

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS  
WORKERS COMPENSATION COMMITTEE  
LAS VEGAS, NEVADA  
NOVEMBER 19, 2016  
DRAFT MINUTES

The National Conference of Insurance Legislators (NCOIL) Workers' Compensation Committee met at the Paris Las Vegas Hotel on Saturday, November 19, 2016 at 10:15 a.m.

Senator Jerry Klein of North Dakota, Chair of the Committee, presided.

Other members of the Committee present were:

Sen. Jason Rapert, AR	Aswm. Maggie Carlton, NV
Rep. Martin Carbaugh, IN	Sen. James Seward, NY
Rep. Matt Lehman, IN	Rep. Michael Henne, OH
Rep. Peggy Mayfield, IN	Rep. Marguerite Quinn, PA
Rep. Steve Riggs, KY	Rep. Bill Botzow, VT
Rep. George Keiser, ND	Rep. Kathie Keenan, VT

Other legislators present:

Rep. Lana Theis, MI  
Asm. Will Barclay, NY

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 July 14, 2016 meeting in Portland, Oregon.

## DISCUSSION OF NORTH DAKOTA WORKERS COMPENSATION SYSTEM

Rep. Keiser stated that workers comp in ND is called "Workforce Safety and Insurance" and feels there is a lot of benefit in the name. He continued by saying that his presentation is aimed at emphasizing safety prior to coverage. He went on to say that ND is one of the four remaining monopolistic worker's comp systems in the US. The others are Ohio, Washington and Wyoming. Rep. Keiser stated that the reality is when you are a monopolistic State, you own the company. Rep. Keiser further stated that in ND there are no provisions for self-insurance or private insurance for the purposes of workers' comp.

Rep. Keiser continued by saying that claims for occupational injury and disease are filed with WSI and adjudicated by in-house agency claim adjusters and that WSI is a special agency funded solely by employer premiums. He also noted that WSI administers a

constitutionally created fund for the benefit of injured workers and those funds are not available for other purposes. He then reviewed ND workers' comp 2016 facts and figures. He went on to say that their benefit structure was established by the Legislature and was set out in their statute, Title 65 of the ND Century Code. He also stated that, historically, the legislature has targeted benefit enhancements to the most severely injured. He continued by saying that the benefits are most of the standard benefits however, the one that was a bit different was the Death and Scholarship Benefits for the surviving family members in catastrophic or death situations. Rep. Keiser stated that WSI pays lifetime, deductible-free medical benefits related to the work injury and that there is no maximum dollar or duration limit on medical coverage. He did add that in catastrophic cases, WSI can pay a lifetime allowance of up to \$75,000 for remodeling or adaptations to homes and up to \$150,000 for vehicles and vehicle adaptations.

Rep. Keiser then reviewed Temporary Total Disability (TTD) and Permanent Total Disability (PTD). An injured worker receives tax-free wage-loss benefits equal to 2/3rds of the worker's pre-injury gross weekly wage, plus \$15 per week for each dependent child, subject to statutory maximums and minimums. ND's maximum weekly wage-loss benefit is \$1,214 per week (125% of state's average weekly wage - SAWW) and the minimum weekly benefit is \$583 per week (60% of SAWW) or 100% of the worker's pre-injury net wages, whichever is less. Rep. Keiser then stated that TTD benefits are provided for a period of up to 104 weeks in ND or until the workers reaches maximum medical improvement, whichever occurs first. PTD benefits end at the time of social security retirement eligibility at which time the disability benefits convert to additional benefit payable (ABP), a post retirement benefit. Rep. Keiser stated that ND implemented that benefit change because someone on a permanent total that gets injured early in their career never has the earning capacity to generate social security retirement that an average person would and as a result ND put into play ABP based on the time you are injured until you go on social security.

He added that an injured worker who is able to return to work but earns a wage lower than their pre-injury wage receives TPD benefits equal to 2/3rds of the difference between their pre-injury and post-injury earnings. Further, partial disability benefits may not exceed five years - the five-year cap on benefits can be waived in catastrophic cases. Rep. Keiser stated that ND also offers ABP which is a post-retirement benefit paid when total disability benefits cease at the time of eligibility for social security retirement benefits - the amount of this benefit is a percentage of the benefit amount the injured worker was receiving at the time of retirement eligibility. The longer the disability period, the higher the amount. Rep. Keiser stated that ND does have Cost of Living Adjustments (COLAs) on workers comp claims noting that long term disability and death benefit recipients are eligible for COLAS after three consecutive years of disability and that the annual adjustments equals the percent increase in the SAWW. COLAs have averaged in ND 5.6% over the last decade and 6.2% over the last five years. The cumulative effect of COLAs in ND over the past five years is a 35% increase in benefits. Rep. Keiser stated that vocational rehab is a very big program – you try to prevent the injury to begin with but if you are injured, ND tries to work as aggressively as they can. Injured workers get up to 104 weeks of retraining including wage loss, tuition and costs.

Rep. Keiser stated that Permanent Partial Impairment Benefits (PPI) benefits are a one-time lump sum cash award paid in addition to medical wage loss and vocational rehabilitation benefit. PPI benefits are determined as a percent of whole-body impairment utilizing the 6<sup>th</sup> Edition of the AMA's Guides to the Evaluation of Permanent

Impairment. PPI benefits are paid according to a schedule that assigns a statutory multiplier to each percent of impairment starting at 14% - that is ND's attempt to put emphasis on major claims. No PPI benefits are awarded for impairment levels below 14%. The PPI benefit amount is determined by multiplying \$340 (35% of SAWW) by the statutory multiplier. For impairment levels between 14% and 100%, PPI awards can range between \$3,400 and \$510,000. Rep. Keiser stated that with Death Benefits, the surviving spouse receives a weekly benefit that is calculated exactly as if the deceased spouse had remained as total permanent total disability – the lifetime cap on death benefits paid on any one claim is \$300,000. WSI does not offset Social Security benefits. Further, a non-dependency death award in the amount of \$15,000 is issued to the estate of a worker who died as a result of a compensable work injury and has no surviving dependents – burial expense reimbursement of up to \$10,000 is also provided. Rep. Keiser added that scholarships are provided for dependents and spouses of workers who died as a result of a compensable work related injury or for spouses and children of an injured worker deemed to be catastrophically injured and that the maximum amount payable on behalf of an applicant is \$10,000 per year for no more than five years. The total amount of scholarships awarded for any one year cannot exceed \$500,000 – that is proportionate to the size/population of ND.

ND believes in fair payment for medical and hospital services which ensures access to qualify healthcare professionals. Based on recent data, WSI reimbursement for physician services equates to 185% of Medicare reimbursement and WSI reimbursement for hospital services was 160% (inpatient) and 171% (outpatient) of Medicare reimbursement. ND has a manual classification premium rate which is established annually for 141 rate classifications and to the extent eligible, individual accounts are experienced rated. Accounts with favorable loss experience receive an experience rate credit and accounts with unfavorable loss experience receive an experience rate surcharge. Accounts providing sufficient security can opt for large deductible or retrospective rating policies. If I have a bad experience rating and its costing me money as an employer I can come in and pre-pay an offset and get back into a better experience rating category. Rep. Keiser stated that one of the most important things ND has ever done with workers compensation is that per statute, employers are assessed the first \$250 in medical costs for every claim unless the claim is reported within 24 hours of the injury. Importantly, unlike other types of insurance, the frequency of claims does not affect rating. ND has found that frequency went up dramatically because no one wants to pay \$250. ND has also found that severity of injury has dropped dramatically as a result of that. ND has continuously been ranked the lowest premium state in the country (2016 Oregon Premium Study) and ND rates are the lowest in the country and 52% below the median state.

Rep. Keiser stated that ND workers comp system was financially stable and they outlined by statute WSI's required surplus levels which are 20% to 40% of reserve liabilities. If WSI's surplus exceeds statutory surplus requirements the statute requires dividends to be issued to policyholders. Total dividends issued in eleven out of the past twelve years have amounted to nearly \$1.1 billion in premium dividend credits returned to ND employers; ranging between 30 – 62% per year. Historically, favorable returns from WSI's investment portfolio have resulted in additional surplus growth. He also stated that the WSI fund investment returns for the last five years have averaged 6.6% ranging between 3.3% and 11.7% per year. For the current year, a 50% dividend credit was declared, which equates to an estimated \$150 million dividend – that acts as a stimulus for employers.

He went on to say that ND has a very pro-active legislative oversight that targets reforms quickly. Rep. Keiser stated that in 2015 ND passed Opioid Control Legislation – the effect of the legislation has been dramatic. The ND legislature is also active in responding to court decisions. During the interim, there is a very small committee that meets with the injured workers and help them put together their issue and they are able to present their position. In the first interim, there were 11 bills which were passed. Additionally, NDCC 54-03-25 requires that during legislative session, any workers' compensation bill and/or amendment affecting benefits or premium rates requires an actuarial impact statement prior to the measure being acted upon. He continued by saying that WSI has a 12% administrative expense ratio, meaning only ten cents of every premium dollar goes towards administering the system.

Rep. Keiser went on to say that litigation is a cost driver in many jurisdictions and that, in ND, litigation is almost non-existent and the number of appeals that actually make it to court is less than 1%. He went on to say that ND has an alternative dispute resolution process via the Decision Review Office (DRO) which is independent of the WSI Claims Department. He noted that this is an elective process and an injured worker can request an independent review through this office in an attempt to resolve the issue prior to entering into the formal litigation process. Following the completion of the DRO process, if still dissatisfied, the injured worker can request a review with an independent attorney of their choice. By statute, WSI pays attorney fees not exceeding \$500 for this independent consult. After that, an injured worker can appeal the decision and request an administrative hearing. Subsequent to the administrative hearing, an injured worker can appeal to the district court and then supreme court. Attorney fees are only paid if the injured worker prevails on all levels.

Rep. Keiser stated that their biggest focus is safety. He stated that they have a department consisting of 14 employees that are safety consultants who will come into your businesses and assist in the prevention of workplace injuries and it is at no cost to the employer. Further, premium discounts are provided to employers for successful participation of up to 25%. Premium discounts to employers for successfully implementing safety programs totaled \$26 million in FY 2016. He noted that safety grants are a wonderful way to help savings with the bottom line. Since 2005, WSI has issued \$44.5 million in safety grants to employers and industry groups. In addition, qualifying ND associations and employee organization can receive funding of up to \$175,000 annually for safety training and education programs.

WSI is a managed care organization and has many medical cost containment elements including a Utilization Review Department which includes RN, PT, and MD Utilization Review specialists. Much of the decision process is based upon evidence based treatment guidelines. In addition, fee schedules exist for: Hospital Outpatient, Ambulatory Surgical Center, Physician Administered Drugs, Pathology, Medicine, Durable Medical Equipment, Clinical Laboratories and Hospital Inpatients, Dental, Evaluation & Management among many others. In addition, one of the biggest cost drivers in the workers' compensation arena is time lost. In ND, time-loss claims account for only 11.5% of total claims. He stated that there is a Statutory hierarchy for return to work plans (unless PTD) – WSI will compile a plan for workers to return to gainful employment even if only at minimum wage. Unless a worker is declared PTD, ND law sets the expectation that an injured worker will return to some type of employment. Rep. Keiser concluded by stating that there is an Overall Customer Satisfaction survey

program and on a low to high satisfaction scale of 1 – 5, most recent surveys reflect an injured worker satisfaction rate of 4.10 and an employer satisfaction rate of 4.31.

Sen. Seward stated that while it would be very hard to compete with ND, is the private market prohibited from writing in ND? Rep. Keiser responded stating that as a monopolistic state, the private market is prohibited from writing in the state. Sen. Seward followed up by asking if the \$250 co-pay for an unreported injury within 24 hours designed to developed a fraud deterrent. Rep. Keiser responded by stating he did not mention fraud but they have a very established fraud unit and that the \$250 co-pay has nothing to do with fraud and that it has all to do with just getting employers to report the accident in a timely way.

Rep. Henne asked if there was any way of putting the responsibility back on the employee for the deductible if the employer is unaware of the accident? And, with so many claims, how do you manage them all? Rep. Keiser stated that their electronic reporting system is a very small page: who, what, where, when and what happened and some responsibility is placed on employees. There are specific guidelines of what needs to be covered and addressed in safety meetings. Employers eventually have to make a decision whether or not they think they have a claim. He went on to say that early intervention was critical.

Rep. Lehman asked as an agent bordering the monopolistic state of Ohio, one of the concerns is the uniformity of how to handle both credits and debits from two states where the mods might be higher? Rep. Keiser responded by stating that in ND, they have reciprocity agreements with Minnesota, Montana and SD stating that the injured worker goes to the state that the company is domiciled in and that is the coverage that will be provided. However, ND did put in their statute a lot of provisions like what is temporary employment because that is the big issue. For most businesses that are multi-state, they most likely have purchased multi-state coverage.

Rep. Quinn asked have they always been monopolistic or did they have to blow up something and start all over. Rep. Keiser stated that they have always been monopolistic and over the years, benefits have been added. He added that it was the little things that bother the injured worker. He concluded by saying small changes are always being made.

Rep. Botzow asked how do you describe an employee and, in ND are there any frictions in that area? Rep. Keiser stated that sole proprietors can opt not to take coverage. The children of business owners do not have to take coverage. He also stated that ND has clear standards of what an independent contractor is and they have addressed it the best they can but it is not without its problems.

## PROPOSED AMENDMENTS TO MODEL STATE STRUCTURED SETTLEMENT ACT

Jack Kelly, National Association of Settlement Purchasers, noted that this was a model act initiated in 2004 and has been adopted in 49 states. Throughout the years certain events have occurred where there were loop holes in the rules of civil procedure that have been identified by New York, Vermont and a number of other states and that needed to be closed. The amendments, among other things, required that there be a personal appearance by the payee and that it be filed in the jurisdiction of the payee's residence. He went on to say that it is endorsed and supported by the National

Association of Purchasers and the National Structured Settlements Trade Association. Upon a motion made and seconded, the Committee unanimously readopted the Model State Structured Settlement Protection Act with the proposed amendments.

## DISCUSSION ABOUT THE EVOLVING WORKFORCE AND DEFINITION OF “WORK”

Mona Carter of NCCI stated that her topic was “The Uberization of Workers’ Comp” which has to do with the many changes that are going on in the 21<sup>st</sup> century that are beginning to look a lot different than what individuals are used to. She stated that what is needed is to be prepared for the changes. She stated that the first issues typically raised are independent workers, sub-contractors, leased employees, casual labor and product-based workers and where do they fit into this marketplace. She stated that there is a need to review some of the traditional concepts and start to explore some of the newer concepts like on-demand, gig economy, portable benefits, contingent workforce, peer-to-peer and that is how many new workers are finding jobs. What most people are familiar with is the traditional concept of people going to work for 40 hours a week, 8 hours a day. She went on to say the new concepts don’t look and feel like anything of what has been talked about.

She asked what is the definition of “employee”, “employer” and “work”? In many states a control method has been applied. She stated that lots of questions are coming up because the new workforce can work off the cloud and source themselves out for six months at a time. She stated that some of the determining factors that California has used include: a distinct occupation or business, what work has been done under the direction of a principal or by a specialist without supervision, what skill are required to do the job, who supplies the tools and place to work, what is the length of time services are to be performed, what is the method of payment – by time or by the job, what is the work part of the regular business of the principle and what are the fights to terminate at will. These are the questions used in the past when looking at traditional jobs. Will these questions work now?

Ms. Carter gave examples of different policies in different states saying that, for example, in New York, the last time they had reform written into the policy was that only a New York policy was acceptable which created quite a furor in the industry because they were used to putting New York on a 3C policy and did that mean that anytime there was a conference in New York a policy needed to be bought?

She continued by saying that new technology has forced new things to appear. She used Lemonade as an example stating that Lemonade is a new insurance company based out of New York. It is an automobile company which writes instant coverage via an app. She went on to say that it is the first one in the country and it is popular in Europe. It probably won’t be the last company like this to spring up but it came up out of a need. She also used BizInsure LLC as another example stating that BizInsure LLC will be writing small commercial insurance and they don’t say anything about workers’ comp right now but, could be.

Ms. Carter stated that needs create new technology and that challenges continue to arise. As we look at all the growing work comp systems there are challenges like out of state coverage, conflicts with other lines of coverage - when is it comp when is it liability. There are also generational challenges – young people want things quick and fast. There are so many teenagers that have businesses today – how are they hiring people?

She noted that a study about drones was being done to see if they are being properly classified. Ms. Carter concluded by stating that other issues will continue to come up and the need to be proactive is paramount.

Rep. Riggs stated that this was a very special presentation because it asks so many questions and gets your mind thinking about a lot of these questions no one has asked before. He thanked Ms. Carter for attending and presenting to the committee as these issues will come up and they will need to be addressed.

Rep. Botzow stated that this vast change in the workforce is a fascinating issue. He went on to say that one thing he heard was that the DOL last did a count on the contingent workforce around 2000 but there were plans to do another one so that you could start to quantify a population for temporary worker. His concern was that this is an area that needs policy development and if you do policy development, you have to have some definitions so you know how to count things and know what your impacts are. In some states, there are no definitions for a temporary worker and how can you work off that if you don't know what it is to start with? He continued by stating that what he does know is that the last count the DOL did, he believed that they are up to 40% of the workforce which could be put into a variety of "we don't even know what to call it" groups. Do you think we are at the point where we need to put pressure on to at least get basic data that everyone has reasonably agreed on to get policy development?

Ms. Carter stated that she believes that a lot of these issues have grown out of temp staffing and even PEO could be on the fringe of that but that there are some major employers in our country that are using contingent work forces and most of the time we don't think about it very much because typically, they are part-time, minimal wage type workers. But when she started to learn that professionals are now part of that realm – doctors, nurses, then that moves us to another realm. She stated that she did not know if a definition of a temporary worker was needed because at the end of the day you have to decide who the work comp benefit is there for. It was always the employer who had the responsibility to pay the benefits to any workers. Some states have exempted workers like farmers and jockeys but you would have to define whether or not you were going to exempt a temporary worker. If you remember the ACA issue and it took Congress and the federal government a long time to define what a temporary worker was going to be and the larger employers said that if it was going to be 39 hour constitute a full-time employee, then my staff will work 32 hours which creates a moral issue.

#### DISCUSSION REGARDING FEDERAL ISSUES IMPACTING WORKERS' COMPENSATION

Tim Tucker of NCCI stated that he knows the committee had received a comprehensive presentation in Portland on the federal focus on state workers' comp issues. At that time, the committee heard that both Federal Agencies and members of Congress were concerned about the state system and had raised those concerns to Secretary Perez at the DOL and he wanted to call to the committee's attention that, since Portland, the DOL had issued a report last month entitled "Does Workers Compensation System fulfill Its Obligation to Injured Workers". This was released at a forum at the DOL and the highest-ranking members of the administration spoke, Secretary Perez, Dr. Michaels the head of OSHA, as well as the acting commissioner of the social security administration. He went on to say that the report really goes back to a lot of the issues that were raised

back when the DOL did an extensive examination of the state system which was in 1972. A provision included in the OSHA act created that commission and they issued a report in 1972, made some recommendations on the improvements to the system, and the states did respond. He went on to say that he did want to make sure that the committee was aware of this, as it echos some of the concerns that had previously been raised about the adequacy of the state system, and the equitability of it as well. He went on to say that this was an issue that would gain some more steam at the Federal level and some of that might have changed in the past couple weeks with the general election and the outcome. He stated that he thinks what the committee heard in Portland was this interest did serve as a clearing call for all stake holders who have gathered in national meetings as well as in individual state work compensation conference to look at the system and identify areas where additional improvements could be made. He went on to say that this has sparked some dialogue that will lead to some outcomes and that the national conversation and the folks that are heading that up, in which NCCI is a part of, will at the end of this year be issuing a report and they will make sure that they bring that to the attention of the committee as well.

The one item from the report that he wanted to mentioned was the enhanced coordination between state workers compensation and federal programs such as Medicare and social security disability insurance and making sure that the obligations that are properly placed in those programs or in the state system are, indeed, happening. We did see in just this past week that the social security administration is undertaking a pilot project working with some of the individual states and making sure that the 36 states are currently able to have an offset of social security benefits with workers' compensation which is, indeed, occurring so there is increased efforts to make sure there is integrity both in the federal programs and in the state system. He concluded by saying that we were really gearing up for a more robust and comprehensive dialogue but we will see where things go.

Frank O'Brien of PCI stated that there were two presentations on this: Pre-elections and Post-election. Post-election is clear – no one knows what is clear at this particular point in time. Prior to the election, it was pretty clear that the DOL was going to use the bully pulpit to argue for increased intervention by the Federal government in the state workers' compensation system. Now, post-election day, that is not so clear. What is clear from the discussion here today and from the contents of the report, is that there continues to be a tremendous amount of attention that is going to continue to be paid regarding the evolving nature of the workers' compensation system. Some say we are going into a third industrial revolution. The workers' compensation system was a product of the industrial revolution. It is an evolving system, it is a living system. Rep. Keiser's presentation shows that one size does not fit all and there will be multiple approaches to this and, at the end of the day, there will be multiple approaches that work.

#### ADJOURNMENT

There being no further business, the Committee adjourned at 11:45 a.m.