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Dear WCAC Members:

Please consider this letter as you deliberate the issue of whether to repeal Minn. Stat. § 176.041 subd. 5b (subd. 5b). I represent injured workers in Minnesota, and I believe this statute is both obsolete and that it is harmful to Minnesota injured workers and Minnesota taxpayers. I will address these issues, as well as Ms. Anne Green's February 1, 2021 response to Mr. Sisk's presentation before the WCAC.

If injured workers who are Minnesota residents are forced to bring a claim for benefits in North Dakota pursuant to subd. 5b, and receive less benefits than they would have received in Minnesota, there is an increased risk that these individuals will require public benefits from Minnesota to fill the gap. Minnesota taxpayers should not be required to subsidize ND WSI.

In the *Devos* case in which I was one of the attorneys who represented this injured worker, Mr. Devos was a longtime Minnesota resident who was injured on the job in Minnesota. Even though Mr. Devos routinely performed work in Minnesota, he worked less than the 240-hour threshold set forth in subd. 5b, due largely to the fact that he was a seasonal employee. As such, Mr. Devos was subjected solely to the laws enacted in a foreign state, with no legal recourse in his home state of Minnesota.

North Dakota is one of a very small number of states that continue to operate what amounts to a government run monopoly on workers compensation insurance coverage. Only four states in the U.S. currently bar private insurance companies from writing workers' compensation policies. In the last 20 years or so, the states of Nevada and West Virginia have shifted from a state monopolistic system to allow private workers' compensation insurance companies.

When North Dakota Workforce Safety and Insurance (ND WSI) appeared before the WCAC in 2004 prior to the enactment of subd. 5b, ND WSI did not provide "All States Coverage" automatically to all North Dakota employers at no additional cost as it currently does now. In 2004, ND WSI charged \$600 per year for an employer to purchase "All States Coverage". My understanding is that "All States Coverage" became free to all North Dakota employers in 2010.

The information provided on the ND WSI website about "All States Coverage" states the following, "This is coverage for North Dakota based employees who travel to other states on temporary incidental business. Temporary and incidental exposure means exposure outside the state of North Dakota for not more than 30 consecutive calendar days." As such, "All States Coverage" covers North Dakota employers in Minnesota beyond the exemption period contained in subd. 5b of 15 consecutive calendar days or 240 hours worked during a calendar year in Minnesota.

It is difficult to imagine a scenario where a North Dakota employer would have an employee temporarily work more than 30 consecutive calendar days in Minnesota, and thus fall outside the “All States Coverage” provided at no additional cost by ND WSI. As alluded to in Ms. Green’s response, the primary reason that ND WSI now says it needs subd. 5b is that ND WSI does not want to have “All States Coverage” pay Minnesota Workers’ Compensation benefits.

If Minnesota workers’ compensation benefits are comparable to those in North Dakota as Ms. Greene suggests, one must ask why ND WSI is concerned about its premiums increasing if subd. 5b is repealed. Multiple studies have concluded that North Dakota workers’ compensation premiums are already the lowest in the nation. According to an NPR piece entitled, “Injured Workers Suffer As 'Reforms' Limit Workers' Compensation Benefits” by Howard Berkes and Michael Grabell, ND WSI can invest the surplus when insurance premiums exceed the amount needed to cover injuries and that after reserves are met and if investments do well, money is then returned to employers in the form of dividends. The piece goes on to state that from 2005 to 2015, ND WSI had paid about \$900 million back to employers.

There are in fact significant differences between the two states’ workers’ compensation laws that can result in North Dakota paying less in benefits to an injured worker than would be available in Minnesota. I will address a few of them here. One such difference between the two states is that North Dakota utilizes the sixth edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment” as the basis for its impairment ratings. For an injured worker to be entitled to any permanent partial disability in North Dakota, the injured worker must have an impairment rating of at least 14% pursuant to N.D. Cent. Code § 65-05-12.2. Further, ND WSI is not permitted to issue an impairment award for impairment findings due to pre-existing conditions that are made symptomatic by the compensable work injury as Minnesota allows.

Another significant difference between the two states is that pursuant to ND Ch. 90-01-02-38.3, ND WSI reserves the right to require an injured worker to select another health care provider or specialist for treatment and may under certain circumstances make the selection itself. ND WSI can thus take away the choice of a doctor for the injured worker. Minnesota allows the injured worker to choose their own treating doctor pursuant to Minn. Stat. § 176.135 and Minn. R. 5221.0430.

What constitutes the threshold for receiving continued vocational rehabilitation services also differs between North Dakota and Minnesota. For instance, to determine whether an injured worker is entitled to ongoing vocational rehabilitation benefits or retraining, ND WSI does not factor into its average weekly wage calculation factors such as whether the employee works seasonally or receives per diem payments as Minnesota does. As in the *Devos* case, this results in an average weekly wage calculation that is at times significantly less than what would have been calculated in Minnesota. In the *Devos* matter, this reduced average weekly wage calculation was used by ND WSI to deny Mr. Devos further vocational rehabilitation services beyond assistance obtaining a GED.

When considering Minnesota injured workers' access to legal representation in North Dakota, there are substantial differences between the two states with respect to attorney fees. Attorney fees available in North Dakota are capped pursuant to ND Ch. 92-01-02-11.1. North Dakota does not have provisions in its law that allow for attorney fees compared to what is available in Minnesota for *Roraff*, *Heaton*, and *Irwin* fees. Studies in the U.S. have shown that caps on attorney fees have the effect of limiting the number of attorneys who are willing to take on cases, particularly complex ones.

Nationally, there has been much criticism of the ND WSI program in both legal journals and in news articles. One such article appeared in the North Dakota Law Review entitled, "Falling Down on the Job: Workers' Compensation Shifts from a No-Fault to a Worker Fault Paradigm" by Dean J. Haas, J.D., LL.M. Another relevant piece appeared in NPR in a series on national workers' compensation benefits entitled, "I Lost a Hand and this is Workman's Comp...I Didn't Lose a Hook!" by Howard Berkes. Berkes documents the story of a Pennsylvania man who lost his arm in a work accident in North Dakota, and the refusal of North Dakota to approve a myoelectric arm and hand, which according to his orthopedic surgeon are routinely provided to workplace amputees in other states.

With the enactment of subd. 5b, Minnesota has the distinction of being the only state in the U.S. that essentially outsources its workers' compensation benefits to a single other state in this way as the exclusive remedy for a classification of injured workers. Prior to the enactment of subd. 5b, Mr. Devos would have been permitted to bring a claim for Minnesota workers' compensation benefits under Minn. Stat. § 176.041 subd. 4, as he was a Minnesota resident injured in Minnesota. The unfortunate legacy of subd. 5b has been the total elimination of a Minnesota remedy for an entire classification of injured workers where one previously existed.

As a resident of rural northwest Minnesota, I welcome an economic environment that is beneficial to both residents and business on each side of the border. However, subd. 5b was created to address a problem that does not exist in 2021. It should therefore be repealed due to its adverse consequences to Minnesota injured workers and Minnesota taxpayers. Repealing this statute would also restore consistency and fairness to the Minnesota workers' compensation statute, which prior to the enactment of subd. 5b provided a Minnesota remedy for Minnesota residents injured on the job in Minnesota. Thank you for your consideration.

Sincerely,
Rodgers Law Office, PLLC



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