

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS
WORKERS COMPENSATION INSURANCE COMMITTEE
NCOIL SPRING MEETING, NEW ORLEANS, LOUISIANA
SATURDAY, MARCH 4, 2017
11:00 A.M. - 12:00 P.M.

The National Conference of Insurance Legislators (NCOIL) Workers' Compensation Committee met at the New Orleans Downtown Marriot on Saturday, March 4, 2017 at 11:00 am.

Representative Marguerite Quinn of Pennsylvania, Chair of the Committee, presided.

Other members of the Committee present were:

Sen. Jason Rapert, AR	Rep. Greg Cromer, LA
Asm. Ken Cooley, CA	Rep. Michael Webber, MI
Rep. Martin Carbaugh, IN	Rep. George Keiser, ND
Rep. Matt Lehman, IN	Sen. James Seward, NY
Rep. Joseph Fischer, KY	Rep. Michael Henne, OH
Rep. Steve Riggs, KY	

Other legislators present:

Rep. Deborah Ferguson, AR	Rep. Lois Delmore, ND
Rep. Lois Landgraf, CO	Sen. Nellie Pou, NJ
Sen. Dan "Blade" Morrish, LA	Asm. Will Barclay, NY
Sen. David Robertson, MI	Asm. Kevin Cahill, NY
Rep. Lana Theis, MI	

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Paul Penna, Executive Director, NCOIL Support Services, LLC
Will Melofchik, Legislative Director, NCOIL Support Services, LLC

MINUTES

Upon a motion made and seconded, the Committee unanimously approved the minutes of its November 19, 2016 meeting in Las Vegas, Nevada.

PRESENTATION ON WORKERS COMPENSATION PREMIUM FRAUD

Howard Goldblatt, Director of Government Affairs for the Coalition Against Insurance Fraud (Coalition) provided some background on the Coalition and stated that it is hard to measure the cost of fraud. He stated that he can't necessarily quantify the exact dollar amount of insurance fraud in the nation or in a State but he knows that there is a large amount that goes undetected and what they know about is the tip of the iceberg. Fraud affects everyone on a daily basis. It affects the ability of businesses and States to expand and to hire people. It affects individuals spending money because they are spending more on insurance. On workers' compensation, there are several different

schemes to avoid paying the proper premium. The employee leasing scheme is one where the employer basically says the worker is a lease employee and not a salary employee and, therefore, not covered under workers' compensation laws. This is a misrepresentation. Mr. Goldblatt stated that misclassification also occurs when an employer states his or her work force is comprised of independent contractors and not employees. A recently published article stated that there were high paying jobs being removed from payroll to avoid paying workers' comp premiums as well as state and local taxes. Layers of insurance coverage are created between employers and the workforce and this has been going on for the past few years, especially in the construction industry.

Mr. Goldblatt stated that specifically, premium fraud occurs when employers fail or avoid paying the adequate amount of premium which puts their work force at a disadvantage if they get injured or, from a state or local perspective, are not paying the proper amount of taxes to the jurisdiction based on their workers. One way to approach this issue is through insurer-audits to verify work force coverage. One of the obstacles with that is that most of those audits are after the fact and in essence, you end up having given the business an interest-free loan because the insurer may go back to the business saying you should have been paying "x" amount workers' comp and you paid "y" amount so you owe us the difference between "x" and "y". For that year, that business had that extra money to do things with whether to invest it or put it in their own pocket but either way the workers' comp insurer wasn't getting the proper premium. A company can also be fined for lack of insurance. It is seen all the time where the insurance departments or workers' comp department commissions fine a business, per day, or they issue cease and desist orders to halt the non-compliance. The problem with cease and desist orders is that it puts the honest work force that is being used by that cheating employer out of a job. So, cease and desist could harm individuals who had nothing to do with the premium avoidance.

Mr. Goldblatt stated that another problem with premium avoidance is that, especially in the construction industry or where you have contracts, you end up having a process where the dishonest business can undercut the honest businesses in bidding for a contract because they know they will not be paying workers' comp coverage. That puts the honest business in a precarious position - do they continue on the honest path or do they join their competitor by avoiding paying the adequate workers' comp for their workers just so that they are able to compete for those contracts. The contractors are, in many cases, government contractors.

Mr. Goldblatt went on to say that Indiana has pending legislation that creates a payroll fraud task force. The task force would investigate what's going on with avoiding workers' comp and therefore state and local taxes. As of now, the bill is still in committee. In North Carolina, news reports in 2012 estimated 30,000 businesses didn't have coverage. The recent audit from the NC state workers' comp commission in 2013 brought 1,300 businesses into compliance since the news stories broke in 2012.

Mr. Goldblatt suggested some solutions: Florida cracked down on businesses using check cashing facilities for payment of payroll because the discovery was businesses that were avoiding paying workers' comp were paying their employees in such a way that they had to go to check cashing facilities to get paid. There are strict regulations on what a check cashing facility can be used for to avoid the workers' comp scam. The Coalition believes that there should be a sharing of payroll data between tax agencies and workers' compensation insurers that collect business taxes so that the workers'

comp insurer could compare how much that business is saying they pay and what they tell the workers' comp insurer. The odds are that businesses are not going to be cheating the tax revenue, but they are going to be cheating the workers' compensation board. The odds are that you are getting the proper number of payroll for your information business taxes - they are cooking the books when it comes time to share with workers' comp coverage.

Mr. Goldblatt stated that there needs to be a wide range of solutions involving strict regulations targeting the fraud, because the bottom line is the people who are being harmed are the honest workers who don't have the coverage and who are being used to shift their work place injuries to their health insurance where the odds are there are deductibles to be met or co-pays, and so you are asking a worker who is legitimately injured in a work accident to pay more out of pocket or recovery than they would have if the business had proper workers' comp coverage. Additionally, the Coalition thinks that workers groups, organized labor and the insurance industry need to work together better to identify the problems in the individual states and notify State legislators. They are not necessarily natural allies but it helps everyone in the system if everyone was paying their fair share so that everyone could be properly covered.

Rep. Quinn asked to what extent are the workers aware that they do not have proper coverage - do they find out upon having injury? Mr. Goldblatt responded that in most cases, workers do not know and even if they did know, it puts their jobs at jeopardy because if they go to the employer and ask if they are paying for workers' comp insurance, that employee may be out of work the next day. Rep. Quinn then asked if there has been a whistle blower component with this issue in any states. Mr. Goldblatt stated he was not aware of any.

Rep. Keiser asked if the Coalition had done any kind of analysis of the different approaches among States to stop these problems. Mr. Goldblatt replied no but there should be an analysis done. Rep. Keiser also stated that tax agencies have a lot of problems and ND has found that if you are going to lie to job services, you are going to lie on taxes. Rep. Keiser further stated that with regards to shifting costs to medical claims, what they're also avoiding is the responsibility for wage replacement and vocational education.

Rep. Henne asked doesn't the audit with the independent contractors identify the fraud because with a general liability policy, you have to have a certificate proving the independent contractor has their own insurance. Mr. Goldblatt responded that presumably, it should, but it has been known that some these companies will fake those certificates.

Sen. Seward. asked Mr. Goldblatt how he would assess where the states are in terms of fraud from the employee side. Mr. Goldblatt stated most, if not all states, have laws targeting the specifics of workers' comp claims fraud. In some cases, some states have to beef that up to do more work on that and target certain practices. He continued by saying that he also sees States not giving as much attention to the premium fraud on the employer side. Sen. Seward stated that in New York, the companies that write auto insurance have special units that fight fraud - is that the case with workers' compensation carriers. Mr. Goldblatt stated that most workers' comp carriers do have the same type of anti-fraud effort that you see on the property/casualty or the health side.

Rep. Henne asked if more specific misclassification such as classifying workers in less-dangerous job categories is a problem as well. Mr. Goldblatt acknowledged that is indeed a problem in addition to what he has stated.

DISCUSSION ON FLORIDA WORKERS COMPENSATION REFORM AND ITS IMPACT ON OTHER STATES

Ron Jackson of the American Insurance Association (AIA) stated that the Florida Supreme Court (*Castellanos v. Next Door Company*) recently struck down the statutory attorney fee schedule. The court held that the strict schedule, and no means by which the schedule can be varied from, was unconstitutional. Interestingly, the majority in their opinion stated that a reasonable attorney's fee had always been the lynch pin of the workers' compensation system which, if you think about it, is fairly astounding. Most people would say the lynch pin of the workers compensation system is quickly, efficiently, and cost effectively treating injured workers for work place injuries, getting them back to work as soon as possible and to the extent possible, avoiding litigation. Mr. Jackson stated that attorney's fees and incentives matter and that is why the attorney fee schedule had been so effective in improving the Florida market and other states by providing some limitation and removing the incentive to litigate which is not the purpose of the workers' compensation system.

Mr. Jackson stated that AIA has been working with others in industry and the employer community how to respond to the Florida Supreme Court decision. Mr. Jackson further stated that since the decision, we are already seeing a return to the "battle days" where the fee schedule is supposed to be the starting point but the administrative law judge can look at that particular case and determine whether fees in excess of that fee schedule are to be awarded and invariably the judges are awarding fees in excess of the fee schedule. AIA believes the appropriate policy response is for Florida to join the majority of states' policy, which is that claimant's attorney fees are paid from the award. That addresses the incentive for needless litigation. If there's nothing that's going to be paid by the claimants, they and particularly their attorneys, have every incentive in the world to take small disputes or manufactured disputes and get them out of the system and into the court. Mr. Jackson noted that NCCI in their rate hearing recently, before the Office of Insurance Regulation, noted that although only 6% of all workers compensation claims in the State of Florida involve attorneys, that 6% of claims represents over 40% of the system-wide cost and that should tell you a lot about the hugely negative impact that can occur when you're sending the wrong incentives and encouraging and really allowing litigation to occur. Mr. Jackson closed by urging the Committee members to not follow the Florida approach in their respective States.

DISCUSSION ON LOUISIANA WORKERS COMPENSATION SYSTEM

Kristin Wall, President and CEO of the Louisiana Workers Compensation Corporation (LWCC) stated that the LWCC was created by statute in 1992. The Louisiana workers comp system had imploded and all the carriers had left the system. After looking at all the different states LA decided it wanted to create a state fund. She stated that there are 23 state funds across the country and she said that they are all very different. Ms. Wall stated that LWCC was created as a private, non-profit mutual insurance company. Mutual carriers can take a long term view when they are looking at things. She said that they feel the market of last resort and that they are the residual market, and they are

also a competitive market. That gives them the opportunity to operate like a business. There is no worry that people won't be covered in LA because LWCC will cover all employers. LWCC has several missions. One is solvency - a broke insurance company is not a good insurance company and solvency is about keeping your promises. Providing workers' comp at the lowest feasible cost is a mission as well. LWCC is very sensitive about how much it charges to employers. She added that they are also very sensitive and careful about the treatment of the injured workers. She stated that they have a balancing act that's going on all the time at LWCC and that safety is extremely important - it is the heart and soul of workers' compensation.

To illustrate that LWCC is not focused on trying to do the cheapest possible thing for injured workers but rather, is focused on giving the best care it can. Ms. Wall told a story about an injured worker who suffered a traumatic brain injury. He's been able to stay out of nursing home care. A lot of that is certainly about his dedication to getting better but it is also about taking care of injured workers the right away. LWCC has paid \$2.5 million with several more million dollars in the future. So, when you think about things that can happen to people and the need for solvency and the need for a long-term view, he's going to need them.

Ms. Wall stated that incidents of injury have decreased across the country and that is a credit to the insurance industry and employers who really invested in technology. She stated that LWCC has brought its rates down by almost 60% for policy holders. She added that if you look across the region and country, you could see LA is a high cost state but it doesn't pay as much as it used to and each State has different needs.

Sen. Rapert asked Ms. Wall for her thoughts on the Arkansas workers compensation system. Ms. Wall stated that each State has a lot of things to balance - people representing injured workers' that say they're not getting the care they need; policy holders saying it's unaffordable. Part of the Arkansas story might be that it's trying to attract businesses and that when you're trying to do that, they're looking for a lower cost state and it's not likely if workers' comps is going to be part of their cost. Ms. Wall stated that Louisiana is a wage loss state so as long as there is wage loss, we're likely to keep them on comp and to be on comp, they need to be treated for medical so you can see how that gets a little more expensive. Arkansas is a schedule state. There's a period of time where benefits are off and not necessarily medical benefits but the wage benefits. So, she stated that you can see that's a less generous approach to the way things are done in other places. Fraud, attorney involvement and things like that could run the cost of the state up or it can bring it back down. Ms. Wall also noted the issue of choice of physician -- if you say, I'm only going to allow you to go to the physician of the insurance company or a panel of doctors, your costs would be a lot less and there are a lot of people in Louisiana who would like to see that happen but LWCC doesn't take that approach.

Sen. Rapert asked if LWCC had a cap for the number of weeks people can be paid. Ms. Wall responded that Louisiana does not and that they are a wage loss state but Arkansas is in the majority in that it has a schedule so they're going to cap it at some point and say that's it. That makes a huge difference in the cost of the system. She stated that it was a delicate balance. She added that there are many parties with interests and added that reducing costs might have unintended consequences. It might be at the expense of someone else. Ms. Wall stated that the main point of this is that State legislators are in control. Ultimately, LWCC is not a policymaker and is not an

advocate. It doesn't go to legislators and lobby those things. It tries to say that if "this" happens "this" is more than likely going to be the outcome.

Sen. Seward asked who specifically manages the care of the injured workers. Ms. Wall responded that LWCC does and that in serious cases like the one mentioned earlier they have a specialist claims person on it. They also interface with LWCC nurses and they hire external case managers who build plans. Ultimately, there are physicians involved and they do not have a staff of physicians but they do have a physician in their office that helps look at things and to talk to the other physicians. Ms. Wall noted that the more you turn things over to others, it becomes more impersonal.

Rep. Quinn stated that according to the June, 2016 Workers' Compensation Research Institute on the use of opioids, Louisiana is the highest in the nation for opioids use per claim. Rep. Quinn asked what LWCC was doing to try to stop that and asked if it was a matter of higher intensity/level of severity of injuries that led to that ranking. Ms. Wall responded by saying that it is a terrible problem and that it is an epidemic across the country. She continued by saying that physicians are over-prescribing opioids. Part of the reason is that it is the path of least resistance. When people come in hurting, then you want to solve their problem if you are a physician. She stated that LWCC has a successful and focused workers' comp pharmaceutical benefits manager tracking each and every claim, and each and every prescription and it will push back and go back to the doctors and say "this is not right." She emphasized that they are not winning the war, and Louisiana is really trying to work on something and she thinks more needs to be done. She concluded by saying that, now, the CDC was coming in and doing some things too that is going to help but ultimately, it is going to take people getting sued to solve the problem.

Rep. Cromer thanked Ms. Wall for all of LWCC's efforts and stated that it has done tremendous work for injured workers in the state.

ADJOURNMENT

There being no further business, the Committee adjourned at 12:00 p.m.