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Are Employees Obtaining Sure and Certain Relief under the 1995 Legislative Enactments of the North Dakota Workers' Compensation Act

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ARE EMPLOYEES OBTAINING "SURE AND CERTAIN RELIEF" UNDER THE 1995 LEGISLATIVE ENACTMENTS OF THE NORTH DAKOTA WORKERS' COMPENSATION ACT?

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I. INTRODUCTION

The North Dakota Workers' Compensation Act was created as a compact between workers and employers. The concept behind workers' compensation is that workers forego suing their employers when injured on the job, in exchange for an employer's agreement to cover those injuries, through payment of premiums to the Workers' Compensation Bureau. The system is to provide immunity to employers, and provide employees, their families and dependents, sure and certain relief regardless of questions of fault.

"Sure and certain relief" remains an amorphous concept. It transfigures itself with the social and economic climate of the times, with the changing expectations of those who should receive it and those who should give it.[1] "Sure and certain relief" was initially created to provide benefits for wage loss and medical bills. Yet, as the world became more technical, more long term disabilities began to develop in the workplace. As a result, the Workers' Compensation Act had to expand in order to provide relief for these disabilities. Within the last ten years, enactments in the Workers' Compensation Act have expanded "sure and certain relief" to include not only wage loss and medical benefits, but benefits

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1. The amorphous nature of "sure and certain relief" is captured by viewing the different expectations between claimants and Workers' Compensation Bureau [hereinafter Bureau] members. The Bureau's expectation of "sure and certain relief" is promptly returning employees to work so that they may become self sufficient and no longer needing benefits. This view is reasonable considering that the Bureau is not a general health insurer, but rather a statutorily created entity to provide relief only to workers injured in the course of their employment. Employees' expectations of "sure and certain relief" encompass financial, emotional, and physical protection. Claimants want the financial protection to provide for themselves and their families while disabled and until returned to the workforce. Furthermore, they seek the emotional and physical protection of knowing they are physically able to return to work without fear of aggravating an injury or suffering a new one. Employees and the Bureau agree that morale is boosted when claimants are out of the workers' compensation web and returned as functioning members of the workforce and society. But, differences lie in how and when workers should be returned to the workforce.

such as permanent partial impairment awards and rehabilitative services. Although the North Dakota Legislature realized that expansions were necessary to provide "sure and certain relief" to injured employees, they failed to realize the escalating costs that were associated with these benefits. As a result of this expansion, the Legislature has become saddled with the dilemma of providing "sure and certain relief" to present and future injured employees while keeping insurance premiums at a reasonable rate for employers in order that they may afford to keep their workers employed.

In response to this dilemma, in 1995, the North Dakota Legislature modified the expanded concept of "sure and certain relief" by passing enactments that limited benefits to injured workers who suffered work-related medical injuries with objective signs, that encouraged the return of the worker to the workforce as soon as possible, and that cut back on costly litigation involved in workers' compensation claims. In passing these enactments, the 1995 Legislature significantly altered the Workers' Compensation Act, and as a result has adversely affected an injured employee obtaining "sure and certain relief". In protest to the 1995 enactments, opponents of the legislation drafted proposed legislative reforms called the Initiative Petition.[2] The Initiative Petition repeals the majority of the 1995 legislative enactments, retaining only some of the 1995 enactments with slight modifications. The Petition goes on the primary ballot in June of 1996. If passed into law, and not vetoed by two-thirds of both the House and the Senate, it will become the new Workers' Compensation Act.

This article will explore the major changes made by the 1995 legislature and the ramifications that those changes have had on an injured employee's obtaining "sure and certain relief." Thereafter, the Petition will be discussed in response to the 1995 changes, accompanied with commentary addressing whether its suggestions are beneficial to the injured employee's quest for "sure and certain relief."

II. HISTORY OF THE WORKERS' COMPENSATION ACT

The Workers' Compensation Act was enacted in North Dakota to resolve the perceived inadequacies of the civil justice system. The purpose of the Act was to provide "sure and certain relief" for workers injured in hazardous employment, regardless of fault.[3] Before it was

2. INITIATIVE PETITION TO THE SECRETARY OF STATE, STATE OF NORTH DAKOTA (1996) [hereinafter INITIATIVE PETITION]. The Initiative Petition is the brain child of the non-profit group Workers Against Inhumane Treatment [hereinafter W.A.I.T.].

3. Breitwieser v. State, 62 N.W.2d 900, 902 (N.D. 1954); State v. E.W. Wylie Co., 58 N.W.2d 76, 81 (N.D. 1953); State *ex rel.* Amerland v. Hagan, 175 N.W. 372, 377 (N.D. 1919).

enacted, workplace safety had not been a primary concern, and compensation to injured employees was generally random and ineffective:

> The law [of industrial accidents] was wildly nonuniform, full of unpardonable differences and distinctions. This meant that, by 1900, the [fellow-servant rule] had lost some of its reason for being. It was no longer an efficient device for disposing of accident claims. It did not have the courage of its cruelty, nor the strength to be humane. It satisfied neither capital nor labor. It siphoned millions of dollars into the hands of lawyers, court systems, administrators, insurers, claims adjusters. Companies spent and spent, yet did not buy industrial harmony—and not enough of the dollars flowed to the injured workmen. At the turn of the [twentieth] century, rumblings were already heard of the movement that led to a workmen's compensation plan.[4]

Consequently, Workers' Compensation developed, where, both the employer and the employee exchanged certain common law rights for the benefits of a regulated system.[5] The employee gave up his or her right to seek damages by instituting an action against the employer.[6] Conversely, the employer was relieved of civil liability for damages by its contribution to the workers' compensation fund and was presented with a quantifiable risk.[7]

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4. Haney v. North Dakota Workers' Compensation Bureau, 518 N.W.2d 195, 213 (N.D. 1994) (Meschke, J., dissenting) (internal quotations omitted). *See also Hagan*, 175 N.W. at 383 (Robinson, J., dissenting) (stating that

> "[t]he purpose of such an act is to make a business that is hazardous and dangerous bear the inherent risks of personal injury arising in the course of the employment, regardless of ordinary negligence also to do away with long-continued and vexatious litigation and the exorbitant claims of personal injury lawyers, who commonly take half the sum recovered, as if they had sustained half the injury. Then, as it were, they move heaven and earth to procure a verdict and to sustain it, and often stand in the way of a settlement of great benefit to the injured party.").

5. *Breitwieser*, 62 N.W.2d at 902; *Wylie*, 58 N.W.2d at 81.

6. *See* 1919 N.D. Laws ch. 162. Thus, all remedies, proceedings, compensation, civil actions, or causes of action were abolished. *See also Wylie*, 58 N.W.2d at 81. This was a small concession for the employee, at the time of the enactment. Historically, in order to succeed on a claim of negligence, the employee had to overcome the common-law defenses of contributory negligence, the fellow-servant rule, and assumption of the risk. George H. Singer, *Workers' Compensation: The Assault on the Shield of Immunity—Coming to Blows with the Exclusive-Remedy Provisions of the North Dakota Workers' Compensation Act*, 70 N.D. L. REV. 905, 908-09 (1994). *See also* 1919 N.D. Laws ch. 162, § 11. Under the 1995 amendments, an employee may sue his or her employer if the employer has failed to comply with the Act and the employee is injured, and the employer may not assert the common-law defenses of the fellow servant rule, assumption of risk, or contributory negligence. N.D. CENT. CODE § 65-09-02 (1995). The defenses of contributory negligence and assumption of risk were previously abolished by their incorporation into North Dakota's comparative fault statute. *Haney*, 518 N.W.2d at 200.

7. *Wylie*, 58 N.W.2d at 81.

> Thus was provided a more certain, speedy and inexpensive relief for the injured workman than was afforded by the common-law rule of negligence. Industry was made to bear a portion of the economic loss resulting from the employment itself in which both employer and employee were engaged as co-adventurers. The ultimate end is to lighten the burden imposed upon society by reason of industrial accident and disease.[8]

Simultaneous to its enactment, the North Dakota Legislature was heavily involved in other forms of social engineering. The same Legislative Assembly that created the Workers' Compensation Act also adopted legislation creating a state bank, a state mill, and a state elevator.[9] Not surprisingly, the original bill exhibited a socialist bent. The fund was entitled the "North Dakota Insurance Fund."[10] The bill was subsequently amended to replace "Insurance" with "Workmen's Compensation."[11] The stated intent of the Act was to "restore to industry those injured in the course of employment."[12] This was to be accomplished by providing the appropriate training, education, and employment.[13]

Since its initial adoption, the Workers' Compensation Act has withstood several constitutional attacks. For example, the Act has been upheld against a claim that it arbitrarily and unreasonably included certain occupations which were not hazardous and excluded others that

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8. *Id.* *See also* Singer, *supra* note 6, at 912 (stating that industry requiring human agency for its operation should be responsible for the upkeep of that agency).

9. State *ex rel.* Amerland v. Hagan, 175 N.W. 372, 377 (N.D. 1919). According to the *Hagan* Court, some of that legislation was referred to the people by referendum petitions, however, the Workers' Compensation Act was not one of the referred enactments. *Id.* The populist nature of the Act and its counterparts prompted one North Dakota Supreme Court Justice to comment: "[The Workers' Compensation Act] was passed by a farmer Legislature, which did not care to impose on themselves the burdens of compulsory insurance for their employees [sic]. It is an act for the cities, and not for the country. The farmer Legislature had no interest in the rates." *Id.* at 385 (Robinson, J., dissenting).

10. *See* H.J. 16th Leg. Assembly, 1st Sess. 295-99 (1919) (indicating that the word "insurance" should be struck from the title).

11. *Id.* The supreme court's treatment of the fund has been similarly dysfunctional. The court began by analogizing workers' compensation to a contract of insurance for purposes of construing the Act. Bordson v. North Dakota Workmen's Comp. Bureau, 191 N.W. 839, 841-42 (N.D. 1922). In Sandlie v. North Dakota Workmen's Comp. Bureau, 295 N.W. 497 (N.D. 1940), the court held that the fund is not a health or life insurance fund, nor was it an accident insurance fund, except to a limited degree. *Id.* at 499. In Breitwieser v. State, 62 N.W.2d 900 (N.D. 1954), the Court concluded that the fund became the "insurer of the employe[e] for injuries or death occurring in his employment." *Id.* at 902. Subsequently in Beyer's Cement, Inc. v. North Dakota Ins. Guar. Ass'n, 417 N.W.2d 370, 373 (N.D. 1987), the court held that workers' compensation was like accident insurance in that it was made available when an injury occurs, but is unlike accident insurance because it was governmentally created and run, the injury must be work-related, and fault is irrelevant.

12. H.B. No. 56, 16th Leg. Assembly, 1st Sess., § 4 (1919).

13. *Id.*

were.[14] Later decisions by the court have upheld this distinction, specifically the agricultural exemption from the Act's compulsory enrollment.[15] Nonetheless, the court, has not hesitated to act when it perceives an unconstitutional action by the Bureau in promulgating or enforcing its regulations.[16]

The judiciary's police powers continue to exist and thus the legislature has a duty to act reasonably.[17] It remains to be seen whether the 1995 enactments and amendments to the Workers' Compensation Act satisfy this requirement.

III. THE 1995 LEGISLATIVE ENACTMENTS

A. REHABILITATIVE SERVICES

In 1975, the North Dakota Legislature incorporated rehabilitative services into the Workers' Compensation Act.[18] Rehabilitation encompasses the notion that compensation is not complete when the wound has been healed, but rather completeness requires that an injured worker be restored to his maximum usefulness attainable with the physical impairment.[19] Rehabilitative services include vocational retraining, counseling, education, and workplace modification.[20] Eligibility for rehabilitative services is considered on a case-by-case basis. An injured employee is most likely to be eligible for rehabilitative services if he or she is unable to return to his or her pre-injury occupation. In 1995, the North Dakota Legislature enacted various amendments to the rehabilitative services available to an employee.

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14. State *ex rel.* Amerland v. Hagan, 175 N.W. 372, 377-78 (N.D. 1919).

15. Benson v. North Dakota Workmen's Comp. Bureau, 283 N.W.2d 96, 107 (N.D. 1979), *overruled*, Haney v. North Dakota Workers' Comp. Bureau, 518 N.W.2d 195, 202 (N.D. 1994). *See generally* LeAnne K. Jabs, Comment, *Constitutional Law—Workers' Compensation: Equal Protection Challenge to the Agricultural Exemption and Use of Rational Basis Scrutiny in Haney v. North Dakota Workers' Compensation Bureau, 518 N.W.2d 195 (N.D. 1994)*, 71 N.D. L. REV. 781 (1995) (discussing the constitutional challenge to the agricultural exemption and identifying other states which use similar exceptions).

16. *See, e.g.*, Becker v. North Dakota Workers' Comp. Bureau, 418 N.W.2d 770, 775 (N.D. 1988) (holding the Bureau's pretermination procedure denied claimant due process under state and federal constitutions).

17. *Haney*, 518 N.W.2d at 201.

18. 1975 N.D. Laws ch. 584, sec. 1.

19. 2 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 61.21 (Supp. 1995).

20. N.D. CENT CODE § 65-01-02(27) (1995). Rehabilitation services are defined as "nonmedical services reasonably necessary to restore a disabled employee to substantial gainful employment as defined by section 65-05.1-01 as nearly as possible." *Id.* *See infra* notes 23-24 and accompanying text (defining "substantial gainful employment").

1. Income Test

One area of rehabilitative services that under went renovation by the 1995 Legislature was vocational rehabilitation. Vocational retraining is utilized only when an employee is unable to be pigeon-holed into one of the categories listed in the hierarchical priority options of section 65-05.1-01(4).[21] The goal of vocational rehabilitation is to return the injured employee to "substantial gainful employment," with as little retraining as possible.[22] "Substantial gainful employment" is bona fide work which is reasonably attainable in light of various factors,[23] and which provides an opportunity to restore the employee as soon as possible and as nearly as possible to 90% of the employee's average weekly wage or to 66 2/3% of the states' average weekly wage, whichever is less.[24] This percentage basis is known as the income test.[25]

Prior to 1995, "substantial gainful employment" attempted to restore an injured employee to the employee's average weekly wage at the time of injury or to 75% percent of North Dakota's average weekly wage.[26] The 1995 legislature cut the income test from 100% of the employee's average weekly wage to 90% and, alternatively, from 75% of North Dakota's average weekly wage to 66 2/3%.[27] The former reduction was made to provide consistency in the payment of benefits.[28] The latter reduction from 75% to 66 2/3% was made to allow the Bureau greater flexibility in identifying rehabilitation options for injured employees.[29]

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21. N.D. CENT. CODE § 65-05.1-01(4) (1995). *See infra* part III.A.2 and accompanying text (identifying the hierarchical priority options).

22. N.D. CENT. CODE § 65-05.1-01(3) (1995).

23. *Id.* Such factors include: an injured worker's injury, functional capacities, education, previous occupation, experience, and transferable skills. *Id. See also infra* notes 58-61 and accompanying text (discussing an injured employee's functional capacities).

24. N.D. CENT. CODE § 65-05.1-01(3) (1995).

25. *Id.* This income test is employed to fit an employee into one of the listed options found in § 65-05.1-01(4). *Id.*

26. 1991 N.D. Laws ch. 714, sec. 55. The legislature has consistently cut back on the definition of "substantial gainful employment." Prior to 1991, the state attempted to restore the employee to his average weekly earnings at the time of injury or to the average weekly wage in North Dakota, whichever was less. 1989 N.D. Laws ch. 771, sec. 1.

27. 1995 N.D. Laws ch. 628, sec. 2.

28. *See Testimony to the House Indus., Business, & Labor Comm. on H.B. No. 1253* (Jan. 23, 1994) (written testimony of Julie Leer, attorney for Bureau). This reduction in the income test from 100% to 90% of the employee's average weekly wage provides consistency with § 65-05-10. *Id.* Section 65-50-10 precludes payment of temporary partial disability benefits unless the loss of earning capacity exceeds 10%. *Id.*

29. *Id.* Testimony relied upon expected this provision in the income test to allow vocational consultants to identify more return-to-work options or short-term retraining options for employees. *Id.*

The average weekly wage in North Dakota is $373.[30] Sixty-six and two-thirds of that wage results in an average weekly wage of $248.64, or $6.22 per/hr. Prior to 1995, the average weekly wage used by the Bureau was $279.75, or $7 per/hr.[31] This $31.11 reduction has resulted in an expanded employment base for vocational consultants to find work for an injured employee. The pre-1995 income test wage results in 64 various jobs offering a starting wage near $7 per/hr.[32] The 1995 enactment's income test wage results in 84 jobs offering a starting wage near $6.22 per/hr.[33] Consequently, the 1995 reduction in the income test has increased the employment base for which the Bureau may return a worker to the workforce and reduced the amount of time an injured worker is required to be out of the work force.

According to the Workers' Compensation Bureau, the enactments provide "sure and certain relief" to an employee because they are being returned to the workforce more quickly than in the years previous. But from an employee's perspective, the employees are being denied "sure and certain relief" because the injured worker is being returned to a job which is grossly underpaid compared to the injured employee's pre-injury standard of living. The Bureau contends that they are not a job service and their responsibility is to return the worker to the workforce. But the figures are deceiving. The above figures are based upon a forty hour work week. Many of the jobs included in the expanded job listing do not provide employment for forty hours a week. Thus, the expansion of the employment base may not be as large as considered by the above figures. Furthermore, the employment figures only represent the availability of jobs, not whether injured employees are suited for that employment, or whether those jobs are available. Although the reduction in the income test has allegedly created nineteen more occupations to which a worker may be returned, the increase is moot if the jobs are not available, or the injured employee is not suited for that occupation.

Furthermore, any financial protection that an injured employee may receive with the Bureau's utilization of the income test is impotent. The Bureau need only return the worker to a job which "*offers an opportunity* to restore the employee *as soon as practical* and *as nearly as*

30. TOM PEDERSON & A. NELSE GRUDVIG, JOB SERVICE NORTH DAKOTA, 1996 ANNUAL PLANNING REPORT 18 (1996). The $373 figure represents the average North Dakota weekly wage in 1994.

31. *See supra* text accompanying note 26 ($373 x 75% = $279.75).

32. *See* TOM PEDERSON & LYNDA STEINWAND, JOB SERVICE NORTH DAKOTA, WAGE & BENEFIT SURVEY, 1994-1995 12-35 (1996). Calculations were made with a $.30 differential to accommodate the "nearly as possible" language of § 65-05.1-01(3). *See infra* note 34 and accompanying text.

33. *See* PEDERSON & STEINWAND, *supra* note 32, at 12-35.

possible to the employee's average weekly earnings."[34] In loosely construing section 65-05.1-01(3), the North Dakota Supreme Court has taken the bite out of the income test intended to provide protection to the employee. The employee is not guaranteed a wage of, for example, $6.22 per/hr, but only a wage "as nearly as possible" to the $6.22 per/hr. With a lower weekly wage and controlling precedent that does not require a worker to be given that weekly wage, injured workers feel that they are unable to care for their families if put through the rehabilitation process. Routinely, the rehabilitation process causes economic strain on families. Many families are reduced to a standard of living well below their pre-injury living. In failing to provide financial protection, the rehabilitative process reduces an employee's financial incentive to become rehabilitated and stunts obtaining "sure and certain relief".[35]

Subsection seven of section 65-05.1-01 waives the income test if the injured employee is offered a return to work option at a wage lower than that provided by the income test.[36] If an injured employee is offered employment by his pre-injury employer, the employee's right to the income test is waived.[37] The rationale behind this enactment is based on the notion that returning a worker to his pre-injury employer increases his chances of obtaining his pre-injury employment or of obtaining a job with a similar wage to that of his pre-injury wage since the pre-injury employer would be more sympathetic toward the injured employee.

But by enacting subsection seven, the Legislature has eradicated any financial protection given to an employee. No longer is he entitled to $6.22 per/hr or a wage "as nearly as" possible to $6.22. Rather, the employer may pay the injured employee as little as he wants, within state minimum wage laws. Obviously, opponents to the legislation are concerned with the economic impact that this legislation will have on injured employees who are offered return-to-work programs by their pre-injury employer. The Bureau has attempted to provide some remedial relief. The Bureau will pay two-thirds of the difference between pre-injury wages and post-earning capacity if an injured employee is returned to

34. Held v. North Dakota Workers' Comp. Bureau, 540 N.W.2d 166, 170 (N.D. 1995) (concluding that a rehabilitation plan does not predetermine a weekly wage). *See supra* notes 23-24 (discussing "substantial gainful employment").

35. *See* 2 LARSON, *supra* note 19, § 61.24 (discussing "sure and certain relief").

36. N.D. CENT. CODE § 65-05.1-01(7) (1995).

37. *Id.* This section requires the waiver of the income test when an employer offers the employee a return-to-work option at a wage lower than the income test. *Id.* Although the statute mandates waiver if offered by an "employer," the Bureau has assured that it only applies to an employee's pre-injury employer. Telephone Interview with Julie Leer, Workers' Compensation Bureau (April 9, 1996).

his pre-injury employer and the employee does not make 90% of his earning capacity.[38]

Understandably, the Initiative Petition repeals the 1995 enactments to the rehabilitative statute and returns the income test to 100% of the worker's average weekly wage at the time the injury occurred or to 90% of North Dakota's average weekly wage, whichever is less.[39] It also repeals the mandatory waiver of the income test in subsection seven.[40] The Petition makes the waiver of the income test voluntary between the Bureau and the injured employee.[41] This will at least give the injured employee some involvement in their rehabilitative process which may make the worker more responsive to the rehabilitation process.

However, although the amendments to the income test could drastically impact an employee's earnings, the Initiated Petition does not necessarily provide the best solution to the problem. Raising the income test to 100% of the workers' average weekly wage or 90% of North Dakota's average weekly wage, establishes an average weekly wage of at least $335.70 or $8.38 per/hr.[42] There are 22 occupations that fall within the wage per hour at 90% of North Dakota's average weekly wage.[43] Although the increase in the income test would provide the financial protection needed to employees, it would severely limit the employment base in which to return workers. Therefore, the drafters should reconsider such a large increase in the income test. Perhaps the best route would be to find a wage that will provide the greatest number of jobs and provide a wage that would result in a higher income level for the injured employee. Another consideration would be to draft the income test as a per hour wage as opposed to a weekly wage. This would accommodate jobs that do not provide forty hour work weeks and still provide some financial protection to the injured employee.

2. *Priority Options*

The priority options listed in section 65-05.1-01(4) were also modified in 1995 so that the return-to-work options provide a more flexible placement for the injured worker in the work force.[44] In returning an injured worker to the workforce, vocational consultants attempt to

38. N.D. CENT. CODE § 65-05-10(3) (1995).
39. INITIATIVE PETITION, *supra* note 2, § 21.
40. *Id.*
41. *Id.*
42. *See supra* note 30 and accompanying text (providing the average weekly wage of $373, thus calculating $373 x 90% = $335.70; further, 335.70 x 40 hrs. = $8.38 per/hr).
43. *See* PEDERSON & STEINWAND, *supra* note 32, 12-35.
44. N.D. CENT. CODE § 65-05.1-01(4) (1995).

return the worker using the priority options.[45] The priority options provide a preferential hierarchy to return the injured employee to work.[46] For example, prior to 1995, the listed options, in order of preference, were to return the employee to the same position; return the employee to a modified position; return the employee to an occupation in the local job pool; or return the employee to an occupation in the statewide job pool.[47] The options were changed in 1995 so that, in order of preference the options are: to return the employee to the same position, same employer; to the same occupation, any employer; to a modified position, a modified or alternative occupation, any employer.[48] The 1995 enactments also allow the Bureau greater ease to return the worker to employment anywhere in the state. Under the 1995 enactments, first an attempt must be made to place the injured employee in the same occupation with the same employer.[49] If that fails, for example, because the employer has filled the injured employee's position, then an attempt must be made to place the worker in the same position with any employer anywhere in the state.[50] Prior to 1995, the first attempt was to place that same injured employee into the same position with the same employer; but, if that failed, then the employee was placed into a modified position with his pre-injury employer.[51]

Opponents of the enactment are concerned that they will have to move across the state in order to find work with no real financial protection because of the lax requirement of the income test. This results in a tremendous economic strain on the employee and his family.

The Initiative Petition repeals the 1995 enactments and requires the Bureau to attempt to place the injured employee to a modified position with his pre-injury employer before attempting to place him somewhere else in the state.[52] Although this enactment may hinder the Bureau's job placement, it will at least provide an injured employee a chance to remain in the area. Furthermore, the employee would not have to bear the expenses of moving himself and his family around the state.

45. *Id.*
46. *Id.*
47. 1995 N.D. Laws ch. 628, § 2.
48. N.D. CENT. CODE § 65-05.1-01(4) (1995).
49. *Id.*
50. 1995 N.D. Laws ch. 628, § 2.
51. *Id.*
52. INITIATIVE PETITION, *supra* note 2, § 21.

3. *Part-Time Employment*

If none of the options of section 65-05.1-01(4) are feasible and the employee is released by his doctor to work part-time with the "reasonable expectation" of attaining full-time employment, the Bureau will pay temporary partial disability benefits until the employee is medically capable of full-time employment.[53] Prior to 1995, the worker remained on disability benefits until he was able to return to full time work. This resulted in the Bureau paying benefits to workers who were able to work part time but were unable to work full-time due to medical reasons. Furthermore, it failed to return the worker to any kind of employment. The Legislature enacted section 65-05.1-01(5) to return an injured employee to the workforce, even though he may not be able to work full-time at the time he begins part-time employment.[54] The enactment requires that the employment be one in which there is a "reasonable expectation" of full-time employment.[55]

But in passing this legislation, the Legislature created a loop-hole by putting workers back to work and getting workers off benefits with a low part-time wage. The Legislature failed to define "reasonable expectation." Without a guiding interpretation of "reasonable expectation," the Legislature has created a litigious issue as well as providing little protection to the employee. Opponents fear that this enactment allows the bureau to cut off an injured employee's rehabilitation benefits with no real guarantee that the employee will return to full time work.

The Initiative Petition repeals the above section.[56] However, in doing so, it could adversely affect an employee's "sure and certain relief." Both supporters and opponents of the 1995 enactments acknowledge that getting the employee back to work is beneficial to both the employer and the employee. What is needed is more financial protection to the employee. Repealing this section eliminates a chance of a worker being returned to the workforce. The 1995 enactment provides a great opportunity for an injured employee to return to work, with some financial protection through temporary partial benefits. The concern lies in the interpretation of "reasonable expectation." If the drafters of the Initiative Petition could have provided a definition of "reasonable expectation" which gives some assurance to the injured

53. N.D. CENT. CODE § 65-05.1-01(5) (1995).
54. *Id.*
55. *Id.*
56. INITIATIVE PETITION, *supra* note 39, § 21.

employee that his position will become full-time, then his "sure and certain relief" will be greatly enhanced.

4. *Definition of Substantial Gainful Employment*

In 1995, the Legislature redefined "substantial gainful employment."[57] In redefining this phrase, the Legislature eliminated an employee's medical limitations and age factors in consideration of whether an injured employee should be returned to the workforce or retrained. Instead, the 1995 enactments require the Bureau to consider an employee's "functional capacities" in the quest for substantial gainful employment.[58] The medical limitations factor was changed to functional capacities thus shifting the focus from an injured employee's physical limitations to his positive attributes.[59] The age factor was taken out because it allegedly violated state and federal law on hiring discrimination.[60] In reworking this definition, the Legislature failed to define "functional capacities." But the legislative history defines "functional capacities" as an "objective measurement of an individual's physical capacity to perform work and defines both physical ability and work tolerance levels."[61] Thus, even though the term "medical limitation" was removed, an employee's medical condition is still considered under the "functional capacities" definition.

The Initiative Petition repeals the 1995 enactments and requires that vocational consultants consider an employee's medical limitations and age in considering returning an employee to gainful employment.[62] The 1995 enactments were made to conform the Workers' Compensation Act to constitutional requirements. The Initiative Petition's requirement that age be a consideration in rehabilitating an injured employee will most likely fail due to due process and equal protection concerns. Furthermore, the terminology change was made to benefit an employee, and it accomplishes just that. The focus is now on an employee's positive attributes as opposed to his limitations. Repealing the 1995 enactments to conform to pre-1995 requirements will only create delay if age is considered under the statute because of the constitutional

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57. N.D. CENT. CODE § 65-05.1-01(3) (1995).

58. *Id.*

59. *See Testimony to the House Indus., Business, & Labor Comm. on H.B. No. 1253* (Jan. 23, 1994) (written testimony of Julie Leer, attorney for the Bureau).

60. *Id. See* N.D. CENT CODE § 14-02.4-03 (Supp. 1995) (prohibiting discriminatory employment practices on the basis of age). *See generally* 29 U.S.C. § 621 (1994) (containing the Age Discrimination in Employment Act).

61. *See Testimony to the House Indus., Business, & Labor Comm. on H.B. No. 1253* (Jan. 23, 1994) (written testimony of Julie Leer, attorney for the Bureau).

62. INITIATIVE PETITION, *supra* note 2, § 21.

challenges it will raise. Furthermore, age as a consideration may not withstand constitutional scrutiny.[63] Additionally, considering an injured employee's medical limitations will focus on the injured employees negative conditions. The Legislature altered the language only as a stylistic change and rescinding that alteration will only result in a stylistic change that will have no bearing on employees obtaining "sure and certain relief."

B. RETIREMENT CUT-OFF

Another new section to the Workers' Compensation Act discontinues benefits to "retired" persons.[64] Under this statute, most workers compensation benefits are to terminate upon "retirement."[65]

The Bureau testified in support of the bill by stating it was inconsistent to pay disability benefits to a retired worker who is no longer employed.[66] Other supporters of the bill opined that workers' compen-

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63. *See infra* notes 73-76 and accompanying text.

64. N.D. CENT. CODE § 65-05-09.3 (1995).

65. *Id.* This section provides:

> 1. An employee who has retired or voluntarily withdrawn from the labor force and who is not eligible to receive temporary total disability, temporary partial disability, or permanent total disability benefits, or a rehabilitation allowance from the bureau is presumed retired from the labor market. The presumption may be rebutted by a preponderance of the evidence; however, the subjective statement of an employee that the employee is not retired is not sufficient in itself to rebut objective evidence of retirement.
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> 2. An injured employee who is receiving permanent total, temporary total, or temporary partial disability benefits, or rehabilitation benefits, and who begins receiving social security retirement benefits or other retirement benefits in lieu of social security retirement benefits, or who is at least sixty-five years old and is eligible to receive social security retirement benefits or other retirement benefits in lieu of social security benefits, is considered to be retired. The bureau may not pay any permanent total, temporary total, or temporary partial disability benefits, rehabilitation benefits, or supplemental benefits to an employee who is considered retired; however, the bureau is liable for payment of medical benefits and permanent partial impairment benefits. An employee who is determined to be catastrophically injured as defined by subdivision c of subsection 2 of section 65-05.1-06.1 is not subject to this section.
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> 3. The bureau retains liability for disability benefits, permanent partial impairment benefits, and medical benefits for an injured employee who is eligible to receive social security retirement benefits or other retirement benefits in lieu of social security, who is gainfully employed, and who suffers an injury arising out of and in the course of that employment.
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> 4. This section applies to all persons who retire or become eligible for social security retirement benefits or other retirement benefits in lieu of social security retirement benefits after July 31, 1995.

Id.

66. *Testimony to the House Indus., Business, & Labor Comm. on H.B. 1228* (Jan. 24, 1995) (written statement of Julie Leer, attorney for the Bureau). The Bureau argued that "[w]orkers' compensation disability benefits are paid to compensate an injured employee for wages lost as a result of a work-related injury. Retirement benefits are paid after a person has reached retirement age and is no longer employed *because* the person *has* reached that age. The concept of paying a person who is retired for being unable to work is contradictory." *Id.* (emphasis added).

sation is not a retirement system, but rather a "'wage replacement' system that provides tax-free benefits to injured workers until they reach maximum medical improvement and return to work."[67] Opponents of the bill, however, claimed that social security retirement benefits for those injured early in life would be minuscule because these disabled workers would be less able to contribute to the social security fund so as to support themselves upon retirement.[68]

Opponents of the statute have strong ammunition for their position. First, the statute contains internal inconsistencies. Subsection three of the North Dakota Century Code section 65-05-09.3, states that the Bureau remains liable for benefits owed to injured workers who are eligible to receive social security or comparable retirement benefits, if the worker suffers an injury while gainfully employed.[69] The subsection does not explain why the arbitrary distinction is made between workers receiving what the Bureau deems "wage replacement benefits" under the Act, and those workers receiving actual wages from an employer, nor does it explain when workers' compensation benefits for an eligible worker would be terminated (presumably upon the actual receipt of social security benefits). Apparently the Bureau will compensate workers that it deems "retired," if that person should happen to be injured after he or she becomes eligible for retirement benefits. If the worker should become disabled before eligibility for retirement benefits is established, then she or he is ineligible to receive workers' compensation upon retirement, even if the work-related injury is the reason for not being "gainfully employed" so as to receive benefits under subsection 3.

Second, the purpose underlying workers' compensation benefits is not, as the Bureau has suggested, solely to replace lost wages. The purpose of workers' compensation is to provide injured workers with "sure and certain relief", regardless of questions of fault.[70] As a result, *all* remedies, proceedings, and actions were abolished.[71] The Act, by its very terms, is not limited solely to lost earnings.[72] Compensation is provided for other potential causes of action and injuries.[73]

The constitutionality of the amendment may also be called into question. By denying benefits to persons based on their age, the statute

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67. *Testimony to the House Indus., Business, & Labor Comm. on H.B. 1228* (Jan. 24, 1995) (written statement of Rep. Bob Skarphol).

68. *Testimony to the House Indus., Business, & Labor Comm. on H.B. 1228* (Jan. 24, 1995) (statement of Elaine Speaks).

69. N.D. CENT. CODE § 65-05-09.3(3) (1995).

70. *Id.* § 65-01-01.

71. *Id.* (emphasis added).

72. *Id.* § 65-01-02.

73. *See, e.g.*, N.D. CENT. CODE § 65-01-02(9)(b)(9) (recognizing intentional infliction of emotional distress as a compensable injury).

may violate equal protection.[74] Normally there are three different standards which are applied to review an equal protection claim depending on the right at stake: suspect class or fundamental rights are strictly scrutinized; important substantive rights are reviewed under intermediate scrutiny; and the remaining classes are reviewed under the rational basis standard.[75] The North Dakota Supreme Court, most recently in *Haney v. North Dakota Workers' Compensation Bureau*,[76] applied the rational basis standard to test the constitutionality of the agricultural exclusion from workers' compensation coverage.[77] Other courts, in reviewing the constitutionality of statutes similar to section 65-05-09.3, have also applied the rational basis standard of review.[78] Thus, for purposes of this article, the rational basis standard of review will be used.

Under rational basis review, "a legislative classification will be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest."[79] A classification will not be held to violate equal protection "if any state of facts reasonably can be conceived that would sustain it."[80] Here, just as in *Haney*, the inquiry must start with the specifically stated legislative objective. The rationale set forth by proponents of House Bill No. 1228, was that the bill would prevent duplication in benefits by retired persons who receive both social security retirement benefits and workers' compensation benefits.[81] If this is the case, then the statute is not rationally related to its purpose, because social security retirement benefits and workers' compensation disability benefits do not serve the same purpose:

> Social security retirement benefits are provided to persons over age sixty-five regardless of injury, as long as the recipient has reached the statutory age after having been employed and having contributed to the Social Security Trust Fund. These benefits are not disability benefits, but are old-age entitlements serving the same function as pension payments. In contrast, workers' compensation benefits are provided to compensate

74. N.D. CONST. art. I, § 21; U.S. CONST. amend XIV, § 1.

75. Haney v. North Dakota Workers' Comp. Bureau, 518 N.W.2d 195, 197 (N.D. 1994).

76. 518 N.W.2d 195 (N.D. 1994).

77. Haney v. North Dakota Workers' Comp. Bureau, 518 N.W.2d 195, 200 (N.D. 1994). The court concluded that "[b]ecause the legislature created the remedy of workers' compensation benefits, it [could] impose reasonable limits on it." *Id.* at 201 (citation omitted).

78. *See, e.g.*, Industrial Claim Appeals Office v. Romero, 912 P.2d 62, 66 (Colo. 1996) (stating "[c]lassifications based on age are not suspect or special warranting strict scrutiny or intermediate review" (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976))).

79. *Haney*, 518 N.W.2d at 201 (quoting Lee v. Job Service North Dakota, 440 N.W.2d 518, 519 (N.D. 1989) (further citations omitted)).

80. *Id.*

81. *Testimony to the House Indus., Business, & Labor Comm. on H.B. 1228* (Jan. 24, 1995) (written statement of Rep. Bob Skarphol).

> employees who suffer work-related injuries for loss of income resulting from such injuries. . . .
>
> . . . .
>
> Thus, withholding workers' compensation benefits from persons age sixty-five and older because they presumably receive retirement benefits is not rationally related to the goal of preventing duplicate benefits because workers' compensation benefits do not serve the same purpose as retirement benefits.[82]

Furthermore, the statute is questionable because many persons age sixty-five and older receive little or no social security.[83]

Other possible reasons justifying the enactment of similar laws have been discussed in jurisdictions other than North Dakota. For example, it has been argued that the presumption that persons are retired and receiving retirement benefits over the age of 65 is a reasonable distinction for the sake of administrative convenience.[84] Such an argument was summarily dismissed by the Colorado Supreme Court.[85]

Another proffered reason for the statute has been that the reduction in workers' compensation benefits corresponds with the declining physical capacity of the elderly.[86] Under this theory, the workers' compensation benefits are reduced in order to match the lowered income-producing abilities of persons reaching retirement age.[87] The courts addressing this issue have only identified a tenuous relationship between old age and decreased productivity.[88] This relationship would be even further attenuated under North Dakota law.[89] The North Dakota Workers' Compensation Act computes benefits based on either the worker's average weekly wage *or* the average weekly wage set for the

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82. *Romero*, 912 P.2d at 67-68 (footnote omitted) (citation omitted); *see also* Sasso v. Ram Property Management, 452 So. 2d 932, 934 n.3 (Fla. 1984) (agreeing that statute similar to the one at hand was not rationally related to preventing "double-dipping" because "social security retirement benefits do not serve the same purpose as wage-loss benefits").

83. *Id.* at 68 n.5.

84. *Id.*

85. *Id.*

86. Sasso v. Ram Property Management, 431 So. 2d 204, 219 (Fla. Dist. Ct. App. 1983), *aff'd*, 452 So. 2d 932 (Fla. 1984); Cruz v. Chevrolet Grey Iron Div. of Gen. Motors, 247 N.W.2d 764, 767-68 (Mich. 1976).

87. *Cruz*, 247 N.W.2d at 767-68. This theory has only been held applicable to *reductions* in workers' compensation benefits, not terminations. *See id.* The North Dakota Workers' Compensation Act already recognizes this distinction. *See* N.D. CENT. CODE §§ 65-05-09.1 to -09.2 (1995) (providing for "offset" by percentage reduction in the case of social security and retirement benefits respectively).

88. *Sasso*, 431 So. 2d at 219.

89. N.D. CENT. CODE § 65-05-09 (1995).

state.[90] Thus, the correlation between the worker's physical capacity and the benefits under workers' compensation would be one step further removed. Those cases allowing a reduction in workers' compensation benefits for social security have allowed a reduction from the injured worker's actual income, not from an average wage that does not correspond to the worker's abilities.

A third possible rationale in support of the statute is that older persons should be excluded from workers' compensation because they would likely have retired even if they had not been injured.[91] This could be a valid reason, but the statute does not further that goal. "Even assuming that such a presumption is rational, it is then irrational to allow persons age sixty-five and older who are [permanently partially] disabled to collect workers' compensation because such persons are no less likely to retire at age sixty-five than those who are [totally] disabled."[92] The North Dakota statute still provides permanent partial impairment benefits for retired workers.[93]

The Bureau may argue in support of the statute claiming it provides additional funds to be freed up for compensating younger workers and to reduce employer premiums.[94] The courts are split over whether this objective may be pursued by denying benefits to one class of workers while providing such benefits to other workers.[95]

Finally, the statute is contrary to the very purpose that workers' compensation was created.[96] Under the Workers' Compensation Act, an employer, by virtue of contributing to the fund, is no longer liable for damages in an action by its employee, and in exchange for fund benefits, an employee may not seek damages against his or her employer.[97] Under section 65-05-09.3, however, an injured worker eligible for retirement benefits is precluded from receiving any workers' compensation benefits.[98] Thus, the Act abolishes any civil action and the statute

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90. *Id.*

91. Industrial Claim Appeals Office v. Romero, 912 P.2d 62, 69 (Colo. 1996).

92. *Id.*

93. N.D. CENT. CODE § 65-05-09 (1995).

94. *Romero*, 912 P.2d at 69. *See also* Sasso v. Ram Property Management, 431 So. 2d 204, 220 (Fla. Dist. Ct. App. 1983), *aff'd*, 452 So. 2d 932 (Fla. 1984) (stating that a possible objective for the statute is an attempt to offer increased job opportunities to young workers by creating incentives for older workers to retire).

95. *Compare Romero*, 912 P.2d at 69-70 (affirming that granting increases in benefits to younger workers by denying older workers benefits was arbitrary, unfair, and irrational) *with Sasso*, 431 So. 2d at 220 (holding that attempting to create additional job opportunities for younger workers and reduce premiums is a legitimate concern).

96. *Romero*, 912 P.2d at 70 n.9.

97. N.D. CENT. CODE § 65-01-08 (1995).

98. *Id.* § 65-05-09.3.

prevents any recovery of the fund.[99] The statute would likely be found unconstitutional, therefore, because it deprives elderly workers of an adequate statutory remedy to replace their common law rights which were originally abolished by the Workers' Compensation Act.[100]

Because section 65-05-09.3 conflicts with an elderly worker's right to recover workers' compensation benefits and because the Act precludes any judicial remedy, it is possible that the heightened standard of review could apply to cases arising under the statute.[101] In any event, the statute appears to deny elderly workers equal protection, whether reviewed under an intermediate standard or rational review.[102]

C. PERMANENT PARTIAL IMPAIRMENT

Permanent partial impairment (PPI) awards and benefits were also impacted by the 1995 legislative session.[103] An employee is entitled to a PPI award when he receives a compensable injury which results in a permanent loss of or loss of use of a member of his body.[104] This is a tax-free award, given in addition to wage loss, medical expenses, and rehabilitative benefits. PPI awards are determined by identifying the level of impairment, or loss of function of a particular body part, as a result of a work injury.[105] The 1995 enactments require that impairment evaluations be made under the American Medical Association's (AMA) "Guides to the Evaluation of Permanent Impairment" in effect at the time of injury.[106] In the case of physical impairments from mental disorders, impairments are to be rated under the "Diagnostic and Statistical Manual of Mental Disorders" in effect at the time of injury.[107]

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99. *See id.* (stating that those who receive retirement benefits in North Dakota are not eligible for workers' compensation benefits).

100. *Romero*, 912 P.2d at 70 n.9. Because the Act prevents an injured party from suing, and the statute eliminates a reciprocal benefit, the case of Haney v. North Dakota Workers' Comp. Bureau, 518 N.W.2d 195 (N.D. 1994), is distinguishable. The majority in *Haney*, held that the right to sue, which injured workers gave up in exchange for "sure and certain relief", is an important substantive right. *Id.* at 200. The majority concluded that the Workers' Compensation Act preserved that important substantive right for agricultural workers, therefore the exclusion was constitutional. *Id.* However, § 65-05-09.3 does precisely the opposite for elderly workers because they lose both a cause of action against their employer and their right to recover the workers' compensation benefits which were to be substituted for the lost cause of action. N.D. CENT. CODE § 65-05-09.3 (1995).

101. *See Haney*, 518 N.W.2d at 199-200 (stating that a heightened standard of review should be used when a statute conflicts with fundamental rights).

102. N.D. CENT. CODE § 65-05-09.3 (1995).

103. 1995 N.D. Laws ch. 624, § 1. This section was referred and therefore its effect is suspended, pending the outcome of the June 1996 statewide election. N.D. CONST. art. III, § 5. If approved by the voters, it will go into effect 30 days after the date of the statewide election. N.D. CONST. art. III, § 8.

104. N.D. CENT CODE § 65-05-12.2 (1995).

105. *Id.*

106. *Id.* § 65-05-12.2(6).

107. *Id.*

Under present law, impairment ratings are determined from the most recent edition of the AMA's "Guides to the Evaluation of Permanent Impairment" unless proven otherwise by clear and convincing medical evidence.[108] Presently, an injured employee may recover a PPI award if he has reached "maximum medical improvement" and has established a whole body impairment level of at least 1%, under the AMA guidelines.[109] If an injured employee has failed to reach an impairment rating under the guidelines, the employee may recover a PPI award if the employee has established clear and convincing medical evidence of an impairment rating, such as a doctor's report, recognizing the subjectiveness of the employee's pain.[110]

The 1995 enactments remove the eligibility of an injured employee to provide clear and convincing medical evidence, other than evidence of an impairment rating under the AMA guidelines, in order to establish an impairment rating.[111] Furthermore, the enactments forbid an injured employee recovering a PPI award based solely on the presence of pain.[112] If these enactments pass into law, it will create an impossible obstacle for injured employees to recover PPI awards who have functional impairments not based upon the AMA guidelines. Many injured workers feel pain that is not demonstrably identifiable under the AMA guidelines and even the North Dakota Supreme Court has recognized this phenomena on occasion.[113] Understandably, the Legislature needed to avoid situations where PPI awards were given to injured employees who suffered no actual functional impairment, but deceived their doctors into believing that they were impaired due to their pain. The Legislature has engaged in line drawing. Those injured employees who can establish the threshold impairment rating under the AMA guidelines are able to obtain benefits. Those who may truly suffer impairment, but are not able to establish their pain under the AMA guidelines, are not allowed to obtain benefits. In attempting to weed out fraudulent claims, the Legislature has erected a wall which may prevent truly injured employees from securing PPI awards.

This strong evidentiary barrier is not needed. The Legislature has overlooked the adequate protection given under the present law. The

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108. N.D. ADMIN. CODE § 92-01-02-25(4) (1995).

109. *See id.* (stating that an employee is only entitled to an award for permanent impairment only after the employee reaches maximum medical improvement).

110. *See* Kroeplin v. North Dakota Workmen's Comp. Bureau, 415 N.W.2d 807, 810 (N.D. 1987) (stating that an objectively demonstrable impairment is not the requirement for recovery under the statute).

111. N.D. ADMIN. CODE § 92-01-02-25(4) (1995).

112. N.D. CENT CODE § 65-05-12.2(13) (1995).

113. *See Kroeplin*, 415 N.W.2d at 810 (discussing recovery of benefits even though lacking medically objectiveable evidence).

requirement that a claimant establish by "clear and convincing medical evidence" the existence of a functional impairment separate from the AMA guidelines provides sufficient protection from fraudulent claimants.[114] A claimant unable to establish an impairment rating under the AMA guidelines first must prove to a doctor, who is trained and employed by the system, that he suffers an impairment based solely on his pain.[115] Additionally, this pain must provide "clear and convincing medical evidence", the highest standard in civil law, that a functional impairment exists.[116] There was no testimony provided to the Legislature about the number of claimants that were unable to establish an impairment under the guidelines, and nevertheless were paid by the Bureau. Perhaps the incidents of fraudulent claims based solely upon the employees experience of pain are not all that frequent. What the Legislature has created is an evidentiary hurdle which hinders an injured employee from obtaining another aspect of this "sure and certain relief." The Legislature not only affected the evidentiary standard required to establish an impairment rating, but also the threshold impairment rating required before awarding a PPI benefit.

The 1995 enactments require an impairment rating of 16% before a PPI award is granted.[117] The present law grants a permanent partial impairment award for impairments as low as 1%.[118] The enactment seeks only to compensate impairments due to work-related events as opposed to impairments due to non-work-related events such as aging and leisure activities.[119] The Workers' Compensation Fund was created to benefit an employee injured while in the course of his employment.[120] Consequently, an injured employee should only be compensated for the injury suffered while in the course of his employment. Testimony behind Senate Bill 2202 claimed that the 1% impairment threshold is not able to distinguish between work-related and non-work related injuries and consequently impairment from non-work related injuries were being compensated.[121] The testimony presented alleged that at the 20% threshold level there was the greatest amount of awards and the greatest likelihood that the impairment was due to a work-related injury.[122]

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114. N.D. ADMIN. CODE § 92-01-02-25(4) (1995).
115. *Id.* § 92-01-02-25(9).
116. *Id.* § 92-01-02-25(4).
117. N.D. CENT. CODE § 65-05-12.2(15) (1995).
118. N.D. CENT. CODE § 65-05-12 (repealed 1995). *See* 1995 N.D. Laws ch. 624, § 2.
119. N.D. Cent. Code § 65-05-12.2(4) (1995).
120. *Id.* § 65-01-01.
121. *Testimony Before the Senate Indus., Business, & Labor Comm. on S.B. No. 2202* (Jan. 31, 1995) (written statement of Greg Schmalz, Resources Manager, Melroe Co.).
122. *1995 House Standing Comm. Minutes, Bill/Resolution S.B. No. 2202* (Mar. 9, 1995). The Bureau originally desired the threshold impairment rating to be set at 20%. *Id.*

The Legislature has attempted to accomplish the impossible. It has attempted to sever an injured employee into divisible sections. The enactment has drawn an arbitrary line at 16% which is to establish that any impairment is work-related over 16%[123] and anything below 16% is due only from a natural occurrence. This is simply impossible. Even tort law recognizes that you take your victims as you find them. An individual person is simply too complex to be divided so simply into work-related and non-work-related elements.

Although the enactments result in a $3,600,000 savings to the Workers' Compensation Fund and a reduction in employers' premiums of 3%, approximately 90% of all injured employees with functional impairments will be denied a PPI award.[124] But because some have lost, others will gain. The 1995 enactments increase the awards furnished to employees having impairment ratings above 51%.[125] It has also doubled the cash benefits awarded to those who suffer impairment awards of 90% or greater.[126] Yet, the benefit received through this enactment is an apparition. Less than 1% of injured employees have a functional impairment rating of 51% or over.[127] In trying to award only work-related injuries, the Legislature was attempting to protect only those employees injured while in the course of their employment. But in failing to rely on medical evidence, the Legislature has set up an arbitrary line withholding "sure and certain relief" from the very employees it was attempting to help.

The Initiative Petition modifies chapter 624 by requiring the use of the AMA's "Guides to the Evaluation of Permanent Impairment" of July 1, 1993 which has now been superseded.[128] Clearly, the drafters of the Initiated Petition have overlooked the most recent edition of the AMA's "Guide to the Evaluation of Permanent Impairment." The most recent edition of the "Guide to the Evaluation of Permanent Impairment" should be utilized for the most accurate impairment rating for the injured employee.

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123. N.D. CENT. CODE § 65-05-12.2(15) (1995).

124. *Testimony Before the Indus., Business, & Labor Comm. on S.B. No. 2202* (Jan. 31, 1995) (statistics regarding PPI awards in fiscal year 1994, presented by Stephen D. Little).

125. N.D. CENT. CODE § 65-05-12.2(15) (1995). Those who have an impairment rating of 51% or greater are those who compromise 0.6% of the PPI cases dealt with by the Bureau. *Testimony Before the Indus., Business, & Labor Comm. on S.B. No. 2202* (Jan. 31, 1995) (statistics regarding PPI awards in fiscal year 1994, presented by Stephen D. Little).

126. N.D. CENT. CODE § 65-05-12.2(15).

127. *Testimony Before the Indus., Business, & Labor Comm. on S.B. No. 2202* (Jan. 31, 1995) (statistics regarding PPI awards in fiscal year 1994, presented by Stephen D. Little).

128. INITIATED PETITION, *supra* note 2, § 15. *See also* NORTH DAKOTA WORKERS' COMPENSATION BUREAU NOTES ON INITIATED MEASURE WORKERS' COMPENSATION TITLE 65 (NDCC) (analyzing the initiated measure's impact on the 1995 enactments).

Furthermore, the Petition retains the minimum threshold impairment rating of 1% before a PPI award is granted.[129] This 1% rating simply recognizes the inability of the law to sever an injured worker into work-related or non-work-related parts. Workers agree that only work-related injuries should be covered by the Workers' Compensation Fund. But until medical evidence can establish that an injured employee's impairment is due solely to work-related events, the Workers' Compensation Act must provide protection to all employees with any impairment due to work-related events.

Additionally, the Initiative Petition retains the eligibility of the employee to prove an impairment rating by clear and convincing medical evidence.[130] This maintains the protection given to injured employees who are unable to establish the minimum threshold requirement. Furthermore, it provides the clear and convincing standard to protect the Bureau from paying fraudulent claims.[131] It is true that there are some injured employees who may have enough skill to finesse their subjective complaints of pain past a doctor in order to recover a PPI award, but until the Bureau can document how many of these there are, the Initiated Petition properly protects the injured employees who are not falsifying claims and who are not able to establish an impairment rating under the AMA guidelines. The Initiative Petition provides protection for the injured employee and provides them with a step in the direction of being able to secure "sure and certain relief."

D. ATTORNEY'S FEES

The 1995 Legislature also altered when attorneys are entitled to payment of fees and the amount of fees that they may collect under the Workers' Compensation Act.[132] An attorney representing an injured worker in a binding dispute resolution or an administrative hearing may only recover his fees from the Bureau when the injured worker has prevailed.[133] Furthermore, enactments to section 65-02-08 establish a 20% cap on any award received except those on the initial issue of compensability.[134] The 20% cap is subject to the maximum fee set out

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129. INITIATED PETITION, *supra* note 2, § 15.

130. *Id.*

131. *Id.*

132. N.D. CENT. CODE § 65-02-08 (1995).

133. *Id. See also id.* § 65-02-15 (providing that the Bureau shall only pay injured employees' attorneys only when the employee prevails). "Prevailing" includes the settlement of claims. Interview with Regan Pufall and David Thiele, North Dakota Workers' Compensation Bureau (Mar. 1995).

134. N.D. CENT. CODE § 65-02-08. *See also id.* § 65-05-12.2(18) (1995) (providing 20% cap on permanent impairment disputes).

in section 92-01-02-11.1 of the North Dakota Administrative Code.[135] The enactments also preclude payment of attorneys' fees to those attorneys whose injured client has not attempted to resolve the dispute through the Workers' Advisory Program.[136]

Prior to 1995, attorneys received payment of fees whether they prevailed or not. Furthermore, attorneys were able to recover fees from the time of constructive denial[137] until issuance of a notice of informal decision from the Bureau.[138] The 1995 enactments deny payment to attorneys whose clients' claim falls into constructive denial.

The intention behind the modifications by the Legislature stemmed from the concern over the litigiousness in the system and costs associated with litigating disputed claims. In 1994, the Workers' Compensation Bureau paid approximately one million dollars to claimants' attor-

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135. *Id.* N.D. ADMIN. CODE § 92-01-02-11.1(3) (1995) provides:

> Total fees paid by the bureau for all legal services in connection with a claim may not exceed the following:
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>
> b. At a rate of eighty-five dollars per hour the sum of seven hundred dollars, plus reasonable costs incurred, for legal services in connection with an offer by the bureau to make a lump sum settlement pursuant to subsection 1 of North Dakota Century Code section 65-05-25.
>
> c. The total sum of one thousand eight hundred dollars, plus reasonable costs incurred, following issuance of an administrative order under North Dakota Century Code chapter 28-32 reducing or denying benefits, for services provided if the formal hearing request is resolved by settlement before the evidentiary hearing is held.
>
> d. The total sum of three thousand six hundred dollars, plus reasonable costs incurred, if the employee prevails after an evidentiary hearing is held.
>
> e. The total sum of four thousand dollars, plus reasonable costs incurred, if the employee's district court appeal is settled prior to submission of briefs. The total sum of five thousand five hundred dollars, plus reasonable costs incurred, if the employee prevails after hearing by the district court.
>
> f. The total sum of six thousand five hundred dollars, plus reasonable costs incurred, if the employee's North Dakota supreme court appeal is settled prior to hearing. The total sum of seven thousand two hundred dollars, plus reasonable costs incurred, if the employee prevails after hearing by the supreme court.
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> ....
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> h. The total sum of six hundred dollars, plus reasonable costs incurred, for services in connection with binding arbitration, if the employee prevails, provided further that the fees may not exceed twenty percent of the amount awarded.
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> i. The total sum of one thousand dollars, plus reasonable costs incurred, if the employee requests binding dispute resolution and prevails. The total sum of five hundred dollars plus reasonable costs incurred, if the employer requests binding dispute resolution and the employee prevails.

136. N.D. CENT CODE § 65-02-27 (1995). *See also infra* part III.H. (discussing the Workers' Advisory Program).

137. *See* 1995 N.D. Laws ch. 614, § 1 (indicating the changes to the payment of attorney's fees). Constructive denial occurs sixty days after everything necessary for the Bureau to issue a formal or informal decision has been submitted, but due to reasons beyond their control, such as backlog of cases, the Bureau is unable to issue its decision, and the claim fails into constructive denial. It does not mean that a claim has necessarily been denied.

138. *Id.*

neys.[139] Furthermore, the Bureau presented evidence that attorney involvement is associated with high total claim costs and with no added benefit to injured employees.[140] Proponents of the new enactments contend that prior to 1995, attorneys had no incentive to bring only meritorious cases since they received payment for their fees whether they prevailed or not.[141] Proponents contend that frivolous suits over small amounts clog up the system preventing quick resolution of claims of truly injured employees. But perhaps the reason that so many frivolous claims are being brought by attorneys is the atmosphere which is created by a bureaucratic system which forces employees to hire an attorney and incur such expenses.[142] Although the Legislature may have been acting with the best interests of the employee in mind, they have impacted the opportunity of an injured employee to obtain "sure and certain relief." The cap and limitations on the payment of fees will provide limitations on the ability of an injured worker to find counsel. The result will likely be that injured employees are denied "sure and certain relief" due to lack of representation.

Moreover, opponents to the denial of attorney's fees for claims that have fallen into constructive denial allege that it deters the Bureau from swiftly deciding cases and presents difficulties for injured workers to secure legal representation.[143] The cap and limitations on attorney's fees, especially in the context of constructive denial, will most likely have no effect on the Bureau's responsibility to issue decisions. In many constructive denial cases, backlog is created by forces beyond the Bureau's control, such as doctors failing to submit reports, which will not be affected by attorneys seeking to acquire an injured employees decision.

Interestingly, the Initiative Petition retains the 1995 enactment which provides attorney's fees to those who prevail.[144] However, the Initiative Petition repeals the maximum fee arrangements[145] and the 20% cap on attorney's fees.[146] Even those who oppose the 1995 enactments realize that the filing of frivolous claims creates obstacles to an injured

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139. *Testimony before the Senate Indus., Business & Labor Comm. on H.B. 1208* (written statement of Chuck Peterson, Chair Workers' Compensation Coalition, Greater North Dakota Association).

140. CLAIM COSTS: AN INTERSTATE COMPARISON, NATIONAL COUNCIL ON COMPENSATION INS., INC. 3 (Apr. 1994).

141. Interview with Regan Pufall and David Thiele, North Dakota Workers' Compensation Bureau (March 25, 1996).

142. *See Testimony Before the Senate Indus., Business, & Labor Comm. on H.B. 1208* (1995) (written statement of Sandi Tabor, Executive Director, State Bar Association of North Dakota).

143. *Testimony Before the Senate Indus., Business & Labor Comm. on H.B. 1208* 2-3 (1995) (written statement of Edwin W.F. Dyer III, Esq.).

144. INITIATIVE PETITION, *supra* note 2, § 25.

145. *Id.*

146. *Id.* at §§ 4, 28.

employee's ability to obtain "sure and certain relief." But any protection granted by the above limitation becomes moot by the repealing of the maximum fee arrangement and the 20% cap on attorney's fees. By repealing these sections the Initiative Petition will maintain the litigiousness of the system, continuing the backlog in the system that the Initiative Petition seeks to avoid. Perhaps increasing the cap on attorney's fees above 20% will provide a happy medium to both the proponents and opponents of the legislation. An increase will still provide a cap on attorney's fees, thereby protecting the Bureau, and it will at the same time provide a greater incentive to attorneys to take on worker compensation claims.

E. PREFERRED PROVIDER LEGISLATION

In 1995, the legislature enacted the "preferred provider" legislation.[147] Section 65-05-28.1 allows an employer in an approved risk management program[148] to select the treating doctor for their injured employees.[149] An employer who participates in the preferred provider program must provide written notice to its employees of its selection in order to inform its employees of the preferred provider.[150] If the employee disagrees with the selection of the preferred provider, he is able to select his own preferred provider as long as he makes the election and notifies the employer in writing prior to the occurrence of an injury.[151] According to the legislation, an employee has sixty days after a compensable injury to seek medical treatment only from the employer's selected preferred provider.[152] If the employee seeks treatment from someone other then the preferred provider, the treatment is considered noncompensable and the employee becomes responsible for the medical bills.[153] If the employee finds a conflict with the employer's

147. N.D. CENT CODE § 65-05-28.2 (1995). Section 65-05-28.1 provides:

> Notwithstanding section 65-05-28, an employer subject to this title who maintains an approved risk management program pursuant to section 65-04-19.1 may select a preferred provider to render medical treatment to employees who sustain compensable injuries. "Preferred provider" means a designated provider or group of providers of medical services, including consultations or referral by the provider or providers.

Id. § 65-05-28.1.

148. *See* N.D. CENT. CODE § 65-04-19.1 (1995) (providing an employer who maintains a safety program approved by the Bureau a five percent discount on their annual premiums).

149. *Id.* § 65-05-28.1.

150. *Id.* § 65-05-28.2.

151. *Id.* § 65-05-28.2(2).

152. *Id.* § 65-05-28.2(1).

153. N.D. CENT. CODE § 65-05-28.2(1) (1995). The statute makes an exception for emergency care and those injuries the "employee reasonably did not know was related to a compensable injury." *Id.*

preferred provider, the employee may make a written request to the Bureau to change providers.[154] But treatment by the employee's chosen provider is not compensable until approval is given by the Bureau.[155] An employer may object to the employee's choice of provider, but must file a detailed objection with the Bureau within five days of the employee's request.[156]

By enacting this law, North Dakota has joined the majority of states that have preferred provider legislation.[157] Those that support the enactment believe that employers as premium payers should have the right to control the choice of doctor.[158] Benefits of the Preferred Provider Program include both the decrease in the costs of claims and the increase in the quality of medical treatment.[159] Employers have a strong incentive to ensure that their employees are receiving quality care which promotes their early and safe return to work.[160] The new enactment intends to provide an injured worker with a doctor who has a thorough understanding of the nature of their employment situation. Ideally the doctor of choice would have routinely dealt with workers' compensation injuries.[161] Supporters claim that a preferred provider who has a working knowledge of the workplace and employment situation is better able to assist the employer and employee in determining what types of work the employee can perform and the time frame in which an injured employee can return to work.[162]

Opponents to the enactments fear that employers will favor doctors that give result-orientated diagnoses unfavorable to the employee. It is feared that these doctors would be unsympathetic to the injured employee returning them to work too soon and severing any benefits to which the employee may be entitled. The enactments require that the employer post their preferred provider list, thereby giving notice to every employee. However, the law does not require an employee to use the provider chosen by their employer. The employee may select the doctor of his choice as long as he notifies his employer before an injury occurs. Therefore, if an injured worker thinks that the doctor chosen is unsym-

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154. *Id.* § 65-05-28.2(3). The request must be made more than sixty days following the injury and at least thirty days prior to treatment by the provider. *Id.*

155. *Id.* § 65-05-28.2(4).

156. *Id.* An employee has five days in which to respond to the employer's objection. *Id.* The Bureau must rule within 15 days after the employee's objection or expiration of the time of filing. *Id.*

157. *Testimony Before the Senate Indus., Business, & Labor Comm. on H.B. 1221* (Jan. 23, 1995) (statement of J. Patrick Traynor, Deputy Director, N.D. Workers' Compensation Bureau).

158. *Id.* at 2 (citation omitted).

159. *Id.*

160. *Id.* at 3.

161. *Testimony Before the Senate Indus., Business & Labor Comm. on H.B. 1221* (Feb. 28, 1995) (statement of Rep. Al Carlson).

162. *Id.*

pathetic to workers' compensation patients, the worker may exercise the right to choose the doctor of his choice. Whether an injured employee is truly free to choose his own doctor may be an enigma, since the injured employee must first be given approval from the Bureau to visit with the doctor of their choice. Many workers may fear that the Bureau would deny them approval to see a physician known to be sympathetic to workers' compensation patients. The workers would not be protected from this situation since the Bureau has no obligation to provide any written documentation of reasons why they are being denied their choice of doctors.

Furthermore, opponents to the legislation allege that an employee who disagreed with the preferred provider's diagnosis is unable to submit evidence of a second opinion. Section 65-05-28.2 prevents a doctor who is not a preferred provider from rendering an opinion about any matter pertaining to the injury.[163] This includes matters of "causation, compensability, impairment, or disability."[164] Consequently, this would leave the injured worker at the mercy of the employer's doctor unless an independent medical evaluation is ordered by the bureau.[165]

The Initiative Petition does not address the preferred provider enactments. The preferred provider enactments seem to fall under the Bureau's definition of "sure and certain relief" by promoting quality care and the early and safe return to work. But in effect the law has some serious procedural and evidentiary consequences. Ideally, the preferred provider statute benefits the employee. Perhaps the drafters of the Initiative Petition should address the shortcomings of the legislation so that an employee can be granted quality care and a safe return to work with procedural protections such as written explanations of denials by the Bureau and the availability of second opinions.

F. DEFINITION OF COMPENSABLE INJURY

1. Objective Medical Findings

The 1995 Legislature redefined "compensable injury." The 1995 Legislature requires a work-related injury to be established by medical evidence supported by objective medical findings.[166] Prior to 1995, the only evidentiary requirement to establish a compensable injury was that

163. N.D. CENT. CODE § 65-05-28.2(1) (1995).

164. *Id.*

165. *See id.* § 65-05-28(3) (providing that injured employees must submit to independent examination in the event of a dispute between the Bureau and injured employees).

166. *Id.* § 65-01-02(9).

an injury had occurred and had arisen out of and in the course of employment.[167] Therefore, the 1995 enactment requires a higher standard of proof before an injury is classified as compensable. The purpose behind the enactment is to weed out those claimants that do not suffer from a legitimate injury.[168] Specifically, this legislation is directed at those injuries which are commonly based upon the subjective complaints of the injured workers, such as loss of range of motion, atrophy, loss of muscle strength, and muscle spasm.[169]

In redefining a compensable injury to require objective medical findings, the Legislature has placed an obstacle in the way of injured employees seeking "sure and certain relief." Understandably, false claims need to be weeded out so that only the truly work-related injured may receive benefits. But in attempting to accomplish this, the Legislature made some serious mistakes. What constitutes an objective medical finding? Under section 65-05-12.2, an impairment rating would qualify,[170] but does a doctor's diagnosis of pain overcome the hurdle? By failing to define "objective medical findings," the Legislature has created fertile ground for litigation.

Additionally, the enactments eliminate legitimate claims based solely on subjective complaints not able to be objectively verified, for example, soft tissue injuries.[171] Many injuries have been substantiated, yet have failed to be supported by objective medical evidence of physical injury.[172] In passing this enactment, the Legislature failed to rely on any statistics demonstrating the number of claims paid out or denied by the Bureau because they were based solely on subjective claims of the injured worker. Furthermore, the Bureau testified that requiring objective medical evidence would have no material impact on the Workers' Compensation Fund.[173] This, however, seems odd as it would suggest

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167. 1995 N.D. Laws ch. 607, § 1.

168. *1995 Senate Standing Comm. Minutes, Bill/Resolution H.B. No. 1225* (Feb. 27, 1995) (statement of Ken Horner, Cross Country Courier).

169. *Testimony to the House Indus., Business & Labor Comm. on H.B. No. 1225* (Jan. 23, 1995) (written statement of Julie Leer, Attorney N.D. Workers' Compensation Bureau). This enactment attempts to keep the evidentiary requirements consistent. The 1995 Legislature also modified the evidentiary requirements for PPI awards. *See supra* notes 114-15 and accompanying text.

170. *See* N.D. CENT. CODE § 65-05-12.2 (1995) (providing the mandatory terms of determining a permanent impairment).

171. *Testimony Before the Senate Indus., Business & Labor Comm. on H.B. No. 1225* (Feb. 27, 1995) (statement of Edwin W.F Dyer III, Esq.).

172. *See* Johnson v. North Dakota Workers' Comp. Bureau, 496 N.W.2d 562, 565 (N.D. 1993) (reversing suspension of rehabilitative benefits based on claimants lack of good faith); Kroeplin v. North Dakota Workmen's Comp. Bureau, 415 N.W.2d 807, 810 (N.D. 1987) (authorizing PPI award even though no objectively demonstrable evidence); Lyson v. North Dakota Workmen's Comp. Bureau, 129 N.W.2d 351, 354-55 (N.D. 1964) (upholding finding that claimant was totally and permanently disabled even though no concrete physical defects were apparent).

173. NORTH DAKOTA WORKERS' COMPENSATION BUREAU 1995 LEGISLATION, SUMMARY OF ACTUARIAL

that they are at the present not paying out any unnecessary claims based solely upon the subjective claims of an injured worker.

The Initiative Petition repeals the definition of compensable injury which requires evidence of objective medical findings.[174] The Initiative Petition requires proof that the injury arises out of and in the course of employment.[175] In repealing the newer definition, the drafters have torn down any procedural barrier that was placed in the way of injured employees who suffered work-related injuries and who could establish any objective medical evidence. At the same time, the drafters have also made it easier for impostors to cross the threshold of compensability since no objective medical evidence will be required to support their injury. What needs to be to established, and is not accomplished by the Initiative Petition, is a compromise between those who are legitimately injured in the course of employment and are unable to establish objective medical evidence to be compensated from those who are not legitimately injured, and not to be compensated. Perhaps the best way to resolve this dilemma is to define "objective medical findings" deferentially to include those that suffer subjective findings of pain by eliminating the objective requirement and including a protective device such as proof by clear and convincing evidence of medical findings of pain. This would provide some protection to the Bureau to prevent paying non-legitimate claims yet provide some protection to legitimately injured employees by allowing recovery despite a failure to establish "objective medical findings."

2. *Mental-Mental Injuries*

Excluded from the 1995 definition of "compensable injury" are mental injuries caused by mental stimulus.[176] An example of a mental stimulus would be purely mental stress in the workplace.[177] Prior to 1995, noncompensable mental injuries were those that stemmed from personnel actions such as transfers, promotions, demotions, or termina-

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INFORMATION, H.B. 1225 (Nov. 28, 1994).

174. INITIATIVE PETITION, *supra* note 2, § 2(9).

175. *Id.*

176. N.D. CENT. CODE § 65-01-02(9)(b) (1995). The new statutory definition of "compensable injury" does not include "[a] mental injury arising from mental stimulus or a mental or emotional injury arising principally out of a bona fide personnel action, including a transfer, promotion, demotion, or termination except an action that is the intentional infliction of emotional harm." *Id.* These disorders are dubbed "mental-mental" injuries. Thomas S. Cook, *Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application*, 62 NOTRE DAME L. REV. 879, 906-07 (1986-87).

177. *1995 House Standing Comm. Minutes, Bill/Resolution H.B. No. 1252* (Jan. 23, 1995) (statement of Robert W. Morris, Assistant Attorney General, N.D. Workers' Compensation Bureau).

tions.[178] Prior to 1995 and presently, physical injuries or disabilities that result from mental conditions caused by work-related injuries are compensable.[179] Mental disabilities produced from physical trauma are also compensable.[180] The 1995 Legislature enacted this legislation to address those situations where mental injuries were caused by purely mental stimuli, for example, depression resulting from stressful conditions at work.[181] The Legislature enacted this legislation with the realization of the difficulty in presenting a causal relationship between on-the-job stress and mental disorders for compensation claims.[182] Mental-mental claims are based upon the subjective views of the claimants and are regarded as highly speculative due to the supervening factors of non-work activities that may be at play.[183]

The Initiative Petition did not address this part of the enactment which suggests that both supporters and opponents of the 1995 enactments agree that mental injuries caused by mental stimulus should not be compensated. There are those who voice concern that the failure to compensate mental-mental disorders discriminates against those who suffer a mental injury for which the workplace is the cause. But any discriminatory effect that the enactment may have is outweighed by the protection afforded, assuring only proven work-related injuries are compensated.

G. LIBERAL INTERPRETATION

Perhaps the greatest travesty of the 1995 amendments was to deny the injured employee liberal construction under the Workers' Compensation Act. Section 65-01-01 provides that "[t]his title may not be construed liberally on behalf of any party to the action or claim."[184] Prior to 1995, North Dakota case law interpreted the Workers' Compen-

178. N.D. CENT. CODE § 65-01-02(9)(b)(9)(5) (1995). The statute did retain intentional infliction of emotional distress claims for intentional terminations. *See also* Choukalos v. North Dakota Workers' Comp. Bureau, 427 N.W.2d 344, 346 (N.D. 1988) (determining mental injury from termination of employment was not a compensable injury).

179. *See* Darnell v. North Dakota Workers' Comp. Bureau, 450 N.W.2d 721, 725 (N.D. 1990) (discussing sufficiency at employment activities as a substantial contributing factor). This group of mental disorders includes all heart diseases as long as they are employment related and precipitated by unusual stress. N.D. CENT. CODE § 65-01-02(9)(a)(3). *See also supra* notes 171-75 and accompanying text (discussing compensability of claims with nonobjective medical findings).

180. The Workers' Compensation Bureau estimates that over 50% of their claims deal with psychological trauma produced because of the physical injury.

181. *See supra* note 176 (addressing claims based on a purely mental stimulus).

182. *See* Cook, *supra* note 176, at 902.

183. *1995 House Standing Comm. Minutes, Bill/Resolution H.B. No. 1252* (Jan. 23, 1995) (statement of Robert W. Morris, Assistant Attorney General, N.D. Workers' Compensation Bureau).

184. N.D. CENT. CODE § 65-01-01 (1995).

sation Act liberally in favor of the employee.[185] The rationale originated in *Bordson v. North Dakota Workmen's Compensation Bureau*,[186] where Justice Christianson reasoned that insurance contracts were interpreted to avoid forfeiture and to afford indemnity.[187] He saw the primary object of an insurance policy and the Workmens' Compensation Act as the same, therefore granting the Workmens' Compensation Act the same construction as an insurance policy.[188] Hence, outgrew the liberal interpretation construction to promote "sure and certain relief" to those that may be fairly brought under the Act. Although the case law has given liberal interpretation to the Act, the North Dakota Supreme Court requires that the intention behind the section being interpreted be considered.[189]

The intention behind this enactment was to provide a "level playing field" for both the worker, the employer and the Bureau by seeing that Workers' Compensation cases are decided based strictly on the facts of each case.[190] North Dakota has joined the minority of states that construe the provisions of the Workers' Compensation Act based solely on the merits of each case.[191] Testimony behind the legislation suggested that the doctrine of liberal construction caused the Bureau to pay claims and settle invalid cases because the law was strained to bring those not

185. *See* Kallhoff v. North Dakota Workers' Comp. Bureau, 484 N.W.2d 510, 513 (N.D. 1992); Effertz v. North Dakota Workers' Comp. Bureau, 481 N.W.2d 218, 221 (N.D. 1992); Souris River Tel. v. North Dakota Workers' Comp. Bureau, 471 N.W.2d 465, 469 (N.D. 1991); Holmgren v. North Dakota Workers' Comp. Bureau, 455 N.W.2d 200, 202 (N.D. 1990); Lawson v. North Dakota Workers' Comp. Bureau, 409 N.W.2d 344, 347 (N.D. 1987); Syverson v. North Dakota Workers' Comp. Bureau, 406 N.W.2d 688, 690 (N.D. 1987); Claim of Bromley, 304 N.W.2d 412, 415 (N.D. 1981); Morel v. Thompson, 225 N.W.2d 584, 588 (N.D. 1975); Boettner v. Twin City Constr. Co., 214 N.W.2d 635, 639 (N.D. 1974); Heddon v. North Dakota Workers' Comp. Bureau, 189 N.W.2d 634, 638 (N.D. 1971); Erickson v. North Dakota Workmen's Comp. Bureau, 123 N.W.2d 292, 294-95 (N.D. 1963); Bordson v. North Dakota Workmen's Comp. Bureau, 191 N.W. 839, 841-42 (N.D. 1923).

186. 191 N.W. 839 (N.D. 1922).

187. Bordson v. North Dakota Workmen's Compensation Bureau, 191 N.W. 839, 842 (N.D. 1923).

188. *Id.*

189. *See Effertz*, 481 N.W.2d at 221.

190. *1995 House Standing Committee Minutes, Bill/Resolution H.B. No. 1217* (Jan. 16, 1995) (statement of Rep. Carlson).

191. Several states that have legislatively acted to strictly interpret their workers' compensation acts or have repealed their liberal interpretation statute. *See* ARK. CODE ANN. § 11-9-704(c)(3) (Michie 1995); FLA STAT. ANN. § 440.015 (West 1995); IOWA CODE ANN. § 515A.1 (West 1995); ME. REV. STAT. ANN. tit. 39-A, § 153(3) (West 1995); MINN. STAT. ANN. § 176.001 (West 1995); MONT. CODE ANN. § 39-71-104 (1995) (repealed); NEV. REV. STAT. ANN. § 616.012 (Michie 1993); N.M. STAT. ANN. § 52-5-1 (Michie 1995). Other states interpret their workers' compensation acts liberally. *See* CAL. LABOR CODE ANN. § 3202 (West 1995); GA. CODE ANN. § 34-9-23 (Harrison 1995); ILL. ANN. STAT. ch. 215, para. 5 (Smith-Hurd 1996); KAN. STAT. ANN. § 44- 501 (1994); KY. REV. STAT. ANN. § 446.080 (Michie/Bobbs-Merrill 1995); MISS. CODE ANN. § 71-3-155 (1993); MO. ANN. STAT. § 287.800 (Vernon 1995); OHIO REV. CODE. ANN. § 4123.95 (Baldwin 1995); R.I. GEN. LAWS § 28-37-4 (1995); TENN. CODE ANN. § 50-6-116 (1995); W. VA. CODE § 8-33-12 (1995).

really deserving of compensation under the Act. The Bureau hopes this will emphasize to courts interpreting the Act that only work-related injuries should be compensated.[192] Therefore, it does not allow courts leeway in interpreting the provisions of the Act to provide relief. However in passing the Act, the Legislature has failed to notice that many of its terms were not defined and consequently will be left to the courts to interpret. In interpreting those undefined terms, courts must look to the intentions and purposes behind the statute. The Workers' Compensation Act is remedial in nature and that purpose should be furthered in interpretation of the Act.

The Initiative Petition repeals the 1995 enactment and requires the Act to be liberally construed in favor of those that can be brought within it, based on North Dakota case law.[193] In so doing, the drafters have recognized that injured employees are not afforded adequate relief under the Workers' Compensation Act and have tried to provide what little help they could for an injured employee trying to obtain his "sure and certain relief."

Although the Legislature has interfered with an injured employee obtaining "sure and certain relief," in the majority of the sections, they did pass some legislation that does help an injured worker obtain relief. The noticeable provisions are: the Workers' Advisory program, notification provisions, hearing officer requirements, and the uninsured employer compensation provision. The Bureau has also implemented numerous procedural initiatives such as a toll-free number, customer service unit, a fraud unit, an imaging system that connects paper files to computer imaged documents allowing instant and simultaneous access to files, enhancement of research, and statistics computer technology to monitor progress of the claims. These developments will provide greater assistance to injured workers in their quest for "sure and certain relief."

H. WORKERS' ADVISORY PROGRAM

The greatest step that the 1995 Legislature took in providing an injured employee "sure and certain relief" was the adoption of the Workers' Compensation Bureau's ombudsman's program.[194] The Workers' Advisory Program must provide assistance to an injured employee. The program considers issues concerning decisions of the

192. *1995 House Standing Comm. Minutes, Bill/Resolution H.B. No. 1217* (Jan. 16, 1995) (statement of Rep. Carlson).

193. INITIATIVE PETITION, *supra* note 2, § 1.

194. N.D. CENT. CODE § 65-02-27 (1995) (including a sunset clause which will remain in effect until July 31, 1999).

Bureau, communicates with the Bureau staff, and advises the injured employee of the effect of the decision on the employee. The information uncovered by a Workers' Advisory Program during review of an injured employee's disputed claim is not subject to discovery and may not be used as evidence in subsequent proceedings relative to that dispute.[195] The program objective for the Workers' Advisory Program is to provide a "first stop" opportunity to resolve the injured worker's problems expeditiously, preclude payment of attorney fees until the worker's advisers have had an opportunity to interview the aggrieved party, speed up the litigation process by providing an injured employee with a copy of the intake document and summary of the facts in dispute, and provide confidentiality.[196] The Bureau testified in support of this bill claiming that the litigation costs and waiting periods for arbitration could be substantially reduced with the ombudsman's program.[197] Overall it provides a positive alternative to costly litigation processes.

Most parties agree that an ombudsman's program is needed to deal with injured employees. The Initiative Petition retains the Workers' Advisory Program but repeals the section disallowing an injured employee's disputed claim from discovery requests.[198] The Workers' Advisory Program allows injured employees quick answers to questions about their case without the necessity of hiring an attorney. Furthermore, the program provides a bridge between the Workers' Compensation Bureau and the claimants. Hopefully, the more the claimant is able to find out about his case, the quest for his "sure and certain relief" will be easier and faster.

I. NOTICE LEGISLATION

The 1995 Legislature made some strides in providing protection to an injured employee by adopting the notice provisions.[199] Section 65-05-01.2 requires an injured employee, injured on the job, to notify the employer through his immediate supervisor, or one authorized to receive notice, that the accident occurred.[200] The requirement is lax, allowing the employee to give either written or oral notice of the acci-

195. *Id.*

196. *Testimony Before the House Indus., Business & Labor Comm. on S.B. 2377* 2-3 (Jan. 31, 1995) (testimony of J. Patrick Traynor).

197. *Id.*

198. INITIATIVE PETITION, *supra* note 2, sec. 9.

199. N.D. CENT. CODE §§ 65-05-01 (providing that an injured employee notify the employer of the accident); 65-05-01.2 (requiring that notice be given within seven days unless good cause is shown); 65-05-01.4 (requiring the employer to file a first report of notice of injury with the Bureau within seven days from the date the employer receives the notice of the injury).

200. N.D. CENT. CODE § 65-05-01.2 (1995).

dent.[201] Absent good cause, the notice must be given no later than seven days after the accident occurred.[202] If an employee fails to notify the employer of the accident, the Bureau may consider that failure in notifying in the determination of the injury's compensability.[203] Much stricter standards are placed upon the employer of the injured employee. If the employer fails to notify the Bureau within seven days of the report of the injury, this failure to notify is considered an admission by the employer that the alleged injury may be compensable.[204]

Prior to 1995, the North Dakota Workers' Compensation Act had no notification provisions, but relied primarily on the one-year filing statute.[205] An employee had one year from the date of injury, or from the time that a reasonable person knew or should have known of the compensable injury, in which to file a claim.[206]

The purpose behind this enactment is to ensure that no other employee is injured and that the Bureau can begin the process to insure speedy recovery of the injured employee.[207] Studies have shown that six or more days of delay in reporting can more than double the cost of a claim.[208] Furthermore, studies have shown that earlier intervention decreases the likelihood of litigation.[209]

Proponents and opponents of the enactment agree that protection of employees and expediting their claims are of utmost importance. What the Legislature failed to realize is that they did not clarify certain segments of the statute. For example, they provided no definition of "good cause,"[210] for the circumvention of the notice requirements. Their

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201. *Id.*

202. *Id.*

203. *Id.* § 65-05-01.3 (providing that failure to notify is only one discretionary factor in the Bureau's determining the compensability of the injury).

204. *Id.* § 65-05-1.4.

205. N.D. CENT. CODE § 65-05-01 (1995). The new statute provides:

> [a]ll original claims for compensation must be filed by the injured employee, or someone on the injured employee's behalf, within one year after the injury or within two years after the death. The date of injury for purposes of this section is the actual date of injury when that date can be determined with certainty by the claimant and bureau. When the actual date of injury cannot be determined with certainty, the date of injury is the first date that a reasonable person knew or should have known that the employee suffered a compensable injury and the employee was informed by the employee's treating health care provider that the employee's work activities are a substantial contributing factor in the development of the employee's injury or condition.

Id.

206. *Id.*

207. *1995 Senate Standing Comm. Minutes, Bill/Resolution No. 1206* (Feb. 27, 1995) (statement of Rep. Skarphol).

208. WORKERS' COMPENSATION COST CONTAINMENT AT THE TRAVELERS, THE TRAVELERS INS. CO. (Feb. 1994) (supporting Bill/Resolution No. 1206).

209. *Id.*

210. N.D. CENT. CODE § 65-05-01.2 (1995).

failure to do so provides little guidance to claimants. For example, what if the injured worker suffers from latent syndromes, like carpal tunnel syndrome? One would assume that a latent condition would be good cause not to notify one's employer simply because the employee does not know of the injury until some time later. But are they under a duty to notify the employer when the injury becomes apparent? The statute makes it unclear whether latent conditions qualify under the notification statutes. This provides little guidance for claimants, and anticipates an injured employee being penalized due to the Legislature's failure to clarify the statute.

The Initiative Petition repeals the notification enactments.[211] By repealing the enactments, the drafters have hindered an injured employee getting a quick resolution of their claim. The notification provisions will provide speedier access to medical care and benefits and in the long run "sure and certain relief." They will also help make the workplace safer by notifying the employer of any injury which occurred due to unsafe conditions. But the notification provisions need to be amended in order to clarify what injuries fall under the statute. Employees need better notice of which injuries need to be reported to employers and the Bureau.

It should be observed that the notification provisions do not effect the filing time for an injured employee. A claim may still be filed within one year after the injury or two years after death.[212] If the injury date is uncertain, the date of injury is the date that a reasonable person knew or should have known that the employee suffered a compensable injury.[213]

J. HEARING OFFICERS

The 1995 enactments cleaned up a problem with impropriety that existed within the Workers' Compensation Program and provided also one of the biggest steps toward an employee obtaining "sure and certain relief." Section 65-02-22, requires that a hearing officer be law-trained and maintain an office separate from the Workers' Compensation Bureau.[214] Since 1991, the Bureau has used the Office of Administrative

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211. INITIATIVE PETITION, *supra* note 2, §§ 30-33.

212. N.D. CENT. CODE § 65-05-01 (1995).

213. *Id.*

214. *Id.* § 65-02-22. The new statute provides:

> A hearing officer designated by the bureau under chapter 28-32 must be a person licensed to practice law in this state. A hearing officer designated by the bureau may not maintain an office within the bureau from which the hearing officer conducts daily business. This section does not preclude a hearing held pursuant to chapter 28-32 from being held within the bureau.

Id.

Hearings but did not require that their hearing officers be law-trained. Furthermore, the hearing officers maintained their offices in the Workers' Compensation building. This resulted in an appearance of impropriety which caused claimants to have a feeling of insecurity about the system in which they would have to deal. The Bureau claims that the costs of implementing this enactment will cost the Workers' Compensation Fund approximately $120,000 per year.[215] Whatever this enactment will actually cost the fund, the Bureau will make up by providing quality decisions, removing impropriety, and ensuring a fairer system of decisions, moving an employee one step closer to obtaining his or her "sure and certain relief."

Perhaps the biggest flaw is that the Initiative Petition repeals the requirement that the hearing officers be law-trained and that hearings be conducted by the Office of Administrative Hearings in accordance with the Administrative Practices Act.[216] In repealing this section, the drafters of the Initiative Petition have set back an injured employee's opportunity of obtaining "sure and certain relief." Having hearing officers apprised of the law can only result in informed, accurate, and hopefully, quality decisions. These quality, well-penned decisions, will reduce the number of decisions appealed which will ultimately let an injured employee find his or her "sure and certain relief."

IV. CONCLUSION

The North Dakota Workers' Compensation Act was intended to provide immunization to employers and provide employees, their families, and dependents, "sure and certain relief" regardless of questions of fault.

The 1995 Legislature's concept of "sure and certain relief" is a concept which has been influenced by the economic conditions surrounding North Dakota employers and the Workers' Compensation Bureau. The Legislature has attempted to solve the dilemma of trying to provide "sure and certain relief" to employees, while trying to keep premiums down for employers and reduce the alleged $228 million unfunded liability of the Workers' Compensation Bureau.

With the 1995 Legislative enactments, the Legislature has significantly reduced premiums for employers and has reduced the alleged unfunded liability, but yet arguably has sacrificed an injured workers' "sure and certain relief" in the process. Of course, the Legislative

215. NORTH DAKOTA WORKERS' COMPENSATION BUREAU 1995 LEGISLATION, SUMMARY OF ACTUARIAL INFORMATION, H.B. 1225 (Nov. 28, 1994).

216. INITIATIVE PETITION, *supra* note 2, § 7.

changes have been enacted under the guise of providing relief to employees. Enactments, such as the reduction in the income test and its mandatory waiver, return the injured worker to the workforce more quickly than in the past. Enactments requiring objective medical evidence in both rewarding PPI benefits and the definition of compensable injury apparently provide protection for injured workers by protecting the Bureau's fund, by making sure only truly injured workers injured by work-related activities are being compensated. However, these benefits may be gained at the expense of the worker's financial condition or at the expense of excluding truly injured workers who are unable to meet the evidentiary burden. Furthermore, the Legislature has completely denied benefits to those who reach age sixty-five. Understandably, the Legislature wants to provide some protection to everyone: the Bureau, the employer, and the worker. But this is an impossible task. The Legislature reasons that employees must take cuts so that employers will remain in the state to provide them jobs. Further, the employees must take cuts so that the Bureau is able to reduce the $228 million unfunded liability, so that they may actually pay out the injured employee's present and future claims. But in taking these cuts, the employee is rarely given anything in return. This is not to say that the Bureau and employers do not provide benefits for the injured employee. The 1995 Legislature did create the Workers' Advisory Program, notification provisions, hearing officer requirements, and uninsured employer compensation statutes which benefit the injured employee and cost both the Bureau and employers' money. But the expenditures are disproportionate.

The Initiative Petition repeals the majority of the 1995 enactments which include some of the statutes that help the worker obtain "sure and certain relief." Other sections of the Initiative Petition retain the 1995 enactments with slight modifications. It is between the weakness of the Initiative Petition and the weakness of the 1995 enactments that injured employees may find their "sure and certain relief." The Initiative Petition alone, however, does not provide an injured employee with "sure and certain relief." In many instances, the Initiative Petition reverts back to the pre-1995 law, without providing solutions to the problems that faced the injured worker receiving his or her relief under the law prior to 1995. It is in the middle ground, between the strengths and weaknesses of the 1995 enactments, that an injured employee may find his or her "sure and certain relief."