



**NEVADA LEGISLATURE
LEGISLATIVE COMMISSION'S SUBCOMMITTEE
TO REVIEW THE UNITED STATES DEPARTMENT OF
LABOR'S REPORT ON THE NEVADA OCCUPATIONAL
SAFETY AND HEALTH PROGRAM**

(Nevada Revised Statutes 218E.200)

SUMMARY MINUTES AND ACTION REPORT

The third meeting of the Nevada Legislature's Legislative Commission's Subcommittee to Review the U.S. Department of Labor's Report on the Nevada Occupational Safety and Health Program (*Nevada Revised Statutes* [NRS] 218E.200) was held on June 7, 2010, at 9:30 a.m. in Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. The meeting was videoconferenced to Room 2135 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. A copy of this set of "Summary Minutes and Action Report," including the "Meeting Notice and Agenda" ([Exhibit A](#)) and other substantive exhibits, are available on the Nevada Legislature's website at <http://www.leg.state.nv.us/interim/75th2009/committee/>. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (e-mail: publications@lcb.state.nv.us; telephone: 775/684-6835).

SUBCOMMITTEE MEMBERS PRESENT IN LAS VEGAS:

Senator Maggie Carlton, Chair
Assemblyman Marcus Conklin

SUBCOMMITTEE MEMBER PRESENT IN CARSON CITY:

Senator Maurice E. Washington

LEGISLATIVE COUNSEL BUREAU STAFF PRESENT:

Wayne J. Thorley, Senior Research Analyst, Research Division
Daniel Peinado, Deputy Legislative Counsel, Legal Division
Ricka Benum, Senior Research Secretary, Research Division

OPENING REMARKS AND INTRODUCTIONS

- Chair Carlton called the meeting to order and outlined the procedures for the Subcommittee's work session meeting.

APPROVAL OF MINUTES OF THE MAY 18, 2010, MEETING IN LAS VEGAS, NEVADA

- The Subcommittee **APPROVED THE FOLLOWING ACTION:**

ASSEMBLYMAN CONKLIN MOVED TO APPROVE THE MINUTES OF THE MAY 18, 2010, MEETING HELD IN LAS VEGAS, NEVADA. THE MOTION WAS SECONDED BY CHAIR CARLTON AND PASSED. SENATOR WASHINGTON WAS NOT PRESENT FOR THE VOTE.

PUBLIC COMMENT

- Marie D. Holt, Property and Casualty Section Chief, Division of Insurance, Department of Business and Industry (DBI), commented on Owner-Controlled Insurance Programs (OCIPs). Ms. Holt explained that when the Legislature approved the programs in 1999 the threshold limit was \$150 million. The Commissioner of Insurance has the ability to annually review the established threshold limit and to make a determination if an increase is warranted according to the rate of inflation. Ms. Holt reported that on June 30, 2009, the Commissioner issued Bulletin No. 09-006 ([Exhibit B](#)) increasing the current minimum threshold amount to \$210 million. She added it is anticipated that the threshold will be increased to \$216 million in 2010 ([Exhibit C](#)).
- Chair Carlton noted that the eligibility thresholds for OCIP projects is addressed under Recommendation No. 5 of the "Work Session Document" and inquired why the thresholds are increased rather than lowered.
- Janice D. Moskowitz, Lead Actuary, Division of Insurance, DBI, explained that current NRS requires the Commissioner of Insurance to raise the threshold each year according to the *Engineering News Record*, a professional journal, and based on the Construction Cost Index. Ms. Moskowitz stated the index is a composite average of 20 cities. She added it is possible that Las Vegas may not be accurately represented by the index, but the *Engineering News Record* warns against using any one city to determine the threshold amount since the index changes so often, and using the average provides for level adjustments.
- Chair Carlton called for additional public testimony; there was none.

**WORK SESSION—DISCUSSION AND POSSIBLE ACTION ON
RECOMMENDATIONS RELATED TO:**

- *Accident and Fatality Investigations*
- *Citations, Fines, and Appeals*
- *Construction Unions*
- *Federal Funding for the Nevada Occupational Safety and Health Administration (NV OSHA)*
- *General Operations of NV OSHA, Including Assessments, Fees, and Employee Furloughs*
- *Owner-Controlled Insurance Programs*
- *Penalties for Willful Violations*
- *Public Works Projects*
- *Safety and Mechanical Inspections*
- *Salary of NV OSHA Inspectors*

“WORK SESSION DOCUMENT”

The following “Work Session Document” ([Exhibit D](#)) has been prepared by the Chair and staff of the Legislative Commission’s Subcommittee to Review the United States Department of Labor’s Report on the Nevada Occupational Safety and Health Program (NRS 218E.200). It is designed to assist the Subcommittee members in developing statements and determining recommendations to be forwarded to the 2011 Session of the Nevada Legislature. Each item in this document may be the subject of further discussion, refinement, or action. Some recommendations for legislation may be combined into a single bill draft request (BDR).

The recommendations contained herein do not necessarily have the support or opposition of the Subcommittee. Rather, these possible actions are compiled and organized so the members may review them to decide if they should be adopted, changed, rejected, or further considered. The members of the Subcommittee may vote to send as many Subcommittee statements or letters as they choose; however, pursuant to NRS 218D.160, the Subcommittee is limited to five BDRs, including requests for the drafting of legislative resolutions. For purposes of this “Work Session Document,” the recommendations have been grouped, in part, by topic and also by possible Subcommittee action. They are not preferentially ordered. Additionally, although possible actions may be identified within each recommendation, the Subcommittee may choose to recommend any of the following actions: (1) draft legislation; (2) draft a

legislative resolution; (3) draft a Subcommittee letter; (4) draft a Subcommittee resolution; or (5) include a statement in the final report.

The source of each recommendation is noted in parentheses. Please note that specific sponsors of the recommendations may not be provided if the proposals were raised and discussed by numerous individuals and entities during the course of the Subcommittee's meetings. It should also be noted that some of the recommendations may contain an unknown fiscal impact. Subcommittee members should be advised that Legislative Counsel Bureau (LCB) staff will coordinate with the interested parties to obtain detailed fiscal estimates, where appropriate, for inclusion in the final report.

RECOMMENDATIONS FOR LEGISLATIVE MEASURES

- Chair Carlton stated her intent to begin the work session with items specifically outlined in the *Review of the Nevada Occupational Safety and Health Program* report ([Exhibit E](#)). She opened the work session with discussion on Recommendation No. 7.

Recommendation No. 7: Request the drafting of a bill to increase insurance assessments, fines, and other fees levied by NV OSHA. The increased revenue would go towards: (a) hiring additional NV OSHA staff, including inspectors, trainers, and administrative staff; and (b) increasing the salary of safety and mechanical inspectors to a level more comparable with the average salary of private industry inspectors. (Recommended by various presenters throughout the legislative interim)

- Chair Carlton explained that testimony indicated that NV OSHA has become a training ground for private industry. She explained that the State cannot compete with the higher salaries paid by private employers and noted that since NV OSHA is a totally fee-based agency, funds from Recommendation No. 7 would not be derived from taxpayers resources.
- Assemblyman Conklin suggested grouping the recommendations that pertain to fines, determining which are the best options, and combining them into one BDR.
- Chair Carlton indicated her intent to submit one BDR as the past Chair of the Senate Committee on Commerce and Labor. She added that the recommendations the Subcommittee approves must be heard by the entire Legislative Commission, and there may be items or portions of the proposals the Commission will decide not to support. Chair Carlton referred to the document provided by staff ([Exhibit F](#)) as a working document in addition to the "Work Session Document."

Chair Carlton opened discussion on Recommendation Nos. 22 and 25.

Recommendation No. 22: Send a Subcommittee letter to the Division of Industrial Relations and the NV OSHA, both within Nevada's Department of Business and Industry, requesting a salary survey to determine how the average salary of state safety inspectors compares to that of safety inspectors in the private sector. Preferably, this survey should be conducted by Nevada's Department of Personnel, and not by a private entity. (Recommended by Assemblyman Marcus L. Conklin)

Recommendation No. 25: Send a Subcommittee letter to Nevada's Congressional Delegation; the Chair of the U.S. Senate Committee on Health, Education, Labor and Pensions; the U.S. House Committee on Education and Labor; the U.S. Department of Labor; and the U.S. Occupational Safety and Health Administration requesting support for legislation and policies that ensure federal funding to states with OSHA plans is fair and adequate. Specifically, the letter will state that a more equitable funding formula would allow NV OSHA to hire more inspectors and administrative staff. It would also allow NV OSHA to increase the salary of State safety and mechanical inspectors to a level more comparable with private sector inspectors. (Recommended by Senator Maggie Carlton, Chair)

- Assemblyman Conklin referred to Recommendation No. 25 and proposed that a letter be sent to the Director of NV OSHA; the Division of Industrial Relations (DIR); the Department of Business and Industry (DBI); and to Nevada's Department of Personnel requesting a salary survey as outlined in the recommendation.
- The Subcommittee **APPROVED THE FOLLOWING ACTION:**

ASSEMBLYMAN CONKLIN MOVED FOR APPROVAL TO SEND A LETTER ON BEHALF OF THE SUBCOMMITTEE TO NEVADA'S DEPARTMENTS OF BUSINESS AND INDUSTRY AND PERSONNEL, REQUESTING THAT A SALARY SURVEY BE CONDUCTED AS STATED IN RECOMMENDATION NO. 22 WITH THE ADDITION OF A DATE FOR COMPLETION OF THE SURVEY. THE MOTION WAS SECONDED BY CHAIR CARLTON AND THE MOTION PASSED. SENATOR WASHINGTON WAS NOT PRESENT FOR THE VOTE.

The Subcommittee agreed that there was no objection if the Majority Leaders of the Senate and Assembly prefer that the letters be sent from the Legislative Commission rather than from the Subcommittee.

- The Subcommittee **APPROVED THE FOLLOWING ACTION:**

ASSEMBLYMAN CONKLIN MOVED TO SEND A LETTER OF SUPPORT AS STATED IN RECOMMENDATION NO. 25 TO NEVADA'S CONGRESSIONAL DELEGATION, EITHER ON BEHALF OF THE LEGISLATIVE COMMISSION OR ON BEHALF OF THE SUBCOMMITTEE. THE MOTION WAS SECONDED BY CHAIR CARLTON AND THE MOTION PASSED. SENATOR WASHINGTON WAS NOT PRESENT FOR THE VOTE.

- Chair Carlton reopened discussion on Recommendation No. 7.
- Assemblyman Conklin proposed that Recommendation No. 6 be addressed in the same BDR as Recommendation No. 7, noting that both items pertain to violations.

Recommendation No. 6: Request the drafting of a bill to increase the financial penalty for willful violations. Currently, the fines for willful violations not resulting in a workplace death must be between \$5,000 and \$70,000 (see NRS 618.635). The fines for willful violations resulting in the death of a worker are up to \$50,000 for the first offense and up to \$100,000 for each subsequent offense (see NRS 618.685). Under current law, willful violations resulting in a worker death may also result in imprisonment. The increased fines would not only discourage unsafe practices, but also raise money to hire additional NV OSHA staff. (Recommended by Assemblyman Marcus L. Conklin)

A discussion ensued regarding fine assessments and incomplete remediation on the part of the contractors. Assemblyman Conklin stated that willful violations are difficult to prove, and if a contractor is found guilty of a willful violation, any penalties should be severe and addressed promptly in addition to increasing assessments and/or fines. He expressed uncertainty whether it is possible to designate where the excess funds would be applied and for what specific purpose. There was agreement that Recommendation No. 12 be included along with Recommendation Nos. 6 and 7. Chair Carlton concurred that willful violations should come with severe penalties and fines.

Recommendation No. 12: Request the drafting of a bill that would allow NV OSHA to enforce settlement agreements via fines and other measures in advance. Settlement agreements between NV OSHA and cited employers generally contain language that requires the employer to take certain actions, such as staff training and safety program changes. However, short of going to District Court, NV OSHA has no reasonable ability to enforce the conditions of the agreement. (Recommended by Steve Coffield, Chief Administrative Officer [CAO], NV OSHA, Department of Industrial Relations [DIR])

- Chair Carlton commented that it is important to divide the policy issues from the inspection and educational issues. There are different stages of violations, pre-incident and post-accident. She added the Subcommittee's intent is to make regulations strong

enough to prevent workplace accidents and injuries, and that it is necessary to remove existing hazards and make sure there are remedies in place before injuries occur.

During discussion, Assemblyman Conklin proposed packaging the proposals addressing the issue of fines. It was agreed that Recommendation Nos. 6, 7, 12, 14, and 15 be combined into one BDR. He indicated that he was comfortable with the Subcommittee staff researching fine amounts and penalties applied in other states and submit suggestions for appropriate amounts in discussions with NV OSHA representatives.

Recommendation No. 7 is stated on page 4 of these minutes.

Recommendation No. 14: Request the drafting of a bill requiring that fines due to safety violations be paid prior to bankruptcy of the employer. This would be accomplished by requiring that NV OSHA be named among the first creditors to be paid during a bankruptcy proceeding. (Recommended by Robert A. Ostrovsky, Chairman of the DIR Advisory Council)

Recommendation No. 15: Request the drafting of a bill amending the appeals process for workplace safety violations. Currently, employers can file multiple appeals with no bond or cash payment for unsafe activity. This bill would require that a bond or cash payment be made upfront to prevent employers from using the appeals process as a means to avoid paying fines. If a settlement agreement is reached during the appeals process that reduces the original fine, a refund will be made. (Recommended by Senator Maggie Carlton, Chair, and Robert A. Ostrovsky, Chairman of the DIR Advisory Council)

- Chair Carlton commented that combining the items would address several issues outlined in the *Review of the Nevada Occupational Safety and Health Program* report ([Exhibit E](#)).
- The Subcommittee **APPROVED THE FOLLOWING ACTION:**

ASSEMBLYMAN CONKLIN MOVED FOR APPROVAL TO COMBINE RECOMMENDATION NOS. 6, 7, 12, 14, AND 15 AND MOVE THE PROPOSAL FORWARD AS ONE BDR TO ADDRESS FINES AND SETTLEMENTS. THE MOTION WAS SECONDED BY CHAIR CARLTON AND THE MOTION PASSED. SENATOR WASHINGTON WAS NOT PRESENT FOR THE VOTE.

- Chair Carlton pointed out that Recommendation No. 10 is designed to resolve a particularly disturbing problem and it is necessary to develop a solid resolution. She indicated her intent to combine recommendations that address the inspection process and develop one BDR designed specifically to help protect workers.

Recommendation No. 10: Request the drafting of a bill that allows NV OSHA to cite employers for workplace safety violations even if an inspector did not observe an

employee being exposed to the hazard. Current law provides that NV OSHA cannot issue a citation without witnessing an employee exposure to a hazard. However, when State inspectors are on the jobsite, workers often take breaks. As a result, they are generally not in the proximity of a hazard even though a hazard may exist. This bill would allow NV OSHA to use interviews and other judgments to issue citations based on the likelihood that an employee was actually exposed to a hazard. (Recommended by Steve Coffield, CAO, NV OSHA, DIR, DBI)

- Assemblyman Conklin suggested including language that would put the focus on the condition of a workplace and not whether there are employees present in the work area during an inspection.
- The Chair added that a BDR derived from Recommendation No. 10 may address issues such as the actual inspection process and employee work stoppages during inspections. Chair Carlton added that considering the complicated nature of Recommendation No. 10, it may require a stand alone BDR.
- Assemblyman Conklin called for discussion on Recommendation No. 13.

Recommendation No. 13: Request the drafting of a bill that would prevent business owners and contractors with outstanding unpaid fines due for safety violations from obtaining or renewing a business or contractor's license in Nevada. (Recommended by Steve Coffield, CAO, NV OSHA, DIR, DBI)

- Assemblyman Conklin explained that Recommendation No. 13 would give NV OSHA the authority to delay a business or a contractor from obtaining a license, if there are outstanding fines. He suggested the Recommendation be included in the last motion. He added that when an entity lacks the authority to enforce violations, the least expensive way for a business to resolve the issue is to just pay the fine and continue business as usual. Assemblyman Conklin added that if someone cannot operate their business, they are more likely to pay attention.
- Chair Carlton noted the intent was to include outstanding or unpaid fines for safety violations and allow NV OSHA to have the ability to share the information with the State Contractors' Board (NRS 624.040) or the Office of the Secretary of State. She received clarification from Steve Coffield, CAO, NV OSHA, DIR, DBI, that currently any information pertaining to violations may be shared, but the licensing agency may still issue licenses.
- Assemblyman Conklin proposed giving NV OSHA the authority to block the licensure of businesses and contractors who have outstanding violations. He expounded that NV OSHA will be directed to make the licensing agencies aware of outstanding safety violation fines, and when a license is due for renewal, the license will not be issued until the debt is paid. It was agreed that the language in Recommendation No. 13

would be addressed in a BDR requested by the Assembly Committee on Commerce and Labor.

A dialogue ensued with Chair Carlton reopening discussion on the items that focus on the inspection process (Recommendation No. 10). In addition, Assemblyman Conklin called for discussion on Recommendation Nos. 18, 19, and 20.

Recommendation No. 18: Request the drafting of a bill requiring NV OSHA, during the investigation of any workplace accident resulting in a fatality, to interview surviving family members of the worker and solicit any pertinent information the worker may have shared with his or her family. (Recommended by Debi Koehler-Fergen, private citizen, mother of fatally injured worker Travis Koehler)

Recommendation No. 19: Request the drafting of a bill requiring all NV OSHA investigations involving a workplace fatality be recommended to the local district attorney (DA) and/or the Office of the Attorney General (AG). The NV OSHA solicitor will still be lead investigator; however, this bill would give the DA or the AG the option of reviewing the case and prosecuting even if the NV OSHA solicitor does not believe the investigation warrants a citation or criminal prosecution. (Recommended by Debi Koehler-Fergen, private citizen, mother of fatally injured worker Travis Koehler)

Recommendation No. 20: Request the drafting of a bill requiring NV OSHA to notify family members or other worker representatives, regardless of whether the injured worker was a member of a union or not, when: (a) an investigation begins; (b) citations are issued; (c) formal settlement agreements are signed; (d) the case is contested; and (e) the case is closed. This bill would also allow family members of workers killed on the jobsite the opportunity to participate in all conferences and meetings pertaining to the investigation. Finally, the bill would require NV OSHA to give family members or other worker representatives a written copy of all their rights pertaining to a workplace accident investigation. (Recommended by Debi Koehler-Fergen, private citizen, mother of fatally injured worker Travis Koehler)

- Assemblyman Conklin referred to page 3 of [Exhibit F](#) and indicated that several of the NV OSHA deficiencies would be addressed, and requested that Recommendation Nos. 18 and 20 be combined in a BDR and additionally, that Recommendation No. 19 also go forward as a BDR.
- Chair Carlton proposed that Recommendation Nos. 18, 20, and 21 be combined into one BDR. In addition she requested the Subcommittee's support for the worker advocate position outlined in Recommendation No. 21 to be created under the Office of the Nevada Attorney for Injured Workers, DBI, (NRS 616A.435) in the capacity of an ombudsman role.

Recommendation No. 21: Request the drafting of a bill creating a worker advocate position to assist families that have recently lost a family member to a workplace fatality.

The advocate would serve as a source of information for the family during the beginning investigative process of the accident. (NOTE: During the Work Session, the Subcommittee members may choose to discuss which State office or department will contain the worker advocate position.) (Recommended by Senator Maggie Carlton, Chair)

- Assemblyman Conklin clarified that the specific language of the issues and recommendations the Subcommittee agrees to move forward will be compiled and developed by the Subcommittee's staff into appropriate BDRs for the Chair's review.
- Chair Carlton responded in the affirmative. She reopened the discussion on Recommendation No. 19 and stated that the issue of potential prosecution for workplace fatalities is so complex that it should be heard before the entire Legislative Commission as an independent item to decide if the issue should move forward.

There was agreement among the Subcommittee that Recommendation Nos. 18, 20, and 21 would move forward as a BDR. Chair Carlton reconfirmed that Recommendation No. 19 be heard as an independent item before the Legislative Commission.

- Chair Carlton stated that four categories have been identified for BDRs, leaving one remaining available BDR. She suggested that the final BDR focus on the issue of OCIPs and to update the procedures that were developed during recent sessions. In particular, she mentioned the requirement that consultants be on the jobsite at all times.

Recommendation No. 1: Request the drafting of a bill to require project owners or principal contractors on OCIP projects to submit a comprehensive safety plan to the Nevada Occupational Safety and Health Administration (NV OSHA) before a construction project can begin. The bill would allow, with prior NV OSHA approval, the safety plan to be amended and updated as the project progresses. This proposal would amend the language in NRS 616B.725. (Recommended by various presenters throughout the legislative interim)

Recommendation No. 2: Request the drafting of a bill to set forth the frequency that safety inspections must take place pursuant to NRS 616B.725. Currently, the statute requires "regular inspections." This bill would amend the statutory language to clarify with what frequency the inspections must occur. (Recommended by Robert A. Ostrovsky, Chairman of the Division of Industrial Relations [DIR] Advisory Council) 10:15:41 AM

Recommendation No. 3: Request the drafting of a bill to require detailed recordkeeping of the results of safety inspections performed pursuant to NRS 616B.725. This bill would also require the safety inspection records to be submitted to NV OSHA for regular review. (Recommended by Senator Maggie Carlton, Chair, and Robert A. Ostrovsky, Chairman of the DIR Advisory Council)

Recommendation No. 4: Request the drafting of a bill to amend NRS 616B.725 concerning the number of safety coordinators required on an OCIP project. Specifically, the bill would

amend the statutory language to require that the number of safety inspectors required be positively correlated with the average number of workers on the construction site. In other words, jobs with more workers would require more safety inspectors. This bill would also require that a full-time Safety Consultation and Training Section (SCATS) employee be on OCIP jobsites. These SCATS positions would be paid for by the OCIP. (NOTE: During the Work Session, the Subcommittee may choose to discuss the specific ratio of safety inspectors to workers.) (Recommended by Robert A. Ostrovsky, Chairman of the DIR Advisory Council)

Recommendation No. 5: Request the drafting of a bill to amend NRS 616B.710 by lowering the eligibility threshold for an OCIP project to an estimated construction cost of \$100 million. Currently, the eligibility threshold is \$150 million. (Recommended by Steve Holloway, Executive Vice President, Associated General Contractors [AGC], Las Vegas Chapter)

There was no further discussion or action on Recommendation Nos. 1 through 5.

- Senator Washington requested additional discussion on Recommendation No. 10, and expressed concern with the terms “interviews or other judgment” used by NV OSHA. He pointed out that the language in the recommendation is too broad, and the word “judgment” could be interpreted differently by each inspector. Senator Washington requested that the wording be stated in a narrow defined statement and still remain within the scope of the intent.
- Steve Coffield, previously identified, noted that the language submitted for Recommendation No. 10, is conceptual in nature. He agreed with Senator Washington on the intent to keep a balance of authority.
- Chair Carlton reminded the members that the language would be reviewed and must be agreed on by the Legislative Commission.

During additional discussion of Recommendation No. 10, Mr. Coffield explained to Senator Washington that during staff conversations conceptual language was developed, but they did not think it appropriate to submit the language prior to the hearing. Mr. Coffield restated that the intent is for NV OSHA to have the ability to address workplace hazards. He added that citations are currently issued on past exposure, observed exposure, or future exposure, and the problem remains that violations work in theory, but not in practice. He offered to work with the Subcommittee’s staff to develop specific language for the BDR.

- Senator Washington indicated his vision would be to guard the employers’ rights, while protecting employees and asked for confirmation that the language would define in statute what constitutes a hazardous situation.

- Mr. Coffield replied that the definition of a hazardous situation is contained in the *Federal OSHA Field Operations Manual* and the *Nevada Operations Manual*, which is an administrative policy that has been upheld by the courts.
- Senator Washington indicated the importance of setting specific parameters for employers while emphasizing the legislative intent, and to avoid language that may be vague.
- Chair Carlton stated that if a work area is considered a hazard with employees on the job, it should be considered a hazard even when employees are not present.
- Senator Washington expressed agreement, but did not want inspectors to have unyielding power.
- John Wiles, Division Counsel, DIR, DBI, clarified that the hazards are occupational safety and health standards in nature, and the discretion of the inspector is limited to identifying those types of hazards. The DIR would like the language to create the presumption that arises when a hazardous condition occurs.
- Chair Carlton noted her intent to submit Recommendation No. 10 as a Subcommittee bill and that she will work with members of the Senate Committee on Commerce and Labor during the 2011 Legislative Session. She opened discussion on the notification issues in Recommendation Nos. 17, 18, 20, 21.

Recommendation No. 17: Request the drafting of a bill granting employees, families of employees, or employee representatives the right to contest the findings of the Occupational Safety and Health Review Board. This bill would allow those injured in workplace accidents, or families of those injured or killed, to contest the adequacy of a citation issued by NV OSHA and to contest the decision of the Occupational Safety and Health Review Board. (Recommended by Debi Koehler-Fergen, private citizen, mother of fatally injured worker Travis Koehler)

- Senator Washington reopened discussion regarding Recommendation No. 14 and inquired whether the Subcommittee or the Legislature could mandate the position of creditors in a bankruptcy proceeding.
- Chair Carlton clarified that the language states that NV OSHA be named “among” the first creditors, and serves to give guidance to prioritization. There was agreement that the Legal staff would review the appropriate language to be stated in the BDR.
- Chair Carlton referred to Recommendation No. 17, addressing the appeal process. She requested clarification from the DIR representatives, pertaining to the legal standing of the injured worker’s family.

- Mr. Wiles, previously identified, stated that under existing law the families have no legal standing during the administrative review process of workplace violation citations. The parties include the employer, the State or federal OSHA system, and the employee organization or representatives, but only to the extent of abatement.
- Chair Carlton noted that she was in search of a means to give the workers' families a voice during the citation or court process to give them the ability to be heard and the statutory ability to state their concerns to the employer.
- Assemblyman Conklin viewed the family of an injured or dead worker the aggrieved party.
- Mr. Wiles noted the difficulty of the subject, and explained that when NV OSHA attends these types of hearings, they are trying to establish an OSHA violation and to resolve the hazard, and impose an administrative fine as a deterrent. The process is not designed to aggrieve the families who have lost a loved one.

A discussion ensued among the Subcommittee members and Mr. Wiles. It was determined that it is unlikely the family could bring a civil proceeding against the employer for negligence, since Nevada and many other states have an exclusive remedy provision, which states if a worker is injured or killed in the course of his duties at work, the workers' compensation system would bar any suits to collect monetary damages as a result. Mr. Wiles agreed with Chair Carlton that the family essentially is left with no where to turn and no legal remedy. He added that the current system is not structured to allow an available remedy for the family members of a worker who has lost his life or been injured in a workplace accident.

- Senator Washington pointed out the magnitude of the problematic situation in trying to resolve such an emotional issue for the family in the venue of an OSHA proceeding. He added that OSHA representatives may have expertise in dealing with injuries or loss of life, but they may not be proficient in handling the emotional aspects of dealing with a family going through such a crisis.
- Chair Carlton indicated that the issue outlined in Recommendation No. 10 is too complicated, needs to be addressed in independent discussions during the next legislative session, and may require exclusive remedy provisions. She recommended the BDR come from an individual legislator and she further suggested assembling a group of interested persons to work on the issue.

After reviewing the items remaining for consideration in the "Work Session Document," Chair Carlton opened discussion on Recommendation No. 11.

Recommendation No. 11: Request the drafting of a bill that would clarify and strengthen the criteria needed for employers to use the affirmative employer defense known as "unpreventable employee misconduct." Under current law, the courts have ruled that in

order to prove unpreventable employee misconduct, an employer must have: (a) a company rule addressing the conduct; (b) effectively communicated the rule to employees; and (c) enforced the rule. (Recommended by Steve Coffield, CAO, NV OSHA)

- Assemblyman Conklin requested Mr. Coffield to outline the exact language that NV OSHA would like to see included to clarify the current statutes on “unpreventable employee misconduct.” He was of the opinion that Recommendation No. 11 should be submitted from the agency rather than the Subcommittee. Assemblyman Conklin indicated either he or Chair Carlton could assist DIR in obtaining a BDR, but that the specific language should come from NV OSHA. He expressed discomfort in supporting a concept with no specific language.
- Chair Carlton indicated she was comfortable with the direction NV OSHA was going and that they wanted the end result to be in statute which states in order for an employer to use the defense of unpreventable misconduct they must have specific workplace rules, communicate the rules to the employees, and then enforce those rules that employees cannot violate.
- Mr. Coffield, previously identified, concurred with Chair Carlton’s statement and emphasized that the language needs to be more specific to prevent employers from blaming the employee for workplace safety issues, when actually there has been a lack of developed safety training program on the part of the employer. He added that the fact remains that often employers have not established a valid safety program, have a mediocre culture of safety, and minimal or no supervision, and then attempt to hold the employees responsible. The concept would be to “toughen up” the requirements before an employer could use the defense.
- Assemblyman Conklin offered that he was not opposed to the concept, but he wanted to know details on how the minimum rules would be defined and how the safety instructions and rules would be communicated to the employees. He proposed the possibility of developing the language under the administrative codes, rather than by statutes. He noted that the procedures and technologies have changed over the years. First industries used handbooks, then employees watched safety videos, employers may now utilize Web training, and in the future they may mandate that everyone learn from iPod recordings. Assemblyman Conklin disagreed with continual statute changes and stated that the agency should have the authority to determine an effective communication process.
- Chair Carlton stated she suspects that many of the safety problems arise from the lack of enforcement of violations that are in place. She commented that much of the time rules are made for the people who do not follow the rules.

There was no further discussion by the Subcommittee regarding Recommendation No. 11.

- Senator Washington posed an inquiry to Assemblyman Conklin regarding Recommendation No. 19 and assigning the NV OSHA solicitor as the lead investigator when a workplace fatality occurs.

Recommendation No. 19 is stated on page 9 of these minutes.

- Assemblyman Conklin explained to Senator Washington that including offices not of the same “political persuasion” allows for additional objective observers looking into a fatal accident. He commented that when there has been a major injury or fatality it is best to have as many eyes investigating as possible. Additionally, NV OSHA is limited to an administrative proceeding to determine whether or not a violation, injury, or death occurred; the AG’s office or a local DA’s office is not interested in an administrative violation, only in a violation of Nevada law.
- Senator Washington said he envisions that this could become a confrontational issue between the different agencies. He suggested that Recommendation No. 19 include language other than “lead investigator” as to the criminal prosecution arena and when drafted have specific wording to deal with citations, fees, fines, and warrants. In situations that go as far as criminal prosecutions he requested that the AG or DA take over the position of lead investigator.
- Assemblyman Conklin and Chair Carlton expressed agreement on the proposed language for Recommendation No. 19 and with Senator Washington’s comments.

Recommendation No. 8: Request the drafting of a bill to exempt safety and mechanical inspectors for NV OSHA from the State’s furlough laws that require certain State employees to take one day of unpaid furlough leave each month. (Recommended by various presenters throughout the legislative interim)

Recommendation No. 9: Request the drafting of a bill requiring that public works projects only be awarded to contractors that have an exemplary safety record. This bill would also include language encouraging principal contractors of public works projects to select subcontractors with good safety records. (Recommended by Steve Holloway, Executive Vice President, AGC, Las Vegas Chapter)

- Chair Carlton indicated there was no desire for further discussion of the issue of furlough for NV OSHA inspectors (Recommendation No. 8). She reported that a BDR has already been submitted to address the issue in Recommendation No. 9 for the next session. She restated the Subcommittee’s decision to request four BDRs. She added that staff would work with agency representatives to “fine tune” the proposed language to be presented to the Legislative Commission.

Recommendation No. 16: Request the drafting of a bill prohibiting the use of unclassified citations by NV OSHA. A bill currently being considered in the U.S. Congress, the Protecting America’s Workers Act contains a provision that would also prohibit the use of

unclassified citations. (Recommended by Debi Koehler-Fergen, private citizen, mother of fatally injured worker Travis Koehler)

Recommendation No. 23: Send a Subcommittee letter to all construction union organizations in the State encouraging them to actively advertise safety and mechanical inspector job openings with NV OSHA to their union halls, members, and those involved in their apprenticeship programs. (Recommended by Senator Maggie Carlton, Chair)

Recommendation No. 24: Send a Subcommittee letter to NV OSHA encouraging them to schedule staffing so that the most qualified and experienced safety and mechanical inspectors perform scheduled inspections while newer inspectors perform complaint inspections. (Recommended by Robert A. Ostrovsky, Chairman of the DIR Advisory Council)

The Subcommittee took no action on Recommendation Nos. 1 through 5, 8, 9, 11, 13, 16, and 17. There was no discussion on Recommendation Nos. 23 and 24.

PUBLIC COMMENT

There was no additional public comment.

ADJOURNMENT

There being no further business to come before the Subcommittee, the meeting was adjourned at 11:26 a.m.

Respectfully submitted,

Ricka Benum
Senior Research Secretary

Wayne J. Thorley
Senior Research Analyst

APPROVED BY:

Senator Maggie Carlton, Chair

Date: _____

LIST OF EXHIBITS

[Exhibit A](#) is the “Meeting Notice and Agenda” provided by Wayne J. Thorley, Senior Research Analyst, Research Division, Legislative Counsel Bureau (LCB).

[Exhibit B](#) is Bulletin No. 09-006 dated June 30, 2009, titled “Consolidated Insurance Programs” issued by Scott J. Kipper, Commissioner of Insurance, Division of Insurance, Department of Business and Industry.

[Exhibit C](#) is draft language for Bulletin No. 10-007 to be issued June 30, 2010, titled “Consolidated Insurance Programs,” Division of Insurance, Department of Business and Industry.

[Exhibit D](#) is the “Work Session Document” titled “Legislative Commission’s Subcommittee to Review the United States Department of Labor’s Report on the Nevada Occupational Safety and Health Program (*Nevada Revised Statutes* 218E.200)” prepared by Wayne J. Thorley, Senior Research Analyst, Research Division, LCB, dated June 7, 2010.

[Exhibit E](#) is a report titled *Review of the Nevada Occupational Safety and Health Program* dated October 20, 2009, prepared by the United States Department of Labor, Occupational Safety and Health Administration, Region IX, San Francisco, California.

[Exhibit F](#) is a table titled “Cross Reference Chart” submitted by Wayne J. Thorley, Senior Research Analyst, Research Division, LCB, dated June 3, 2010.

This set of “Summary Minutes and Action Report” is supplied as an informational service. Exhibits in electronic format may not be complete. Copies of the complete exhibits, other materials distributed at the meeting, and the audio record are on file in the Research Library of the Legislative Counsel Bureau, Carson City, Nevada. You may contact the Library online at www.leg.state.nv.us/lcb/research/library/feedbackmail.cfm or telephone: 775/684-6827.