

Chairman Onorato and members of the Senate Labor Committee: My name is Robert Beloten, and I am the chair of the New York State Workers' Compensation Board. I have requested this opportunity to testify before you in order to explain the Board's proposal to conduct a pilot program to test the efficacy of utilizing digital audio recording technology in our hearing parts.

Senator Onorato, in your April 1, 2009, letter to former Chair Zachary Weiss discussing the issue of verbatim reporters, you stated, "It is imperative that workers appearing before the Board have complete and accurate records of their hearings." I agree 100% with that statement.

As you know, I served as a workers' compensation law judge for 18 years. I worked with verbatim reporters on a daily basis and witnessed their excellent work and positive contributions to our system. Nevertheless, if our goal is to ensure complete and accurate records of workers' compensation hearings, we must do our due diligence with respect to digital audio recording devices. Failure to explore and test this new technology would be shortsighted, and violate our obligation to make sure that all the parties appearing before the Board have a complete and accurate record of their hearing.

It is imperative that the committee understand that the Board has made only one decision with respect to the implementation of digital audio recording technology at its hearings—*that no one will be losing their job*. Other than that, we have made no final decisions.

The purpose of this pilot program is simply to test the effectiveness of this new technology. Before the Board issued its request for information (RFI) and request for proposal (RFP), we received and reviewed a report from the New York State Technology Enterprise Corporation, or NYSTEC, which is a trusted and unbiased technology advisor to New York State. The report, entitled: ***Analysis: Digital Audio and Video Recording Solutions for Hearings***, provided the Board with an overview of the viability of using digital audio recording devices at hearings. A copy of the report has been submitted to you as an addendum to my prepared testimony.

I reference this report to demonstrate that the Board is doing its homework with respect to this issue. The report highlights the widespread use of audio recording devices at administrative and judicial hearings throughout the country, and provides insight into the use of the technology. On pages 10 through 12, the report discusses the use of such devices by the Oregon and Nevada workers' compensation systems, as well as Albany County Family Court's experience over the past five years with digital audio recording technology. The report also indicates that the United States Social Security Administration has recently equipped 1,472 hearing rooms with state-of-the-art recording devices.

This report makes clear that the technology that supports the creation of a hearing record is progressing at a rapid pace. It states, "The implementation challenges are neither technical nor financial; the products exist and they pay for themselves in the long run."

Currently, the Board finds itself facing a number of different obstacles to our goal of ensuring complete and accurate records—obstacles that makes further study of this technology necessary. Our inability to recruit and retain verbatim reporters makes this pilot project a pressing need and there may also be cost savings, which, in this economic climate, I cannot overlook.

Once a vendor is selected and a contract is entered into, the Board anticipates that it will implement a pilot program to test this new technology in at least one New York City hearing location and two upstate locations, with one potentially in a remote locale. Although it is impossible to predict exactly when the pilot program will be implemented, it is anticipated that it will start sometime in the summer of 2010. Once begun, it will take approximately a year to collect the necessary data and evaluate the pilot. So, it will be close to two years before the Board is in a position to make an implementation decision.

I am aware that the proposal to test this technology has faced criticism. In fact, I am certain that you will hear later about the potential for inaccuracies in hearing transcripts, the inability to capture the testimony of those with diverse dialects or disabilities, and the inability to read back testimony at hearings. It is precisely these issues that this pilot program will test.

It is important to understand that the question behind this pilot is not *yes/no* or *either/or*, but rather multiple choice. It will answer where this technology may work and where it may not, under which circumstances it may function, and under which constraints.

Because it is not so much the test that is important, but the grading, stakeholders—namely workers' compensation claimants, employers, carriers, and their legal representatives—will be provided an opportunity to voice their concerns and suggest recommendations for improving the process during the term of the pilot program. We will keep the Legislature fully informed of the progress of this program, and any findings—positive or negative—that result.

The pilot program will enable the debate over digital recording to progress from the theoretical to the practical. I would note that the NYSTEC report I submitted to you details the Oregon worker's compensation system's experience in a similar endeavor. The report states:

The biggest obstacle that Oregon WCB confronted in implementing the software was cultural. Judges didn't like having their court reporters replaced. Judges and lawyers alike were resistant to the new technology....Once the system was installed, training was completed, and everyone grew accustomed to the software, lawyers and judges alike saw how much easier it was to save and store recordings and have transcripts made.

The Board has also made overtures to PEF and CSEA to actively participate in the implementation and evaluation of this pilot program. At the September PEF Labor/Management meeting, we discussed the pilot program and specifically invited union officials to work with us on this project. The Board notified PEF and other unions as far back as September of 2004 of its interest in exploring alternative methods for transcribing the minutes of its hearings.

In short, the pilot program is being conducted in such a way as to allow the Board to make an informed decision on the continued use of verbatim reporting, versus the implementation of digital audio recording of its hearings. The Board would be remiss if it did not at least explore the many improvements and advantages offered by this new technology, which is currently used by various courts and administrative bodies throughout the country.

If, after completing the pilot program, a decision is ultimately made to utilize digital audio recording technology at Board hearings, it is important to emphasize that no verbatim reporters will lose their jobs in the process. While avoiding the elimination of jobs is certainly a legitimate concern, the difficulty presently faced by the Board in successfully recruiting and keeping its verbatim reporter positions filled must also be considered. The Board's verbatim reporters are often enticed to take similar, but higher paying, jobs offered by the New York State Court system, and essentially use their positions with the Board as a training ground.

The present difference between the hiring rate of a verbatim reporter 1 for the Board and a court reporter with the unified court system is nearly \$15,000. A total of 74 verbatim reporters have left the Board since January 1, 2005. That is a 74% turnover rate in just four years. Also, the Board presently has a 13.8% vacancy rate that could very well result in the Board cutting back on the number of hearings that it holds, at a time when the prompt resolution of claims is paramount to the Board's legislative reform initiatives.

As you know, in our current fiscal climate, we are in no position to substantially increase such compensation. And while we may ultimately disagree respectfully about the relative advantages of verbatim reporting versus digital recording, I think we can all agree that we should at the very least explore alternative means of recording a hearing that could be used when reporters are not available, particularly when the alternative would be a delay in hearing the claims of, and providing relief to, injured workers.

In addition, of the 100 individuals who applied for the most recent Verbatim Reporter 1 exam, only 70 actually showed up, and only 19 passed the exam. The Board has had to terminate six provisional verbatim reporters because they failed the exam four or more times. We continue to work with the Department of Civil Service to make the exam process better, but this takes time, and there are still no guarantees that an individual who passes a civil service exam will be a capable and productive verbatim reporter.

The implementation of digital audio recording technology is one potential solution to the ongoing problem faced by the Board in recruiting and keeping verbatim reporters. Also, if the pilot program demonstrates the effectiveness of this technology, it can serve as a back-up in emergency situations when an adequate number of verbatim reporters are not available.

Some have opposed the Board's pilot program on the basis that the recording of Board hearings by other than verbatim reporters violates workers' compensation law (WCL) §122. The Board's Office of General Counsel, however, has thoroughly reviewed this issue and has concluded that WCL §122 does not require that testimony at workers' compensation hearings be transcribed by verbatim reporters employed by the Board, and that there is no other specific legislative prohibition to conducting the proposed pilot program.

WCL §122 is an evidentiary statute that provides that a copy of the testimony, evidence and procedure of any investigation transcribed by a stenographer in the employ of the Board and certified as true and correct may be received into evidence with the same effect as if the stenographer were present and testifying. The passage in WCL §122 that states "transcribed by a stenographer in the employ of the Board" is not an explicit direction regarding how transcription

should be accomplished, but is merely a reflection of how such minutes were taken when the statute was first enacted over 90 years ago. The Office of General Counsel has also concluded that a statutory framework for digital or electronic recording of workers' compensation hearings presently exists in WCL §§ 142 and 143, and that only minimal changes to our regulations would be required in order to facilitate digital audio recording at our hearings.

In closing, I want to emphasize that the Board has made no decision as of yet to introduce digital audio recording technology at its hearings, and is merely exploring that possibility via the RFP process and a pilot program. It is hoped that the RFP process and the pilot program will permit the Board to make an informed decision on this matter. Nevertheless, I can assure you that as the Board goes forward with this process, we will seek input from the unions, attorneys, judges, employers and other stakeholders in the workers' compensation system throughout New York State. Again, we will do everything we can to make sure that the legislature is kept in the loop as we move forward.

Thank you for the opportunity to testify before the Senate Labor Committee. I am available to answer any questions that you may have at this time.



Testimony of

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