

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS
WORKERS' COMPENSATION INSURANCE COMMITTEE
NEW YORK, NEW YORK
JULY 10, 2008
MINUTES

The National Conference of Insurance Legislators (NCOIL) Workers' Compensation Committee met at the Marriott Marquis in New York New York City on Thursday, July 10, 2008, at 1:45 p.m.

Rep. Dennis Ross of Florida, vice-chair of the Committee, presided.

Other members of the Committee present were:

Sen. Ralph Hudgens, GA	Sen. William Larkin, Jr., NY
Sen. Robert Dearing, MS	Assem. William Barclay, NY
Rep. George Keiser, ND	Assem. Ivan Lafayette, NY
Rep. Frank Wald, ND	Assem. Nancy Calhoun, NY
Rep. Donald Flanders, NH	Rep. Kathleen Keenan, VT
Sen. Carroll Leavell, NM	Rep. Virginia Milkey, VT

Other legislators present were:

Sen. Ronald Calderon, CA
Sen. Joseph Crisco, CT
Rep. Chip Rogers, GA
Sen. William Haine, IL
Sen. Vi Simpson, IN
Rep. Ronald Crimm, KY
Rep. Robert Damron, KY
Sen. Linda Scheid, MN
Sen. Jerry Klein, ND
Sen. Pete Pirsch, NE
Rep. Anthony Melio, PA
Rep. Charles Curtiss, TN

Also in attendance were:

Susan Nolan, NCOIL Executive Director
Candace Thorson, NCOIL Deputy Executive Director
Michael Humphreys, NCOIL Director of State-Federal Relations
Jordan Estey, NCOIL Director of Legislative Affairs & Education

MINUTES

The Committee voted unanimously to approve the minutes of its February 28 meeting in Washington, D.C.

NEW YORK WORKERS' COMPENSATION REFORMS

Zachary Weiss of the New York State Workers' Compensation Board (NYWCB) discussed key elements of 2007 reforms in New York. He said the reforms are a landmark bargaining achievement among regulators, lawmakers, and representatives of the business and labor

communities. He said the reforms would help to reduce costs for employers, raise benefits for workers and establish long-term system stability.

Mr. Weiss said the new law increased the maximum weekly benefit for injured workers. He said the maximum benefit level will be indexed to the average weekly wage by 2010. He said the new law also raises both the minimum benefit and maximum weekly death benefit levels.

Mr. Weiss said the reforms establish a limit on permanent partial disability (PPD) wage replacement benefits—which were previously lifetime benefits. He said workers classified with a PPD are now limited to 225 to 525 weeks of benefits depending upon an injury's severity. He said lifelong medical benefits for the injury will continue. Mr. Weiss said the decrease in PPD wage replacement schedule is estimated to save the system about \$500 million a year.

Mr. Weiss said the reforms incorporate a safety net by allowing workers with high PPD rates to be reclassified as totally disabled. He said the reclassification allows these individuals to receive lifetime benefits.

Mr. Weiss said the reforms reduce hearings for doctor-ordered diagnostic medical tests by raising the dollar threshold for prior authorization from \$500 to \$1,000. He said, specifically, the diagnostic tests will reduce lengthy and expensive hearings over X-rays, MRIs, and other standard examinations that do not require much subjectivity. He said the law also requires the tests to be done through authorized networks, which will likely reduce the cost per test.

Mr. Weiss said the reforms will streamline settlements by decreasing administrative requirements and the giving workers' compensation board the power to expedite appeal reviews. He said the law also doubles fines for employers or insurers that appeal a decision for the purposes of delay, or on frivolous grounds.

Mr. Weiss said medical costs in New York are high when compared to other states. He said a task force within the insurance department was directed to develop a set of medical treatment guidelines to improve medical care at more efficient costs.

Mr. Weiss said the reforms authorized him to issue stop-work orders for employers that don't maintain workers' compensation insurance and to shut down a business until the situation is resolved. He said these violations are deemed a sufficient danger to public health and safety to justify the stop-work order. He said the orders also lower underwriting risks associated with uninsured employers.

Arthur Wilcox of the New York State American Federation of Labor and Congress of Industrial Organizations (NYS AFLCIO) said the executive branch, a bipartisan coalition of state legislators, and labor and management came together to develop comprehensive and meaningful workers' compensation reforms in New York State. He said the interested parties were allowed negotiate what they needed for solutions to workers' compensation issues. He said insurance vendors were barred from the room so that a real dialogue could occur. He said that labor and management had a number of issues with which they agreed. He said the negotiation process allowed them to really discuss options that benefited workers and employers. He said the bargaining process was the key to the reforms.

Ken Pokalsky of The Business Council of New York State, Inc. (BCNYS) said New York was long considered a low-benefit, high-cost state. He said the average cost per claim in New York State was about \$20,000, which is eighty-percent higher than the national average. He agreed with Mr. Wilcox that the negotiation process was the key to tangible reforms. He commended the state legislature for their work on the reforms, which BCNYS estimated would decrease workers' comp costs by \$20 billion over time.

IMPAIRMENT RATINGS AND RECENT STATE ACTIVITY

Carolyn Bergh of the National Council on Compensation Insurance (NCCI) said the American Medical Association released their *Guides to the Evaluation of Permanent Impairment, 6th edition (Guides)* in December, 2007. She said the *Guides* are used to calculate awards for permanent partial injuries, non-scheduled injuries, scheduled injuries, and, in some cases, to determine eligibility for permanent total disability. Ms. Bergh said most states use impairment ratings as part of a broader formula to calculate disability ratings and awards.

Ms. Bergh said an impairment rating is often the first variable used to determine a disability rating or award. She said some states use adjustment factors, such as age, education, and physical capacity to adjust an impairment rating in order to calculate a disability rating and subsequent award.

Ms. Bergh said the new *Guides* attempt to be more representative of functional losses than earlier versions. She said a functional loss is a person's calculated loss of function due to a work place injury. She said the *Guides* expand on earlier definitions of impairment and disability to include certain health conditions, disorders, and diseases. She said the 6th edition, for example, adds migraine headaches and mental disorders, which were not included in previous editions.

Ms. Bergh said Alaska, Montana, and Tennessee have already adopted the 6th edition. She said other states were waiting until more information is available before they implement the new version. She said employer-choice states—where employers choose where injured workers' go to receive treatment—would likely employ the latest version of the *Guides*.

Ms. Bergh said the new edition is more evidenced-based than earlier versions and emphasizes simplicity, ease-of-application, and medical precedent. She said the goal of the *Guides* is to establish a consistent and objective rating process across organ systems.

Ms. Bergh said the *Guides* differed from earlier versions in the average impairment rating. She said use of the new *Guides* could increase litigation and noted that a major education effort among all stakeholders would continue to occur.

Mr. Wilcox of the NYS AFLCIO said the AMA approach to impairment guidelines could easily discount the value of someone with a non-workplace injury. He said the guides are a harsh device that can penalize people with pre-existing conditions. He said states considering implementation of the new *Guides* should carefully consider how to remove the subrogation device from the evaluation process without penalizing those with disabilities.

Mona Carter with the NCCI said the *Guides* attempt to provide an objective third-party measurement for impairment and to try and be fair for both the worker and employer.

Rep. Ross said there is a significant difference between impairment and disability and that broader discussions of disability often fail to recognize this. He said impairment ratings are more functional and can be objectively analyzed by physicians.

Rep. Wald asked if there was a uniform or prevailing opinion regarding when benefits should begin. He expanded on his comments and asked if an employee traveling to a job site should be covered under workers' compensation.

Ms. Carter reported that states vary considerably in how they approach this issue. She said the issue became highly debated following the events of September 11, 2001. She said various courts throughout the country have been consistently reviewing the issue since, but have not reached a prevailing opinion.

INDEPENDENT CONTRACTOR LAWS IN WORKERS' COMP

Ms. Carter said the National Association of Insurance Commissioners (NAIC) and International Association of Industrial Accidents and Board Commissions (IAIABC) were working to complete a study of independent contractors in the US workers' compensation system. She said the definition of an independent contractor continues to be a huge issue among state systems and noted that seventy-eight bills were considered in 2008 regarding independent contractor status. She said the white paper being conducted by the working group would make recommendations for improving the efficiency of compliance through best practices among some states.

OTHER BUSINESS

Rep. Ross asked the Committee to consider Workers' Compensation Medicare Set-aside Arrangements (WCMSAs) at the 2008 Annual Meeting in Hawk's Cay. He said these arrangements are entered into between parties when a lump-sum settlement is decided for workers' compensation claims. He said CMS requires approval of funding set-aside for medical benefits to preserve the secondary payer status of Medicare. He said approval of these set-asides often results in lengthy delays and noted that approval does not preclude CMS from retroactively seeking monetary compensation from an insurer or injured worker.

Rep. Ross said that H.R. 2359, *The Medicare Secondary Payer and Workers' Compensation Settlement Agreement Act* was introduced in Congress in 2007. He said the legislation would make several changes to *The Medicare Secondary Payer Act* and provide a more efficient process for determining and approving WCMSAs. He asked the Committee to discuss the issue in November, and if agreeable, to consider a resolution in support of federal reforms.

ADJOURNMENT

There being no further business, the meeting adjourned at 2:30 p.m.