nevada’s statutory provisions concerning lifetime reopening rights.

February 20, 2004, Meeting

One of the primary tasks of the Committee, as delineated in S.B. 292, was to review the impact of industrial insurance legislation enacted during the 2003 Session. Therefore, Chairwoman O’Connell asked that staff review those measures with the Committee at its second meeting. Workers’ compensation bills enacted in 2003 are summarized in the “Overview of Industrial Insurance” section of this report. Staff also provided information to the Committee concerning retroactive increases in PTD benefits that have been enacted by the Nevada Legislature since 1973. A summary of the historical increases was distributed to members of the Committee and to the general public who were in attendance at the meeting (see Appendix B).

The issue of presumptive benefits, which was raised by Mr. Jayne and Ms. Bell at the Committee’s first meeting, was discussed again at this meeting. Senator Carlton provided the Committee with a summary of recent discussions between the NSIA representatives and representatives of police officers and firefighters concerning financing of presumptive benefits for firefighters and police officers. In addition, James Jeppson, Washoe County Risk Manager, noted that Washoe County is facing higher self-insured retentions and higher workers’ compensation premiums due in part to risks associated with the presumptive benefits available to firefighters and police officers under the heart and lung provisions of Chapter 617 of NRS. He explained that the Washoe County Commission is concerned about the future

¹ Examples of presumptive benefits for cancer, lung and heart disease, and hepatitis in Nevada’s workers’ compensation law can be found in Sections 617.453, 617.455, 617.457, and 617.485 of NRS, respectively.

liabilities associated with presumptive benefits and has discussed the possibility of joining a group to purchase industrial insurance coverage.

Under public testimony, several injured workers discussed problems they encountered in their efforts to secure industrial insurance benefits to which they felt entitled.

April 30, 2004, Meeting

At the third meeting of the Committee, John O'Connor, representing the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America (IUE-CWA), discussed the appropriateness of reimbursing injured workers for time off of work while they are receiving medical treatment for compensable industrial injuries. He explained that many injured workers who return to work still require follow-up medical or rehabilitative treatment. For people who do not live or work in the major urban areas of Nevada, trips to receive this treatment can require an entire day off work, which can impose a financial hardship unless they are reimbursed for the time spent receiving treatment for their work-related injuries.

Raymond Badger, Badger & Baker, Attorneys at Law, discussed several proposals for legislative action that were developed in conjunction with labor representatives and lawyers who represent injured workers:

- Bad faith law suits against workers' compensation insurers—Mr. Badger suggested that without the threat of a bad faith law suit, many insurers have little incentive to properly manage claims. He stated his opinion that current benefit penalties and fines are insufficient to ensure that claims are handled properly. Under his proposal, self-insured employers would be excluded from the definition of an insurer for the purpose of bad faith causes of action, but an entity “purely doing insurance practices” would be subject to a bad faith case. Chairwoman O'Connell questioned whether the proposal, which would exempt self-insured employers from such suits, raises fairness issues regarding the unequal exposure to liability by self-insured employers and by employers covered by private insurance.
- Licensing of adjusters who handle industrial insurance claims—Mr. Badger indicated that this recommendation would help ensure that adjusters have basic knowledge of Nevada's workers' compensation law and provide for greater accountability if they ignore the law. He noted that there is precedent in the field of vocational rehabilitation for requiring certification or requiring that a counselor be supervised by someone who has been certified.²
- Compensation checks mailed from inside Nevada—Mr. Badger contended that because any advance payments of compensation are prohibited, lost wage payments are always

² See NRS 616A.080 and 616C.555(8).

received on a later date than when one would receive a paycheck. He also stated that this delay has been extended by the fact that many insurers send compensation checks drawn on out-of-state banks. This recommendation is similar to a current requirement for entities that adjust claims maintain an office within this state. In his opinion, a requirement to mail checks from inside Nevada would help to reduce the amount of time it takes for an injured worker to receive his or her compensation check. An issue was raised, however, concerning whether this proposal would result in a substantive difference in the time it takes to get a check to an employee in Las Vegas if the check is generated in Carson City versus a check mailed to Las Vegas from another state.

- Automatic reopening of claims—Under NRS 616C.235, a claim with less than \$300 in medical bills during the first 12 months after the claim is filed can be closed without any right to reopen the claim. Mr. Badger proposed that a claim be automatically reopened for payment of a permanent partial disability (PPD) award, if the claim previously had been closed without a PPD examination and the claimant can clearly show that he had a permanent impairment at the time the claim was closed. He stated that this proposal would help an unsophisticated injured worker who, upon advice of a claims adjuster, did not challenge the closure of his claim in spite of having a permanent impairment that should have been rated.
- Penalty for unfounded refusal to pay a PPD award—Mr. Badger indicated that employers and insurers sometimes challenge or refuse to pay PPD ratings of injured workers without having a sound basis for such a challenge. He suggested that a penalty for such actions be imposed in an amount of 10 percent of the award if an Appeals Officer finds that the recommended PPD award was proper.
- Photocopying charges—Currently, the Nevada Industrial Insurance Act does not limit fees that can be charged for copies. However, pursuant to NRS 616B.021, an insurer may charge a “reasonable fee” for making copies of documents in a claim file. The statute also provides that copies requested by the Administrator of DIR or the NAIW must be provided free of charge. According to Mr. Badger, some insurers charge up to 60 cents per page and these charges are passed on to the injured worker. He proposed that a limit of 20 cents per page be placed on these charges.
- Vocational assessments—Pursuant to NRS 616C.550, if benefits for a temporary total disability will be paid to an injured employee for more than 90 days, a vocational rehabilitation counselor shall, within 30 days after being assigned to the claim, make a written assessment of the injured employee’s ability or potential to return to (a) the position he held at the time that he was injured, or (b) any other gainful employment. According to Mr. Badger, with conversion of the State Industrial Insurance System (SIIS) to the Employers Insurance Company of Nevada (EICON) and the entrance of private insurers into the workers’ compensation insurance market, the problems with SIIS that led to the need to require that vocational assessments be performed may no longer exist. Under his proposal, vocational assessments would no longer be mandatory, but would be

voluntary. Additionally, Mr. Badger noted that there are problems with the requirement to perform vocational assessments because some providers of vocational assessments who work for insurers have ethical responsibilities to injured employees that may conflict with instructions or expectations of their employers.

- Claim acceptance and denial—Pursuant to NRS 616C.065, an insurer has 30 days within which to accept or deny an injured worker’s claim. Mr. Badger explained that some insurers routinely take the full 30 days to determine compensability even if there is no question regarding the legitimacy of the claim. Unwarranted delays in the decision making process can exacerbate untreated medical conditions and can cause severe financial hardship to employees whose injuries render them unable to work. He suggested that the time for an insurer to accept a claim should be the same as the time for an employee to provide notice of his injury, which is seven days.

Barbara J. Gruenewald, representing Nevada Trial Lawyers, suggested that injured workers are not being provided with an adequate choice of treating physicians under managed care arrangements. She recommended that an injured worker be allowed to select as a treating physician any provider of health care services who is willing to abide by the terms of a managed care contract.

Gary Milliken and Dave Oakden, representing Nevada Contractors Insurance, discussed recently repealed provisions of Nevada’s law (NRS 616D.280) that imposed a penalty for removing a required safety device. The penalty took the form of a 25 percent reduction in an injured worker’s indemnity benefits. Mr. Milliken explained that when the provision was repealed, it was considered to be equitable to employers and workers alike since the penalty had been imposed on an injured employee who removed a required safety device, but there was no penalty imposed on an employer who removed a required safety device. However, upon reflection, he noted employers are, in fact, penalized for removing a safety device since a single severe claim can result in a significant increase in the employer’s premiums. He asked that the Committee consider supporting his proposal to reinstate the repealed provisions.

Charles J. Verre, Chief Administrative Officer, DIR, and Brian Kunzi, Director, Fraud Control Unit for Industrial Insurance, explained the reason why criminal penalties imposed by Assembly Bill 140 (Chapter 29, *Statutes of Nevada 2003*) were needed to help ensure employers comply with orders issued by the Administrator of DIR to cease business operations. They both agreed that while there have been no prosecutions under the law to date, the law may have a sentinel effect that encourages employers to provide, secure, or maintain industrial insurance coverage. They both requested that the penalty provision of A.B. 140 remain in Nevada law.

Raymond “Rusty” McAllister, Vice President, Professional Firefighters of Nevada (PFN), and Mr. Jayne, representing the NSIA, provided an update on issues related to presumptive benefits for firefighters and police officers. Mr. Jayne noted that a survey of public entities was being prepared and soon would be provided to the Administrator of DIR for distribution to

self-insured public entities. Robert S. Hadfield, Executive Director, Nevada Association of Counties (NACO), and Nancy Howard, Assistant Director, Nevada League of Cities and Municipalities (NLCM), noted that the survey was necessary to help identify for public entities the financial implications associated with presumptive benefits. Mr. Hadfield emphasized that the public policy of providing presumptive benefits was not at issue, but the size of the financial obligation of public entities needed to be determined. Sue Dunt, Risk Manager, State Risk Management Division, discussed the State of Nevada's projected exposures related to heart and lung claims. She estimated the liability to be approximately \$244 million. Mr. Jeppson explained that while workers' compensation benefits are a known liability and their costs are fairly predictable and relatively easy for actuaries to project, the costs of heart and lung claims are much more difficult to evaluate.

Under public testimony, several injured workers discussed their industrial insurance claims.

July 6, 2004, Meeting

At its final meeting, the Committee heard additional testimony from injured workers regarding the disposition of their claims. There was additional discussion concerning presumptive benefits and a mechanism for funding cost of living increases for individuals on PTD prior to January 1, 2004.

Steven Holloway, representing Associated General Contractors (AGC), discussed owner-controlled insurance programs (OCIPs) as provided for in NRS 616B.710, and explained to the Committee that a primary or alternate safety coordinator must be physically present while work is being performed on an OCIP project. In June 2004, a workplace fatality occurred at a World Market Center job site in Las Vegas that was operating under an OCIP. However, there was no safety person at the site when the accident occurred. He suggested that greater penalties need to be implemented to provide incentives for companies to follow safety requirements.

John Wiles, Division Counsel, DIR, noted that citations were issued and fines imposed against the owner of the World Market Center construction project. A fine in the amount of \$1,000 was imposed for an intentional violation of the statutory provision that requires an owner to ensure that a primary or alternate safety coordinator be physically present while work is being performed on an OCIP project. A second fine, in the amount of \$10,000, was imposed for failure to hire and secure approval of an alternate safety coordinator for the project as required by Nevada law. However, Mr. Wiles noted that existing OCIP statutes do not contain a mechanism to shut down a job site under the circumstances that were present in the World Market Center case.

William L. Keane, Principal Deputy Legislative Counsel, discussed interpretation of provisions of Chapter 616C of NRS concerning PPD offsets. This discussion was prompted by concerns raised at earlier meetings of the Committee by an injured worker who had received several lump sum PPD awards prior to being designated by her insurer as permanently and totally

disabled. Under Nevada law, the insurer is required to offset her PTD by not more than 10 percent each month until the amount of the prior PPDs are recovered. The injured worker complained that the insurer should have stopped taking the offset once she had attained age 70.

Mr. Keane provided the Committee with a copy of a legal opinion related to this topic (see Appendix C), which responds to the question of whether an injured worker's PTD benefit may be reduced because of lump sum payments previously received for PPD awards and whether such reductions continue after the injured worker becomes 70 years of age. The opinion states that based upon the injured worker's receipt of minimum lump sums for PPD awards, she must repay those lump sums or her PTD benefits will be reduced by not more than 10 percent until those lump sums are repaid, without regard to her age.

Senator Schneider discussed a proposal to amend the Nevada Industrial Insurance Act to provide for a limitation on attorney fees when a case involves payment of a PPD award in a lump sum to an injured worker. He suggested the following schedule be considered:

- 25 percent of the first \$5,000 of benefits secured;
- 20 percent of the next \$5,000 of benefits secured; and
- 15 percent of the remaining amount.

He also suggested that a provision be included stating that an injured worker's attorney's fee shall be based only on those benefits secured by the attorney above and beyond any offer already made by an insurer prior to the attorney becoming involved in the case.

Senator Schneider explained that this proposal was designed to address the problem he identified during the Committee's first meeting whereby fees of private attorneys often consume 30 to 40 percent of the injured worker's PPD award. He indicated that Nevada is one of just a few states that do not address the issue of capping attorney's fees for the benefit of injured workers.

During the work session portion of the meeting, the Committee adopted many, but not all, of the recommendations for legislative action that were presented during the course of this study. The approved recommendations include four bill draft requests covering a variety of topics and are summarized in the "Summary of Recommendations" section of this report, beginning on page iii. Also, they are discussed in greater detail in the "Discussion of Recommendations" section of this report, beginning on page 23.

III. OVERVIEW OF INDUSTRIAL INSURANCE

Following is historical and other background information on the development of industrial insurance programs in the United States and Nevada. Also included is a summary of major legislative reforms enacted during the past several decades. This information is intended to provide some historical perspective concerning the issues that were addressed during the course of this study.

A. BACKGROUND INFORMATION

Industrial insurance, also known as workers' compensation insurance, is specialized insurance purchased by employers to provide medical care, disability compensation (indemnity) payments, and rehabilitation services for workers who are injured on the job or who contract occupational diseases in the course of their employment. Workers' compensation was the first social insurance system in the United States. It developed as a consequence of the high rate of industrial accidents in the nineteenth and early twentieth centuries.

Under common law, nineteenth century employers were required to provide reasonably safe places for their employees to work. If an injury occurred, however, and the employer did not voluntarily pay compensation, then the employee had to take his case to court. The litigation that arose out of this situation proved to be an unsatisfactory means of caring for injured workers. Uncertainty of outcome and the costs associated with the delay in compensating injured workers under a common law system were instrumental in the formation of the workers' compensation system.

Even if the employee could afford legal assistance, the employer had several defenses that made it difficult for the employee to collect damages. For example, the employer might plead contributory negligence, suggesting that the employee was at fault to some degree. The employer might also attempt to prove that the real fault was lodged with a fellow worker—the so-called fellow-servant doctrine. Finally, an employer might apply what is called the “doctrine of assumption of risk.” Under this doctrine, the employee was assumed to have had knowledge that he was engaged in a dangerous occupation and, therefore, if he still chose to work in that occupation, he had to assume the known risks of being injured.

American policymakers looked to Europe where the idea of industrial insurance had originated in Germany in the 1800s and later was adopted in France, Great Britain, and other countries. Under a workers' compensation insurance program, the right to bring legal action against an employer on the grounds of negligence was exchanged for a system whereby benefits were paid for all injuries arising out of and in the course of employment. The costs of the work-related injuries were allocated to the employer, not because of any presumption that he was to blame for every individual injury, but because the inherent hazards of employment were considered to be a cost of production.

This “no-fault” approach to insuring employers soon became popular throughout the United States. Between 1911 and 1920, all but six states passed universal industrial insurance statutes. Eventually, the remaining states also enacted such laws.

B. INDUSTRIAL INSURANCE IN NEVADA

Nevada was one of the first states to enact a compulsory industrial insurance law. The original Industrial Insurance Act was adopted in 1913, and a complete revision was drafted in 1947. The state’s industrial insurance laws have been amended during every regular legislative session since 1913.

Certain legislative sessions have brought major changes to the statutes relating to industrial insurance. For example, during the 1979 Legislative Session, self-insurance was authorized for qualified employers. The self-insurance option became effective on January 1, 1980. Prior to that time, the Nevada Industrial Commission (NIC) had been the only provider of workers’ compensation insurance in the state.

The 1979 Legislature removed the hearings and appeals process for contested claims from NIC and placed it in a new Hearings Division within the Department of Administration.

In 1981, the Legislature completely revised the NIC structure. Effective July 1, 1982, NIC ceased to exist and the State Industrial Insurance System (SIIS) began operation as the state-run workers’ compensation insurance carrier.³ Also on that date, the DIR began operation as the primary regulator of the state’s industrial insurance program.⁴

The DIR promotes and enforces safety in the workplace and is responsible for ensuring the timely and appropriate delivery of benefits to injured workers.

The 1999 Legislature authorized the privatization of SIIS. On January 1, 2000, SIIS, doing business as Employers Insurance Company of Nevada (EICON), became a private domestic mutual insurance company. With the privatization of EICON, Nevada began operating in a “two-way” market composed of private carriers and self-insured employers. Within the self-insured category are individual self-insured employers, associations of self-insured private employers, and associations of self-insured public employers.

The Commissioner of Insurance reviews and approves premium rates and is responsible for certifying self-insured employers and associations of self-insured employers who meet

³ In July 1998, SIIS began to do business as Employers Insurance Company of Nevada (EICON). For the purpose of this document, “SIIS” and “EICON” are used interchangeably.

⁴ The Commissioner of Insurance retained authority to approve premium rates charged by EICON. In 1993, both the Division of Insurance (DOI) and DIR were made divisions of the new Department of Business and Industry.

certain statutory qualifications. The Division of Insurance (DOI) also regulates third-party administrators of self-insured programs and managed care organizations.

The NAIW,⁵ a state agency separate from workers' compensation insurers, represents claimants free of charge at the Hearings Division's appeals level, in the State's district courts, and before the Supreme Court of Nevada.

C. LEGISLATIVE RESPONSES TO EARLY PROBLEMS IN NEVADA'S INDUSTRIAL INSURANCE PROGRAM

During the early- and mid-1980s, industrial insurance did not generate an inordinate amount of legislative interest in Nevada. Available information seemed to suggest that there were no major problems within the workers' compensation program. From 1984 through 1988, SIIS paid over \$50 million in dividends to policyholders.⁶ Additionally, from 1985 through 1988, SIIS did not request approval for any increases in premium rates charged to its policyholders.⁷ During the 1980s and early-1990s, Nevada's compensation benefits were among the best in the western states and premium rates were among the lowest.⁸

Beginning in 1988, SIIS instituted the first in a series of premium rate increases. Also at about that time, injured workers became more vocal in expressing their concerns about the manner in which their claims were being handled by SIIS and self-insured employers. In response to this growing level of criticism, in 1989 the Legislature enacted Assembly Bill 1 (Chapter 856, *Statutes of Nevada 1989*). This bill directed the Legislative Auditor to conduct a performance audit of Nevada's workers' compensation program. The audit covered five aspects of the program:

- Medical benefits to injured workers;
- Compensation and other benefits to injured workers;
- Hearings and appeals process;
- State Industrial Insurance System; and
- Department of Industrial Relations.

⁵ Originally created in 1977 as the State Industrial Claimants' Attorney, in 1991, the Legislature changed the agency's name to the Nevada Attorney for Injured Workers (NAIW).

⁶ *State Industrial Insurance System Business Plan*, June 1992, p. 61.

⁷ *Ibid.*, p. 60.

⁸ *Rate and Benefit Comparison: Nevada and Surrounding States*, State Industrial Insurance System, April 2, 1993.

In 1991, the Legislature enacted S.B. 7 (Chapter 723, *Statutes of Nevada 1991*) to resolve many of the issues identified by the Legislative Auditor. This measure reflected the Legislature's intent to reform the industrial insurance system in the following ways:

1. Lower Nevada's high rate of industrial injuries by promoting safety on the job;
2. Serve Nevada's injured employees by streamlining the process for filing, hearing, and appealing claims. The object was to make certain that injured employees and their health care providers received compensation as soon as possible. In addition, the injured employees were to receive appropriate medical care and rehabilitation to allow them to return to work as soon as possible; and
3. Serve employers by protecting against fraudulent claims and by returning injured employees to work as soon as possible.

This bill also established an interim study committee, the Legislative Committee on Industrial Insurance. The purpose of this committee was to study Nevada's laws concerning industrial insurance and to prepare a report for submission to the Governor and the 1993 Legislature. Eight legislators were appointed as members of the Committee. The Committee held eight meetings, including a two-day work session, to obtain expert and public testimony. The Committee considered 188 proposed recommendations. It adopted 62 of them covering a variety of topics including:

- Determination and payment of benefits;
- Medical care, compensation, and other benefits to injured workers;
- Fraud in workers' compensation;
- The organization of SIIS;
- Employer options for industrial insurance;
- Hearings and appeals of contested claims;
- Occupational safety and health; and
- Legislative oversight concerning industrial insurance.

Many of those 62 recommendations were subsequently adopted by the Legislature with the enactment of Senate Bill 316 (Chapter 265, *Statutes of Nevada 1993*).

D. CONTINUED LEGISLATIVE REFORMS AND OPENING NEVADA'S INDUSTRIAL INSURANCE MARKET TO COMPETITION

While the reforms enacted in 1993 helped to improve the financial condition of SIIS, the Legislature determined that additional reforms were necessary. With Senate Bill 458 (Chapter 587, *Statutes of Nevada 1995*), the Legislature clarified provisions regarding exclusive remedy, created separate boards to administer subsequent injury programs of self-insured employers, revised provisions regarding confidentiality of records, clarified the definition of an employee leasing company, and exempted real estate brokers and salesmen from the mandatory coverage requirements of the Nevada Industrial Insurance Act. The Legislature also clarified provisions regarding eligibility for more than one program for vocational rehabilitation, created a Legislative Committee on Workers' Compensation, and authorized collection of a solvency surcharge from certain employers in the event SIIS was declared insolvent by the Commissioner of Insurance.

The Legislature also passed Assembly Bill 552 (Chapter 580, *Statutes of Nevada 1995*) to allow private carriers to offer workers' compensation insurance beginning July 1, 1999. The four-year delay in establishing "three-way insurance" was intended to give SIIS an opportunity to further improve its financial condition so that it could effectively operate in a competitive market. The delay also gave the Commissioner of Insurance time to implement any necessary regulatory controls.

During the 1997 Session, the Nevada Legislature continued its efforts to reform the workers' compensation program. It enacted a number of bills including several measures designed to help the transition to a competitive market. Most significant among the measures enacted were the following:

- Senate Bill 105 (Chapter 645, *Statutes of Nevada 1997*), among other things, authorized the Administrator of DIR to impose certain penalties if an employer fails to provide, secure, or maintain industrial insurance coverage. Also, the bill amended certain provisions of the Industrial Insurance Act that became effective upon the commencement of "three-way insurance" on July 1, 1999.
- Assembly Bill 114 (Chapter 133, *Statutes of Nevada 1997*) eliminated the duty of DIR to certify or authorize insurers to provide industrial insurance, and placed that duty with the Commissioner of Insurance. The bill also clarified existing statutory provisions that prohibit unauthorized insurers from providing workers' compensation insurance in Nevada.
- Assembly Bill 548 (Chapter 285, *Statutes of Nevada 1997*) provided that workers' compensation premium rates paid by employers under the assigned risk plan be actuarially determined to ensure that the plan is financially self-sustaining. This bill also eliminated a requirement that a private carrier provide industrial insurance for the same

classes of risk in this state for which the insurer provides industrial insurance outside this state.

- Assembly Bill 609 (Chapter 410, *Statutes of Nevada 1997*) created in the State Insurance Fund an account for “extended claims” and an account for “current claims.” The bill required SIIS to allocate to the account for extended claims \$650 million in invested assets to be used to pay liabilities of the State Insurance Fund for workers’ compensation claims incurred prior to July 1, 1995. Money and assets credited to the account for current claims must be used to pay liabilities of the State Insurance Fund for claims incurred on or after July 1, 1995.

The measure also repealed provisions authorizing the imposition of a surcharge to ensure the solvency of SIIS; provided that imposition of any assessment to fund the account for extended claims requires legislative approval; authorized the manager of SIIS to establish a plan for designating small employers for the purpose of establishing their premiums; and restricted, for a limited period, the manner in which private carriers may determine premiums for insured employers.

In addition, A.B. 609 amended a provision regarding automatic closure of an injured employee’s claim. If the medical benefits required to be paid for a claim are less than \$500, the claim closes automatically if the claimant does not receive medical treatment for the injury for at least 12 months, instead of just 6 months.

The bill allowed for the electronic transmission of certain documents related to claims; clarified the authority of insurers to purchase annuities for the payment of claims; and transferred, from the Governor to the manager of SIIS, the authority to hire and set the salaries of assistant managers.

Assembly Bill 609 also transferred, from SIIS to DIR, the authority to perform certain regulatory functions, including adoption of regulations regarding the manner in which otherwise confidential information may be made available to certain federal and state agencies. The bill established procedures relating to filing of a claim against the Uninsured Employers’ Claim Fund and provided authority to impose a penalty for failure to provide, secure, or maintain workers’ compensation insurance. The bill also specified which records of SIIS are confidential.

E. PRIVATIZATION OF NEVADA’S INDUSTRIAL INSURANCE MARKET AND OTHER 1999 LEGISLATIVE REFORMS

During the 1999 Session, the Legislature resumed its focus on Nevada’s competitive market for industrial insurance by enacting several measures designed to ensure that the market operates efficiently. Several of the most important measures are explained below.

One of the most significant measures of the 1999 Session was Senate Bill 37 (Chapter 388, *Statutes of Nevada 1999*) which accomplished the following:

- Authorized the privatization of SIIS;
- Increased benefits to injured workers; and
- Created the Governor's Office for Consumer Health Assistance.

The bill provides that before SIIS could transition to a domestic mutual insurance company the Governor must proclaim the following events have occurred before the manager of SIIS can transfer the assets of SIIS to the successor organization:

- A sufficient amount of reinsurance has been purchased by SIIS to operate in a financially responsible manner;
- The manager has taken the steps necessary to establish a domestic mutual insurance company;
- A favorable ruling has been received by SIIS from the United States Internal Revenue Service that establishing the domestic mutual insurance company is not considered a taxable event; and
- The Commissioner of Insurance has determined the domestic mutual insurance company qualifies to transact industrial insurance in Nevada.

On December 16, 1999, Governor Kenny C. Guinn proclaimed that these events occurred. The manager then transferred to the chief executive officer of the newly established domestic mutual insurance company the premiums and other money paid to SIIS, including all records, real property, and securities acquired with money in the State Insurance Fund.

Senate Bill 37 made several changes to the law affecting benefits to injured workers. Some of these changes were topics of discussion by the Committee to Study Nevada's Industrial Insurance Program during this interim. For example, the bill allows an insurer to close certain claims if the medical benefits for the claims are less than \$300 and the injured employee does not receive treatment for the injury for a 12-month period. The measure requires the insurer to provide written notice to the claimant of the closure of such a claim. Further, S.B. 37 provides that under certain circumstances, workers' compensation payments for a PTD must be reduced by an amount equal to the amount of the PPD lump sum previously paid to the injured employee.

The bill also restored a benefit that was cut in 1993 when SIIS was experiencing severe financial difficulties by raising the factor for compensation of a PPD from 0.54 percent to

0.6 percent for each 1 percent of impairment of the whole man for injuries sustained on or after January 1, 2000. In addition, the measure provides that under certain circumstances, the insurer, organization for managed care, health care provider, third-party administrator, or employer must pay a benefit penalty to the injured worker in an amount not less than \$5,000, nor greater than \$25,000.

As noted above, S.B. 37 creates the Governor's Office for Consumer Health Assistance to respond to inquiries related to health care and workers' compensation, to assist consumers and injured employees in understanding their rights and responsibilities under health care plans and industrial insurance policies, and to investigate complaints.

Several other bills from 1999 are noteworthy because they also address some of the issues that came before the Committee during the interim. For example:

- Senate Bill 132 (Chapter 479, *Statutes of Nevada 1999*) expands accident benefits under industrial insurance to include preventive treatment administered as a precaution to a police officer, salaried firefighter, or volunteer firefighter exposed to contagious disease while performing the duties of a police officer or firefighter, or upon battery by an offender. The bill requires that any incidents of exposure to contagious disease must be documented by the employer.

In addition, the bill provides that the employer of a police officer, salaried firefighter, or volunteer firefighter must test each such employee for Hepatitis A, Hepatitis B, Hepatitis C, tuberculosis, and human immunodeficiency virus at the time he is voluntarily or involuntarily terminated, and at 6 and 12 months after the date of termination. The bill provides that a police officer, salaried firefighter, or volunteer firefighter who tests positive for such a disease is eligible, during his lifetime, to receive workers' compensation for the disease or any additional conditions resulting from the contagious disease.

- Senate Bill 133 (Chapter 582, *Statutes of Nevada 1999*) authorizes certain providers of industrial insurance to provide workers' compensation coverage for consolidated insurance programs. The bill requires a consolidated insurance program to provide industrial insurance coverage and a comprehensive safety program for the employees of a contractor or subcontractor engaged in a construction project.
- Senate Bill 175 (Chapter 94, *Statutes of Nevada 1999*) increases the penalties for employers who fail to provide, secure, or maintain industrial insurance.
- Assembly Bill 470 (Chapter 465, *Statutes of Nevada 1999*), among other things, prohibits an organization for managed care from restricting or interfering with any communication between a provider of health care and an injured employee regarding information the health care provider determines is relevant to the health care of the injured employee. The bill also prohibits an organization for managed care from terminating a contract,

demoting, refusing to contract with, or refusing to compensate a health care provider solely because the provider, in good faith, advocates on behalf of an injured employee or assists an injured employee in seeking reconsideration of a decision by the organization for managed care to deny coverage for a health care service.

F. REFINING THE REGULATION AND ADMINISTRATION OF THE INDUSTRIAL INSURANCE PROGRAM AND OTHER 2001 LEGISLATIVE REFORMS

During the 2001 Session, the Legislature focused on the regulation and administration of the market, as well as on contagious disease exposures. For example, Assembly Bill 44 (Chapter 204, *Statutes of Nevada 2001*) allows an insurer to keep the physical records pertaining to industrial insurance claims at a location outside of Nevada, under certain circumstances, but at the same time requires the information be readily available at an in-state office.

In addition to administrative changes, many of the Legislature's policy discussions during the 2001 Session focused on ensuring that employees exposed to contagious diseases receive treatment under industrial insurance. Specifically, Assembly Bill 313 (Chapter 388, *Statutes of Nevada 2001*) provides that if a salaried firefighter with five years tenure or an emergency medical attendant has hepatitis, the disease is conclusively presumed to have arisen out of and in the course of employment and, therefore, the firefighter or emergency medical attendant is eligible for workers' compensation coverage. The measure requires a firefighter and emergency medical attendant to submit to a blood test to screen for hepatitis upon employment and annually thereafter. The employer must pay for the required blood tests. The bill specifies that if a firefighter or emergency medical attendant tests positive for hepatitis upon employment, the disease will not be conclusively presumed to have arisen out of and in the course of employment.

While A.B. 313 specifically addresses firefighters and emergency medical attendants who have contracted hepatitis, the Legislature also approved legislation to ensure that other employees who are exposed to other contagious diseases are covered under workers' compensation. Assembly Bill 279 (Chapter 161, *Statutes of Nevada 2001*) addresses employees with occupational exposure to hepatitis A, hepatitis B, hepatitis C, tuberculosis (TB), HIV (the human immunodeficiency virus), or AIDS (acquired immune deficiency syndrome). The bill provides that a person employed in Nevada who contracts a contagious disease resulting in a temporary or permanent disability is eligible for industrial insurance coverage if: (1) it is demonstrated that the employee was exposed during the course and scope of his employment; (2) the exposure was reported to the employer in accordance with the employer's reporting requirements; and (3) the employee tested negative for the contagious disease within 72 hours of exposure and tested positive after the medically appropriate incubation period, as determined by the State Board of Health, but not later than 12 months after the exposure. The employer must pay for the required tests. Compensation awarded to an eligible employee must include medical and preventive treatment.

In addition, A.B. 279 specifically addresses TB. The bill provides that a police officer or salaried or volunteer firefighter who, after the commencement of his employment, tests positive for exposure to TB when submitting to the physical examination required under the heart and lung provisions of the Nevada Occupational Diseases Act (NRS 617.455 or 617.457) is eligible during his lifetime to receive workers' compensation for TB or any related condition or disease. The police officer or firefighter is not eligible for these benefits if the insurer can prove by a preponderance of the evidence that the exposure was not related to the employment of the police officer or firefighter.

G. EVOLUTION OF THE INDUSTRIAL INSURANCE PROGRAM CONTINUES— 2003 LEGISLATIVE REFORMS

As noted above, Nevada's industrial insurance market has been evolving for more than two decades from a monopolistic state-run industrial insurance program to a fully competitive market. During the 2003 Session, the Legislature continued to work with regulators, employers, labor organizations, injured workers, and the insurance industry to implement prudent public policy.

To protect workers from businesses that fail to provide, secure, or maintain workers' compensation insurance, the Legislature enacted Assembly Bill 140 (Chapter 29, *Statutes of Nevada 2003*). This bill establishes a misdemeanor penalty for a person who knowingly fails to comply with an order of the Administrator of DIR to cease all business operations. This criminal penalty is in addition to any civil penalty or remedy provided by law.

An issue that has been debated by members of the Nevada Legislature for a number of Sessions is that of the declining economic value of PTD benefits. The decline in value is largely due to increases in the general level of prices over time. It is unfortunate for the workers who receive these benefits that for many decades Nevada's industrial insurance laws did not provide for periodic automatic increases in indemnity benefits. Instead, the Legislature occasionally increased benefit amounts for employees with permanent and total disabilities. The most recent increase was in 1991. At that time, for injuries that occurred before July 1, 1980, the Legislature increased the minimum monthly PTD award from \$400 to \$600, regardless of the injured employee's wage at the time of the injury.

Two bills enacted in 2003 address concerns of injured workers about the declining economic value of PTD benefits.

- Assembly Bill 438 (Chapter 29, *Statutes of Nevada 2003*) provides a periodic cost of living increase in disability payments for certain injured workers who become permanently and totally disabled. Specifically, a worker or his dependant is entitled to receive a cost of living increase of 2.3 percent annually for any injury or disability occurring on or after January 1, 2004.

- Senate Bill 193 (Chapter 452, *Statutes of Nevada 2003*) provides that if a final determination of PTD was made before January 1, 1996, an injured worker or a dependant of an injured worker is entitled to receive a one-time payment. The payment is intended to compensate for the lack of a cost of living increase in the injured workers' benefits. The Administrator of DIR will assess each insurer an amount that is required to raise \$500,000. The Administrator also will establish a method for an equitable distribution that will distribute the money proportionally among the eligible disabled workers. The Administrator is required to distribute the payments no later than July 1, 2004.

Several workers' compensation bills were introduced that address both administrative changes and policy changes. The regulatory agencies and the insurance industry worked together to develop several hard-earned consensus bills.

- Assembly Bill 168 (Chapter 305, *Statutes of Nevada 2003*) contains three key provisions. The measure:
 1. requires managed care organizations to offer an adequate choice of health care providers;
 2. requires DIR to adopt the Fifth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. All PPD ratings performed on or after October 1, 2003, must conform to the Fifth Edition. Thereafter, DIR must adopt and implement regulations incorporating the most recent edition of the *Guides* within 18 months of a new edition's publication; and
 3. revises provisions concerning an employer's offer to an injured employee for temporary, light-duty employment, the eligibility of an injured worker for compensation or vocational rehabilitation, and an injured employee's right to receive a benefit penalty in addition to lump-sum compensation.
- Senate Bill 168 (Chapter 393, *Statutes of Nevada 2003*) was enacted at the request of DIR to clarify that the confidentiality provisions of the Industrial Insurance Act do not prohibit DIR or its Administrator from releasing nonproprietary information relating to an uninsured employer or proof of industrial insurance. Additionally, the measure provides that a physician or chiropractor who has a duty to file a claim for compensation may delegate the duty to a medical facility under certain circumstances. Further, the bill allows the Administrator to fine a physician, chiropractor, or a medical facility that has been delegated the duty of filing a claim if the claim is not filed as required by statute.
- Senate Bill 319 (Chapter 455, *Statutes of Nevada 2003*) makes various changes to laws affecting workers' compensation and other insurance topics. One of the most significant changes affecting injured workers is a provision that authorizes the Department of Administration to hold workers' compensation hearings in Carson City or Las Vegas, and

upon agreement of one or more of the parties, to pay all additional costs related to conducting a hearing at an alternate site.

- Senate Bill 320 (Chapter 395, *Statutes of Nevada 2003*), among its other provisions, authorizes the Commissioner of Insurance to adopt regulations to establish a system of external review for workers' compensation.

The Legislature also reviewed its public policy concerning public servants. "Public servants" include police officers, firefighters, and their surviving spouses and dependants. To clarify the provision regarding cancer as an occupational disease of firefighters, the Legislature enacted Assembly Bill 451 (Chapter 316, *Statutes of Nevada 2003*), which outlines specific types of cancer for which a full-time salaried firefighter may receive industrial insurance benefits. If a firefighter is able to demonstrate that he was exposed to certain carcinogens while in the course of employment, he may be eligible to receive industrial insurance benefits for his cancer.

Another policy discussion focused on extending certain provisions governing occupational diseases contracted by police officers. Senate Bill 184 (Chapter 506, *Statutes of Nevada 2003*) provides that a police officer who contracts hepatitis is conclusively presumed to have done so in the course and scope of employment if certain conditions are met. Additionally, the measure requires a police officer, firefighter, or emergency medical attendant to submit to a blood test for hepatitis C upon employment, commencement of coverage, and thereafter on an annual basis during employment. Furthermore, each of these professionals must submit to a blood test for hepatitis A and B upon employment, commencement of coverage, and thereafter on an annual basis during employment unless they have been vaccinated for these strains at the time of employment. The employer of any of these professionals must pay for any vaccinations or for the testing required pursuant to these provisions.

The Peace Officers Research Association of Nevada championed Senate Bill 240 (Chapter 297, *Statutes of Nevada 2003*). This bill authorizes a surviving spouse or child of a police officer or firefighter killed in the line of duty to continue to participate in the group insurance or medical and hospital coverage of the decedent's employer. This measure was requested because of the death of a police officer who was murdered while on the job. His widow determined that the workers' compensation benefits she and her family are receiving would cease if she remarries. This measure assures that a surviving spouse or child will continue to receive benefits regardless of the future marital status of the surviving spouse.

Other industrial insurance bills of significance include the following:

- Assembly Bill 294 (Chapter 233, *Statutes of Nevada 2003*) prohibits an insurer from placing an endorsement upon a check that identifies the check as payment for PTD benefits. Although this measure does not affect an injured worker's benefits, it does alleviate the stigma some people feel when they cash their disability checks. However, to help insurers identify other fraudulent behaviors, the measure authorizes restrictive endorsements on checks for other industrial insurance benefits if the endorsement is clear

and accurate and if the conditions and restrictions are specifically authorized under the provisions of industrial insurance law.

- Assembly Bill 206 (Chapter 72, *Statutes of Nevada 2003*) allows an injured employee who received a lump sum award for a PPD, and who subsequently is determined to be permanently and totally disabled, the option to pay back the award in a lump sum. Previously, a person, by law, could not make the payment in this manner. If the employee does not opt for repaying the PPD award in a lump sum, the employee's insurer may deduct no more than 10 percent of the rate of compensation for the PPD award until the amount of the actual lump sum is fully repaid. Further, if an insurer determines that the employee has repaid a sum that is greater than the actual amount of the original lump sum award, the insurer will refund that amount to the employee.

IV. DISCUSSION OF RECOMMENDATIONS

The Committee to Study Nevada's Industrial Insurance Program devoted many of its meeting hours to hearing concerns of injured workers regarding the administration and adjudication of their workers' compensation claims. In addition, the Committee heard extensive testimony on other matters related to industrial insurance as required by S.B. 292. At its final meeting and work session, the Committee adopted recommendations concerning the following topics:

Permanent Total Disabilities (PTD)

Mr. McAllister, representing the PFN, explained that a 2.3 percent annual cost of living increase was approved by the 2003 Legislature for individuals on PTD on or after January 1, 2004. However, no cost of living increases were provided for individuals who were determined to be permanently and totally disabled prior to that date. He, along with Robert Ostrovsky (representing EICON), discussed a mechanism for funding cost of living increases for individuals on PTD prior to January 1, 2004. They suggested that the Legislature might want to consider using the Uninsured Employers Fund to provide for cost of living increases for these individuals. The Fund, which is administered by DIR, is financed by annual assessments to insurers and pays for claims of injured workers whose employers do not have industrial insurance policies. Mr. Ostrovsky explained that a third-party actuary could determine an appropriate base level for the Uninsured Employers Fund. Any assessments collected over the base level could then be used to cover the cost of one-time payments to individuals on PTD, in lieu of cost of living increases.

After considering the fact that many of the individuals on PTD who were determined to be permanently and totally disabled prior to January 1, 2004, especially those who were injured many years ago, have never received a cost of living increase, the Committee approved the following recommendations:

- 1. Draft legislation to provide a one-time payment to permanent total disability claimants with dates of injury prior to January 1, 2004. This proposed legislation would be similar to Section 3 of Senate Bill 193 (Chapter 452, *Statutes of Nevada 2003*). In addition, provide for an interim study of how to provide for ongoing increases in compensation for permanently and totally disabled workers injured before January 1, 2004. (BDR S-251)**
- 2. Send a letter to the Division of Industrial Relations (DIR), Nevada's Department of Business and Industry, requesting that DIR continue to gather information that could be used in considering a cost of living increase for PTD claimants with dates of injury prior to January 1, 2004.**

Presumptive Benefits

At the November 13, 2003, meeting of the Committee, Mr. Jayne, representing the NSIA, raised an issue concerning whether public entities that employ police officers and firefighters are maintaining sufficient reserves to cover expected future costs of certain presumptive benefits to which these workers may become entitled under the Nevada Occupational Disease Act. Mr. Jayne explained that some self-insured public entities were facing higher self-insured retentions and higher premiums for reinsurance upon policy renewal. He suggested that these higher retentions and higher premiums were a result of fears on the part of insurers that the presumptive benefits represent a significant future financial risk to public entities.

On February 17, 2004, the Washoe County Commission discussed an internal audit report which suggested that a potential \$10 to \$13 million liability may exist for the county's current sheriff's deputies and firefighter retirees. According to the audit report, this liability resulted from a Supreme Court of Nevada case (*Gallagher v. City of Las Vegas*, 114 Nev. 595 (1998)), which allows retirees to establish claims for heart diseases that develop after retirement as long as the former deputy or firefighter had 5 years of full-time, uninterrupted duty with the county and had not worked for another law enforcement agency or fire department since retiring from the county.⁹ On February 20, 2004, Mr. Jeppson, representing Washoe County, explained to the Committee that the Washoe County Commissioners were concerned about the possible future liabilities that were identified in the audit report.

During the April 30, 2004,, meeting, Mr. Hadfield, representing NACO, commented on new accounting regulations issued by the Governmental Accounting Standards Board (GASB). Known as GASB 43, the regulation requires post-employment health care payments, including workers' compensation benefits under NRS 617.455, to be booked as a liability.¹⁰ Mr. Hadfield and Ms. Howard, representing NLCM, provided information on the estimated present value of the unfunded liability to local governments in Nevada (\$44 million), and expressed support for an independent study to ensure that any fiscal impact is accurately calculated in a common format and could also be used by state and local government agencies for accounting compliance purposes.

During the course of this interim study, Mr. Jayne and Mr. McAllister had worked together with several other interested individuals in an attempt to gather data that could be used to assess the extent to which any unfunded liability may exist because of presumptive benefits, and to develop possible methods of paying for those future liabilities. After considerable discussion of this issue, the Committee gave staff the following direction:

- 3. Send a letter to DIR requesting assistance with a study of presumptive benefits that is being conducted by representatives of the Nevada Self Insurers Association and the Professional Firefighters of Nevada. The Committee would like DIR to send a questionnaire to self-insured public entities and compile the data.**

⁹ See Appendix D.

¹⁰ See Appendix E.

Documentation on Checks

During public testimony, it was noted that the check stubs provided to recipients of PTD benefits do not provide information concerning why certain deductions from the gross amount of the check are taken. Nor do the check stubs provide information advising the recipient of when any offsets will be paid in full. To address this concern, the Committee adopted the following recommendation:

4. **Draft legislation to amend Chapter 616C of *Nevada Revised Statutes* (NRS) to require that certain information be included on check stubs for recipients of PTD benefits. The information to be included on the check stub must identify the total amount of the benefit payment before deductions or offsets, the amount of any deductions or offsets (including a reference to the claim number in the case of a deduction to pay back a prior permanent partial disability award), and the net amount of the current PTD payment. Additionally, the check stub must include the balance of all prior PPDs that are being paid back so that the claimant will know the current amount of any remaining offsets. (BDR 53-249)**

Licensing of Claims Adjusters

Mr. Badger noted that non-attorney hearing representatives are required to be licensed by the Department of Administration pursuant to NRS 616C.325. He suggested that adjusters who handle industrial insurance claims be subjected to a similar licensing requirement. The Committee agreed to the following recommendation:

5. **Draft legislation to provide that adjusters who handle workers' compensation claims be licensed by the Division of Insurance, Nevada's Department of Business and Industry, in a manner similar to licensing requirements for non-attorney hearing representatives by the Department of Administration pursuant to NRS 616C.325. (BDR 53-250)**

Automatic Claim Reopening

Mr. Badger noted that some industrial insurance claims are closed without a PPD examination being conducted. In some of those cases, the injured worker can later show that he clearly had a permanent impairment at the time the claim was closed. In such cases, Mr. Badger argued, the injured workers should have a right to reopen the claim for the purpose of having a PPD examination conducted and, if appropriate, a PPD award paid. The Committee agreed to the following recommendation:

6. **Draft legislation to amend Chapter 616C of NRS to provide that a claim can be automatically reopened for payment of a PPD award, if the claim previously had**

been closed without a PPD examination and the claimant can clearly show that he had a permanent impairment at the time the claim was closed. (BDR 53-249)

Mandatory Vocational Assessments

Mr. Badger noted that NRS 616C.550 requires that, under certain circumstances, if benefits for a temporary total disability will be paid to an injured employee for more than 90 days, a vocational rehabilitation counselor shall, within 30 days after being assigned to the claim, make a written assessment of the injured employee's ability or potential to return to gainful employment. He argued that there are many cases where the injured employee will be off work for more than 90 days but will return to his previous employment. In such cases, a vocational assessment is not necessary. To avoid conducting unnecessary vocational assessments in such cases, the Committee agreed to the following recommendation:

7. **Draft legislation to amend NRS 616C.550, which currently provides that, under certain circumstances, if benefits for a temporary total disability will be paid to an injured employee for more than 90 days, a vocational rehabilitation counselor shall, within 30 days after being assigned to the claim, make a written assessment of the injured employee's ability or potential to return to gainful employment. Provide that vocational assessment is no longer mandatory, yet leave the insurer with the discretion to order an assessment and the injured worker the option to request one. (BDR 53-249)**

Mr. Badger also made an argument that some vocational rehabilitation counselors may be put into a difficult position of recommending vocational counseling for an injured worker whose claim is being handled by an insurer that is the counselor's employer. To avoid such a potential conflict of interest, the Committee agreed to the following recommendation:

8. **Draft legislation to amend NRS 616C.550 to prohibit a vocational rehabilitation counselor who is an employee of an insurer from being assigned to provide vocational rehabilitation services on a case administered by his employer. (BDR 53-249)**

Claims Acceptance

Mr. Badger noted that, in many cases, insurers take the entire 30-day period allowed pursuant to NRS 616C.065 before notifying the injured worker of the insurer's decision to accept or deny the claim. Often, such delays appear to be unwarranted by the circumstances of the cases. After initially suggesting that NRS 616C.065 be amended to reduce the time frame for accepting or denying a claim from 30 days to 7 days, Mr. Badger agreed that 7 days may provide too little time for insurers to adequately review the claim and, if necessary, conduct an investigation before rendering a decision concerning claims acceptance. However, the Committee was concerned that some insurers may be inappropriately taking too much time to notify injured workers of their decisions and provided staff with the following directions:

9. **Send a letter to all workers' compensation insurers licensed to operate in Nevada encouraging them to process claims expeditiously.**
10. **Send a letter to DIR suggesting that the timeliness of claims acceptance be included in the audits of insurers that are conducted by DIR.**

Compensation While Receiving Medical Treatment

On April 30, 2004, Mr. O'Connor, representing the IUE-CWA, advised the Committee that workers are compelled to miss a full day's work because of the long distances they must travel for medical care. He suggested revisiting the bill introduced by Senator Mike McGinness in the 2003 Legislative Session (S.B. 268), which did not pass, to include reimbursement to injured workers for time off work when accessing medical care for compensable industrial injuries or illnesses. The Committee agreed to the following recommendation:

11. **Draft legislation to amend Chapter 616C of NRS to require that, in addition to any other benefits an injured worker is entitled to receive pursuant to Chapters 616A to 617, inclusive, of NRS, an injured worker also is entitled to payment of temporary total disability benefits for each hour he is temporarily absent from work for the purpose of receiving medical treatment for his industrial injury or occupational disease after he has been released by his treating physician to return to work if he:**
 - a) **Must travel more than 20 miles from his place of work to receive the medical treatment; and**
 - b) **Is not paid by his employer for the time taken off to receive the medical treatment.**

Provide that an injured employee may not be required to use sick leave, annual leave, compensatory leave or any other leave for his absence from work for the purpose of receiving the subsequent medical treatment. These provisions should apply only to medical treatment that an injured employee receives on or after the effective date of the bill, regardless of when the injury occurred. Also amend NRS 616C.400 to provide that the period prescribed in subsection 1 of NRS 616C.400 does not apply if the conditions outlined herein are met. (BDR 53-250)

Calculation of PPD Awards

At the November 13, 2004, meeting of the Committee, representatives of the NSIA suggested that Nevada's system of rating PPDs has not been studied in many years and may have elements that discriminate against older persons. They proposed that a study be conducted of PPD rating systems used in Nevada and other western states to determine if there might be

alternative approaches to calculating PPD awards that would minimize inequities in payment amounts. At the July 6, 2004, meeting and work session, the Committee provided the following direction to staff:

12. **Direct LCB staff to conduct research concerning how age affects the amount of a PPD award in Nevada and the Western states.**

Consolidated Insurance Programs

In June 2004, a workplace fatality occurred at a World Market Center job site in Las Vegas that was operating under an OCIP. Mr. Holloway, representing AGC, explained that a primary or alternate safety coordinator must be physically present while work is being performed on an OCIP project. However, there was no safety person at the World Market Center site when the accident occurred. He suggested that greater penalties need to be implemented to provide incentives for companies to follow safety requirements.

Mr. Wiles, Division Counsel, DIR, noted that citations were issued and fines imposed against the owner of the World Market Center construction project. However, he noted that existing OCIP statutes do not contain a mechanism to shut down a job site under the circumstances that were present in the World Market Center case.

Based on the discussion related to the World Market Center case, the Committee agreed that stronger incentives would help ensure that owners of construction projects operating under OCIPs adhere to safety requirements. The Committee approved the following recommendation:

13. **Draft legislation to amend Chapter 616B of NRS concerning Consolidated Insurance Programs (CIP) to increase fines, and enhance regulatory authority for violations of safety requirements. (BDR 53-252)**

V. CONCLUSION

The Committee wishes to thank the many individuals who contributed to this study through their correspondence or testimony at the public hearings. The Committee members also recognize the cooperation and assistance provided by the staffs of the Hearings Division, Department of Administration; the Fraud Control Unit for Industrial Insurance, Office of the Attorney General; the Governor's Office for Consumer Health Assistance; Division of Insurance, Department of Business and Industry; Division of Industrial Relations, Department of Business and Industry; and the Nevada Attorney for Injured Workers, Department of Business and Industry.

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APPENDIX A

Senate Bill 292 (Chapter 433, *Statutes of Nevada 2003*)

APPENDIX A

Senate Bill No. 292–Senator Schneider

CHAPTER 433 (*Statutes of Nevada 2003*)

AN ACT relating to insurance; directing the Legislative Commission to appoint a committee to study the impact of Nevada’s industrial insurance program on injured workers, employers and insurers; authorizing the Commissioner of Insurance to conduct a study to review pricing mechanisms for medical professional liability insurance; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The Legislative Commission shall appoint a committee consisting of six Legislators to conduct an interim study of the impact of Nevada’s industrial insurance program on injured workers, employers and insurers.

2. The Legislative Commission shall appoint to the committee three members of the Senate and three members of the Assembly who are acquainted with the statutory program for industrial insurance in this state.

3. The study must include, without limitation:

(a) An examination of the procedures for resolving contested industrial insurance claims filed by injured workers, the costs to injured workers, employers and insurers in litigating such claims, the effect of the benefit penalty on the resolution of such claims, and the timeliness of resolving such claims;

(b) Consideration of whether it is appropriate to reimburse injured workers for time off of work when they are receiving medical treatment for compensable industrial injuries or illnesses, including the cost of such reimbursement to employers and insurers and the impacts on injured workers of not making such reimbursement;

(c) Consideration of whether it is appropriate to increase benefits retroactively to a claimant or dependant of a claimant who is entitled to receive compensation pursuant to chapters 616A to 617, inclusive, of NRS for a permanent total disability caused by an industrial injury or a disablement from an occupational disease that occurs before July 1, 2004, and if so, consideration of the sources for paying for such increased benefits; and

(d) A review of the impact of legislation enacted during the 2003 Legislative Session on injured workers, employers and insurers.

4. In conducting the study, the committee shall seek information and suggestions from experts in the area of industrial insurance and from various representatives of injured workers, employers and insurers.

5. Any recommended legislation proposed by the committee must be approved by a majority of the members of the Senate and a majority of the members of the Assembly who are appointed to the committee.

6. The Legislative Commission shall submit a report of the results of the study and any recommendations for legislation to the 73rd Session of the Nevada Legislature.

Sec. 2. 1. The Commissioner of Insurance may conduct a study to review pricing mechanisms for medical professional liability insurance.

2. If the Commissioner of Insurance conducts a study pursuant to this section, the Commissioner shall submit a report of the results of the study to the Governor and the Legislative Commission.

Sec. 3. This act becomes effective on July 1, 2003.

APPENDIX B

Permanent Total Disability Benefit Increases

APPENDIX B

PERMANENT TOTAL DISABILITY BENEFIT INCREASES

The Nevada Legislature has increased pension benefits for injured employees several times in the past three decades. Following is a summary of those pension benefit increases:

- In 1973, the Legislature enacted a 10 percent increase in permanent total disability benefits for any pensioner who was injured prior to April 9, 1971. The amount of increase was subsequently amended to 20 percent in 1975, to 35 percent in 1979, and to 65 percent in 1981. (NRS 616C.455)
- In 1981, the Legislature approved an increase in pension benefits that was based on the percentage increase in the state average monthly wage with a limitation for certain pensioners who received disability benefits from the federal Social Security system. The higher benefit applied to pensioners who were injured after April 9, 1971. In addition, this provision prohibited payment of the increase for any period before July 1, 1981, thus limiting the increase to future benefit payments and not allowing retroactive payments. (NRS 616C.465 and 616C.470)
- In 1985, the Legislature authorized a 20 percent increase in pension benefits for any pensioner whose injury occurred prior to July 1, 1973. A pensioner was not required to accept the increase if it would cause a corresponding reduction in disability benefits received from the federal Social Security system. (NRS 616C.460)
- In 1991, the Legislature increased the minimum monthly pension award to \$400 regardless of the injured employee's wage at the time of the accident or injury. Information provided to the Legislature at that time indicated that some pensioners had been injured more than 50 years ago and were receiving less than \$50 per month. (NRS 616C.450)
- In 1993, the Legislature raised the minimum monthly pension award for permanently and totally disabled workers and their survivors from \$400 to \$600. (NRS 616C.450)
- In 2003, the Legislature enacted Assembly Bill 438 (Chapter 77, *Statutes of Nevada 2003*). This bill provides a periodic cost of living increase in disability payments for certain injured workers who become permanently and totally disabled. Specifically, a worker or his dependent is entitled to receive a cost of living increase of 2.3 percent annually for any injury or disability occurring on or after January 1, 2004.
- Also in 2003, the Legislature enacted Senate Bill 193 (Chapter 452, *Statutes of Nevada 2003*). This bill requires the Administrator of the Division of Industrial Relations to make a one-time assessment of each insurer and self-insured employer in an amount required to obtain a total of \$500,000. The Administrator must equitably distribute the money collected from the assessment to workers' compensation claimants and dependents who are receiving compensation for a permanent total disability for which a final determination was made before January 1, 1996.

Prepared by:
Research Division
Legislative Counsel Bureau
Rev. January 20, 2004

APPENDIX C

Legislative Counsel Bureau Legal Opinion
Regarding Pension Offsets at 70 Years of Age

STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU

LEGISLATIVE BUILDING
401 S. CARSON STREET
CARSON CITY, NEVADA 89701-4747
Fax No.: (775) 684-6600

LEGISLATIVE COMMISSION (775) 684-6800
RANDOLPH J. TOWNSEND, *Senator, Chairman*
Lorne J. Malkiewicz, *Director, Secretary*

INTERIM FINANCE COMMITTEE (775) 684-6821
MORSE ARBERRY, JR., *Assemblyman, Chairman*
Mark W. Stevens, *Fiscal Analyst*
Gary L. Ghiggeri, *Fiscal Analyst*



LORNE J. MALKIEWICH, *Director*
(775) 684-6800

PAUL V. TOWNSEND, *Legislative Auditor* (775) 684-6815
DONALD O. WILLIAMS, *Research Director* (775) 684-6825
BRENDA J. ERDOES, *Legislative Counsel* (775) 684-6830

July 6, 2004

Senator Ann O'Connell
7225 Montecito Cir.
Las Vegas, NV 89120-3118

Dear Senator O'Connell:

In the context of industrial insurance, you have asked several questions regarding permissible reductions in the amount of benefits to be paid to a particular injured worker for a permanent total disability ("PTD"). Specifically, you have asked whether the injured worker's PTD benefits may be reduced because of lump sums previously received by the injured worker for permanent partial disability ("PPD") awards. If the PTD benefits may be reduced, you have asked the amount by which they may be reduced and whether such reductions continue after the injured worker becomes 70 years of age. Finally, you have asked if there is any authority to support the reduction of the injured worker's PTD benefits based upon the injured worker receiving a lump sum in lieu of receiving vocational rehabilitation services. We answer your questions, below.

BACKGROUND

According to the information provided to this office, the relevant facts concerning the injured worker are as follows. First, the injured worker received two separate minimum lump sum payments for two PPD awards.¹ These two separate minimum lump sums were awarded in 1986 and 1991. In 1996, less than one year before her 70th birthday, the injured worker was determined to be permanently and totally disabled and began receiving PTD benefits.

¹ The concept of a "minimum" lump sum appears to result from the "minimum" provided for such lump sum payments pursuant to NRS 616C.495(4), although the term "minimum lump sum" is not defined and does not actually appear in NRS 616C.495. In any case, however, the information provided to this office specified that the PPD lump sums received by the injured employee were minimum lump sums.

DISCUSSION

- A. Based upon the injured worker's receipt of minimum lump sums for PPD awards, the injured worker must repay those lump sums or her PTD benefits will be reduced by not more than 10 percent until those lump sums are repaid without regard to her age.**

To begin, you have asked whether the injured worker's PTD benefits may be reduced because of the PPD lump sums. If they may be reduced, you have asked the amount by which they may be reduced and have asked whether they may be reduced after the injured worker becomes 70 years of age. Because the injured worker's PTD payments began in 1996, we must consider the governing law as of that date. Further, to the extent that the governing law changed after that date, such changes must be considered.

In 1996, the pertinent provision was NRS 616C.440(4)(b), which at that time read as follows:

4. If an employee who has received compensation in a lump sum for a permanent partial disability pursuant to NRS 616C.495 [the statute which provides for the payment of PPD awards in lump sums] is subsequently determined to be permanently and totally disabled, the compensation for the permanent total disability must be reduced as follows:

....

(b) If the employee received a minimum lump sum, the employee's insurer shall deduct from the compensation for the permanent total disability an amount of not more than 10 percent of the rate of compensation for a permanent total disability until the lump sum is recovered.

(Emphasis added.) Pursuant to NRS 616C.440(4)(b) as it read in 1996, the injured worker's PTD benefits must be reduced by an amount not to exceed 10 percent of the amount the injured worker otherwise would receive, and such reduction must continue until the recovery of the lump sum the employee received for the PPD. The statute did not provide for the reductions to end at any point before the recovery of the lump sum, without regard to the employee's reaching 70 years of age or any other age.

NRS 616C.440 was amended in 1997 and again in 1999, but neither of these amendments affected the above results. In 2003, NRS 616C.440(4) was substantially rewritten, so that the subsection presently reads as follows:

4. If an employee who has received compensation in a lump sum for a permanent partial disability pursuant to NRS 616C.495 is subsequently determined to be permanently and totally disabled, the insurer of the employee's employer shall recover pursuant to this subsection the actual amount of the lump sum paid to the employee for the permanent partial disability. The insurer shall not recover from the employee, whether by deductions or single payment, or a combination of both, more than the actual amount of the lump sum paid to the employee. To recover the actual amount of the lump sum, the insurer shall:

(a) Unless the employee submits a request described in paragraph (b), deduct from the compensation for the permanent total disability an amount that is not more than 10 percent of the rate of compensation for a permanent total disability until the actual amount of the lump sum paid to the employee for the permanent partial disability is recovered; or

(b) Upon the request of the employee, accept in a single payment from the employee an amount that is equal to the actual amount of the lump sum paid to the employee for the permanent partial disability, less the actual amount of all deductions made to date by the insurer from the employee for repayment of the lump sum.

(Emphasis added.) Pursuant to the 2003 amendments, NRS 616C.440(4) now specifies that the amount to be recovered from the injured employee is only the actual amount of the lump sum for the PPD and that the injured employee may repay the lump sum for the PPD in a single payment rather than have her PTD benefits reduced. However, these amendments did not change the basic results discussed above, except to the extent that the injured worker now has the option to end any further deductions from her PTD benefits by paying any remaining deductions in a single payment. Assuming the injured worker does not choose to make such a single payment, then in accordance with both the 1996 and the present versions of NRS 616C.440(4), and all versions in between, the injured worker's PTD benefits must be reduced by an amount not to exceed 10 percent of the amount the injured worker otherwise would receive for her PTD, and such reduction must continue until the recovery of any lump sum the employee received for a PPD.²

² In 1996, the Nevada Supreme Court's decision in SIIS v. Miller raised the issue of whether the amount of the lump sum to be repaid should be the actual amount of the lump sum or the present value of the lump sum. SIIS v. Miller, 112 Nev. 1112, 1120 (1996). However, the subsequent amendments to NRS 616C.440(4) resolved this issue such that present law clearly provides that only the actual amount of the lump sum is to be recovered. This issue does not affect the results of this opinion letter because, according to the information provided to this office, the injured employee addressed by this opinion letter has received lump sums of a sufficient combined size that the actual amount of those awards will not be recovered until approximately 2009, and any increase in the recovery to account for the present value would not have occurred until then.

Given the law as discussed above, we return to your questions. First, with regard to whether the injured worker's PTD benefits may be reduced because of the PPD lump sums, it is the opinion of this office that the injured worker's PTD benefits may be reduced because of the minimum lump sums she previously received for her PPDs. More specifically, pursuant to the law as it existed from 1996 until 2003, her PTD benefits were required to be reduced to recover each of the PPD lump sums. Pursuant to the law after the 2003 amendments, the injured worker's PTD benefits must be reduced to recover each of the PPD lump sums unless she first pays the amounts of those reductions as a single payment for either or both of her PPD lump sums. Next, with regard to the amount by which the injured worker's PTD benefits may be reduced, it is the opinion of this office that, pursuant to the law from 1996 to the present, the amount of the reduction cannot exceed 10 percent of the amount the injured employee would otherwise receive for her PTD. Finally, with regard to whether the injured worker's PTD benefits may continue to be reduced after the injured worker becomes 70 years of age, it is the opinion of this office that, pursuant to the law from 1996 to the present, the reductions must continue until the lump sum is recovered without regard to the injured worker's age.

B. There is not authority to support the reduction of the injured worker's PTD benefits based upon the injured worker receiving a lump sum in lieu of receiving vocational rehabilitation services.

Your final question is whether there is any authority to support the reduction of the injured worker's PTD benefits based upon the injured worker receiving a lump sum in lieu of receiving vocational rehabilitation services. Pursuant to NRS 616C.580(2) and 616C.595, an injured worker may receive a lump sum in lieu of receiving vocational rehabilitation services. However, we have not found authority to support the reduction of PTD benefits because of such a previously received lump sum for vocational rehabilitation services.

CONCLUSION

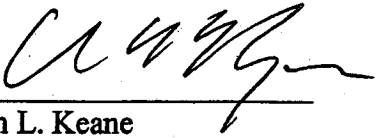
In conclusion, it is the opinion of this office that the particular injured worker described in this letter may have her PTD benefits reduced by an amount not to exceed 10 percent to repay the actual amounts of the lump sums she previously received for her earlier PPD awards. Unless the injured worker chooses to pay the combined amounts of these reductions as a single payment, the reduction of her PTD benefits must occur and must continue until the actual amounts of the PPD lump sums are repaid without regard to the age of the injured worker. Finally, with regard to a lump sum received in lieu of receiving vocational rehabilitation services, this office has not found authority to support the reduction of the injured worker's PTD benefits to repay such a lump sum.

Senator O'Connell
July 6, 2004
Page 5

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By 
William L. Keane
Principal Deputy Legislative Counsel

Ref No. 0405051714
File No. OP_O'Connell040618152348

APPENDIX D

Gallagher v. City of Las Vegas, 114 Nev. 595 (1998)

would not serve the ends of justice.⁵ Accordingly, we deny Crump's petition for a writ of certiorari or in the alternative a writ of mandamus or in the alternative a writ of prohibition.⁶

JAMES GALLAGHER, APPELLANT, v. CITY
OF LAS VEGAS, RESPONDENT.

No. 29354

CITY OF LAS VEGAS, APPELLANT, v.
WILLIAM SORENSEN, RESPONDENT.

No. 29615

May 19, 1998

959 P.2d 519

Appeal from an order of the district court affirming the denial of occupational disease benefits to appellant Gallagher, a retired firefighter with heart disease (Docket No. 29354). Appeal from an order of the district court affirming an award of occupational disease benefits to respondent Sorensen, a retired firefighter with heart disease (Docket No. 29615). Eighth Judicial District Court, Clark County; Sally L. Loehrer and A. William Maupin. Judges.

Firefighter who was disabled by heart disease after his retirement petitioned for judicial review after his request for occupational disease benefits was denied. In separate case, city petitioned for judicial review after benefits were granted to another retired firefighter who developed heart disease after retiring. The district court denied petitions, and appeal was taken. The supreme court held that firefighters were entitled to benefits under statute establishing conclusive presumption that a firefighter's heart disease arose out of and in the course of employment if certain conditions are met.

Reversed and remanded with instructions (Docket No. 29354); and affirmed (Docket No. 29615).

Nancyann Leeder, General Counsel, Nevada Attorney for Injured Workers, Carson City, for Appellant Gallagher and Respondent Sorensen.

⁵We grant the state's April 21, 1998 motion for leave to file an answer to Crump's petition for a writ of certiorari. We direct the clerk of this court to file the state's answer, received on April 21, 1998.

⁶THE HONORABLE A. WILLIAM MAUPIN, Justice, did not participate in the decision of this matter.

McGroarty & Lane, Chtd. and Jason M. Burk, Las Vegas, for City of Las Vegas.

1. **WORKERS' COMPENSATION.**

Veteran firefighters who were disabled by heart disease after they retired were entitled to occupational disease benefits under statute establishing conclusive presumption that a firefighter's heart disease arose out of and in the course of employment if certain conditions are met, where firefighters were employed in full-time continuous, uninterrupted and salaried occupations in state as firefighters for more than five years before they were disabled. NRS 617.457(1).

2. **APPEAL AND ERROR.**

Construction of a statute is a question of law, which supreme court reviews de novo. NRS 233B.135(3)(d).

3. **STATUTES.**

When a statute is capable of two or more reasonable but inconsistent interpretations, it is ambiguous and supreme court must determine what the legislature intended by its enactment.

4. **STATUTES.**

The leading rule of statutory construction is to ascertain the legislature's intent, and to accomplish that goal supreme court may examine the context and spirit of the statute in question, together with the subject matter and policy involved.

5. **STATUTES.**

Supreme court's interpretation of statute should be in line with what reason and public policy would indicate the legislature intended, and should avoid absurd results.

6. **WORKERS' COMPENSATION.**

The primary purpose of Nevada's workers' compensation laws is to provide economic assistance to persons who suffer disability or death as a result of their employment.

OPINION

Per Curiam:

[Headnote 1]

In these appeals, we are asked to decide whether veteran firefighters who are disabled by heart disease after they retire are entitled to occupational disease benefits under NRS 617.457(1), which establishes a conclusive presumption that a firefighter's heart disease arose out of and in the course of employment if certain conditions are met. Based on the history and language of the statute, and the public policy underlying its enactment, we conclude that appellant Gallagher and respondent Sorensen may invoke the conclusive presumption to establish their claims for benefits.

FACTS

Gallagher, Docket No. 29354. The City of Las Vegas

employed appellant James Gallagher as a firefighter on a full-time, continuous, uninterrupted, salaried basis from February 1962 until June 30, 1992, when he retired. During his employment, Gallagher underwent mandatory annual physical examinations, none of which revealed any heart disease. Nevertheless, in 1991 Gallagher felt unwell. He attributed being tired all the time to his demanding work schedule, but was concerned about recurring pain in his side, shoulder and jaw. Gallagher reviewed his 1991 physical with his family doctor, who explained that everything appeared normal. Gallagher passed his next mandatory physical in early 1992, but was still experiencing pain along the back of his arm and in his jaw, shoulder and side. In addition, he was experiencing some shortness of breath. Gallagher had planned to retire on January 1, 1993, but when the City offered him an early retirement, he immediately accepted it and retired on June 30, 1992.

On January 31, 1994, Gallagher suffered a heart attack and learned he had coronary artery disease. He underwent angioplasty to increase blood flow in his right coronary artery. In February 1994, Gallagher submitted a claim for benefits. The City, a self-insured employer, denied the claim. The denial of benefits was upheld on review by a hearing officer and an appeals officer, who both concluded that Gallagher did not qualify for the conclusive presumption of coverage provided by NRS 617.457(1) and did not prove a causal connection between his heart disease and his employment. The district court denied Gallagher's petition for judicial review, and Gallagher appeals.

Sorensen, Docket No. 29615. The City of Las Vegas employed respondent William Sorensen as a firefighter on a full-time, continuous, uninterrupted, salaried basis from November 1957 until June 1992, when he retired. Sorensen also took and passed mandatory annual physical examinations. In June 1982 Sorensen experienced chest pains at work, with pain in his left arm and other symptoms of a heart attack, for which he sought emergency care. A cardiologist examined Sorensen, had him take a stress treadmill test and placed him on a 24-hour heart monitor; the tests revealed an irregular heartbeat, but no evidence of heart disease.¹ Although Sorensen experienced intermittent exercise-induced chest pain for some time before he retired, and his 1990-1992 treadmill tests suggested possible arterial blockage.

¹After the 1982 incident, Sorensen submitted a claim to the State Industrial Insurance System ("SIIS") for reimbursement of his medical expenses under NRS 617.457. SIIS denied the claim. The hearing officer and appeals officer who reviewed the denial affirmed it because there was no evidence that Sorensen had heart disease. The agency decision was not appealed and is not now at issue.

follow-up thallium stress tests revealed no evidence of heart disease. After he retired, Sorensen underwent physical examinations in December 1992 and December 1993, which were also negative for heart disease.

On February 15, 1994, Sorensen suffered a severe angina attack. An electrocardiogram administered the following day yielded normal results, but because Sorensen was still in pain, his family doctor referred him to a cardiologist. When additional tests indicated arterial blockage, Sorensen was taken by ambulance to Sunrise Hospital. Catheterization revealed severe artery disease: the left main artery, which supplies two of three main arteries, was narrowed and severely diseased and a right artery was totally blocked. Sorensen was taken directly to an operating room for 5-vessel bypass surgery. On February 22, 1994, Sorensen submitted a claim for medical benefits. The City denied the claim. On review, a hearing officer upheld the denial of benefits, but an appeals officer reversed. The appeals officer concluded both that Sorensen qualified for the conclusive presumption of coverage provided by NRS 617.457(1), and that he proved a causal connection between his heart disease and his employment. The district court denied the City's petition for judicial review, and the City appeals.

DISCUSSION

NRS 617.358 requires a person seeking compensation for an occupational disease to establish by a preponderance of the evidence that the disease arose out of and in the course of employment. The legislature has created an exception to this requirement, however, for firefighters and police officers with heart disease when certain conditions are met. NRS 617.457 provides, in pertinent part:

1. Notwithstanding any other provisions of this chapter, diseases of the heart of a person who, for 5 years or more, has been employed in a full-time continuous, uninterrupted and salaried occupation as a fireman or police officer in this state before the date of disablement are conclusively presumed to have arisen out of and in the course of the employment.

The primary issue in these appeals is whether the presumption of NRS 617.457(1) applies to a firefighter who was once employed in the occupation on a full-time continuous, uninterrupted and salaried basis for five years or more, but is no longer so employed at the time of disablement.

The City contends NRS 617.457(1) is plain and unambiguous, and that these retired firefighters are not entitled to the presump-

tion because they were not employed as firefighters for nearly two years immediately preceding disablement. Pointing out that there would be coverage under the firefighters' interpretation of the statute for a firefighter who is employed when he is twenty and quits when he is twenty-five, then develops heart disease when he is sixty, the City asserts the legislature could not have intended that result. Thus, the City argues the statute should be read to require five years of service immediately preceding disablement.

The retired firefighters also contend the statute is plain and unambiguous, but they interpret it to mean that the presumption applies after retirement, as long as the conditions have all been met before the date of disablement. They point out there is no language in the statute requiring service "immediately preceding" the date of disablement, although the legislature clearly knows how to draft such a condition: a 1987 amendment to NRS 617.457 contained such language in its conditions of coverage, albeit in a different context, but a 1989 amendment deleted it.² The firefighters argue this court cannot insert words that the legislature chose to leave out.

[Headnotes 2, 3]

Construction of a statute is a question of law, which we review *de novo*. NRS 233B.135(3)(d); *State, Dep't of Mtr. Vehicles v. Lovett*, 110 Nev. 473, 476, 874 P.2d 1247, 1249 (1994). When a statute is capable of two or more reasonable but inconsistent interpretations, it is ambiguous and we must determine what the legislature intended by its enactment. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 649, 730 P.2d 438, 442 (1986). We conclude that NRS 617.457(1) is ambiguous; either of the proffered interpretations is a plausible reading of the requirement that the firefighter "for 5 years or more . . . has been employed . . . before the date of disablement."

[Headnotes 4, 5]

In determining which interpretation is correct, we are guided by well-established principles of statutory construction. The leading rule is to ascertain the legislature's intent, and to accomplish that goal we may examine the context and spirit of the statute in question, together with the subject matter and policy involved. *Id.* at 650-51, 730 P.2d at 443. Our interpretation should be in line with what reason and public policy would indicate the legis-

²The statute was amended in 1987 to establish a presumption of coverage that could be rebutted by showing "that the person suffered from the same ailment sometime during the 5-year period *immediately preceding employment*." (Emphasis added.) 1987 Nev. Stat., ch. 587, § 1, at 1424. The statute was amended in 1989 to create a conclusive presumption of coverage. 1989 Nev. Stat., ch. 480, § 2, at 1021.

lature intended, and should avoid absurd results. *Id.* at 649, 730 P.2d at 442; *Moody v. Manny's Auto Repair*, 110 Nev. 320, 325, 871 P.2d 935, 938 (1994).

[Headnote 6]

The primary purpose of Nevada's workers' compensation laws is to provide economic assistance to persons who suffer disability or death as a result of their employment. *SIIS v. Jesch*, 101 Nev. 690, 693-94, 709 P.2d 172, 175 (1985). Though claimants must ordinarily establish a causal connection between their disability and their employment, the legislature has expanded occupational disease coverage for firefighters and police officers who develop certain diseases, such as heart disease, by relieving them from the burden of proving a causal connection between their employment and their disease.³ The City asserts that medical experts disagree whether individuals in these occupations are at increased risk of developing heart disease, but it is not for us to weigh the medical evidence; the legislature has accepted the existence of such a causal connection and has incorporated it in NRS 617.457(1).

In considering whether these retired veteran firefighters are included within the scope of NRS 617.457(1), we find it helpful to trace the evolution of the statute from its initial form to its present form. When NRS 617.457(1) was enacted in 1969, it required a firefighter seeking coverage for occupational heart disease to prove total permanent or partial disability or death that was caused by extreme overexertion in times of stress or danger, and that arose out of and in the course of ten years or more of firefighting as an occupation.⁴ NRS 617.457(1) was amended in 1973 to cover additional individuals whose occupations involve certain specified kinds of stresses and to reduce the minimum required period of employment to five years.⁵ Additional amendments in 1981 and 1983 limited coverage to firefighters and police officers, but defined police officers in NRS 617.135 to include the individuals previously listed separately in NRS 617.457, and eliminated the requirement that disability be total.⁶

In 1987, the legislature reversed the burden of proof by revising NRS 617.457(1) to create a presumption that heart diseases of

³In addition to the heart disease statute at issue, NRS 617.455(5) creates a virtually identical conclusive presumption that lung diseases are occupational diseases of firefighters and police officers employed in their occupations for five years or more before disablement, and NRS 617.453 creates a rebuttable presumption that cancer is an occupational disease of firefighters.

⁴1969 Nev. Stat., ch. 340, § 1, at 592.

⁵1973 Nev. Stat., ch. 504, § 1, at 768.

⁶1981 Nev. Stat., ch. 339, § 2, at 623-24, and ch. 438, §§ 2 and 7, at 850-52; 1983 Nev. Stat., ch. 197, § 9, at 459.

firefighters and police officers, caused by exposure to noxious gases, fumes or smoke, or extreme overexertion, stress or danger and resulting in disability, are compensable unless it could be proved the person suffered from the ailment sometime during the five-year period immediately preceding employment.⁷ Finally, in 1989, the legislature eliminated the list of causative factors and abandoned the rebuttable presumption in favor of the conclusive presumption found in the current version of NRS 617.457(1).⁸

Each amendment of the statute following its adoption thirty years ago has expanded, rather than limited, coverage for firefighters who develop heart disease. We conclude that it would be inconsistent with the purpose and history of NRS 617.457(1) to deny Gallagher and Sorensen, thirty- and thirty-five-year veterans of the Las Vegas Fire Department, the benefit of the statute's application because they did not discover their heart disease until some months after they retired. Given the language of the statute, and the spirit and policy behind it (and similar statutes) declaring certain diseases of firefighters and police officers to be presumptively occupation-related, the City's interpretation is unreasonable.⁹

In determining that Gallagher did not qualify for the statutory presumption, the district court also relied upon the NRS 617.457(3)¹⁰ requirement that firefighters submit to annual physical examinations during their employment. The court concluded this "element of coverage" cannot "legally" be satisfied once a firefighter retires. The statute, however, merely requires annual exams during employment. The evidence shows that Gallagher did, in fact, "submit to a physical examination, including an examination of the heart, . . . on an annual basis during his employment" and thus satisfied the requirements of NRS 617.457(3).

CONCLUSION

Because Gallagher and Sorensen were employed in full-time continuous, uninterrupted and salaried occupations as firefighters

⁷1987 Nev. Stat., ch. 587, § 1, at 1424.

⁸1989 Nev. Stat., ch. 480, § 2, at 1021.

⁹If the legislature believes some limitation is necessary, it may amend the statute to terminate application of the presumption at some definite point. *See* *SIIS v. Jesch*, 101 Nev. 690, 695 n.2, 709 P.2d 172, 176 n.2 (1985); NRS 617.453(3).

¹⁰NRS 617.457(3) reads: "Except as otherwise provided in subsection 4, each employee who is to be covered for diseases of the heart pursuant to the provisions of this section shall submit to a physical examination, including an examination of the heart, upon employment, upon commencement of coverage and thereafter on an annual basis during his employment."

in this state for more than five years before they were disabled, their heart diseases are conclusively presumed to have arisen out of and in the course of their employment. NRS 617.457(1). Gallagher and Sorensen are therefore entitled to occupational disease benefits as a matter of law. We need not decide whether substantial evidence supports the appeals officers' determinations that Gallagher did not, and that Sorensen did, prove a causal connection between disease and employment. Accordingly, we reverse the order in Gallagher's appeal, Docket No. 29354, and remand to the district court for further proceedings consistent with this opinion. We affirm the order in Sorensen's appeal, Docket No. 29615.¹¹

SMITH'S FOOD & DRUG CENTERS, INC., APPELLANT,
v. ARGENTINE BELLEGARDE, RESPONDENT.

No. 27883

May 28, 1998

958 P.2d 1208

Appeal from judgment entered pursuant to jury award of punitive damages arising from claims for false imprisonment and battery. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Customer who suffered personal injuries when she was sprayed with "pepper spray" and handcuffed while detained for investigation of shoplifting brought intentional tort suit against store and its employees. Following jury trial, the district court entered judgment on jury verdict awarding compensatory damages against each defendant and imposing punitive damages only against store. Store appealed. The supreme court held that: (1) jury's refusal to impose punitive damages against employees did not preclude award against store; (2) employer's punitive damage liability for malicious acts of its agents and employees was to be determined under complicity liability rule; and (3) evidence was sufficient to support award of punitive damages against store for malicious and oppressive acts of its employees based on acting manager's authorization or ratification of those acts.

Affirmed.

Barker, Gillock, Koning & Brown and *Jerry S. Busby*, Las Vegas, for Appellant.

¹¹THE HONORABLE A. WILLIAM MAUPIN, Justice, did not participate in the decision of this matter.

APPENDIX E

Governmental Accounting Standards Board (GASB) Statement No. 43 (News Release)



NEWS RELEASE 05/11/04

GASB Issues Standards to Improve Postemployment Benefit Plan Reporting

Norwalk, CT, May 11, 2004—The Governmental Accounting Standards Board has issued Statement No. 43, *Financial Reporting for Postemployment Benefit Plans Other Than Pension Plans*. Other postemployment benefits (OPEB) include healthcare and other nonpension benefits provided to employees as part of their compensation for services.

The standards apply to OPEB plans that are included as trust funds in the financial reports of plan sponsors or employers, and to stand-alone financial reports of OPEB plans that are established as trusts, when issued by the public employee retirement systems, or other governmental entities that administer them. The Statement also provides requirements for reporting of OPEB funds by administrators of multiple-employer OPEB plans, when the fund used is not a trust fund.

According to project manager Karl Johnson, "Statement 43 provides a framework for transparent financial reporting by governmental entities that have fiduciary responsibility for OPEB plan assets regarding their stewardship of plan assets, the funded status and funding progress of the plan, and employer contributions to the plan." The approach taken generally is consistent with that adopted in the GASB's standards for pension plans, with modifications to reflect OPEB plan differences.

The Board expects to ballot a related Statement, *Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions*, in June.

About the Governmental Accounting Standards Board

The GASB is the independent, not-for-profit organization formed in 1984 that establishes and improves financial accounting and reporting standards for state and local governments. Its seven members are drawn from the Board's diverse constituency, including preparers and auditors of government financial statements, users of those statements and members of the academic community. More information about the GASB can be found at its website www.gasb.org.

Governmental Accounting Standards Board

Improving governmental accountability through better financial reporting

APPENDIX F

Suggested Legislation

The following **Bill Draft Requests** will be available during the 2005 Legislative Session, or can be accessed after “Introduction” at the following Web site: <http://www.leg.state.nv.us/73rd/BDRList/page.cfm?showAll=1>.

- BDR 53-249 Makes various changes relating to industrial insurance.

- BDR 53-250 Provides for licensing claims adjusters and compensating injured workers for time to receive medical treatment.

- BDR S-251 Provides for interim study of increases for permanently and totally disabled workers and for lump sum payment to those workers.

- BDR 53-252 Revises provisions relating to consolidated insurance programs.