NATIONAL COUNCIL OF INSURANCE LEGISLATORS
WORKERS' COMPENSATION INSURANCE COMMITTEE
SCOTTSDALE, ARIZONA
NOVEMBER 18, 2021
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee met at The Westin Kierland Hotel in Scottsdale, Arizona on Thursday, November 18, 2021 at 3:15 p.m.

Texas Representative Tom Oliverson, M.D., Chair of the Committee, presided.

Other members of the Committee present were:

Rep. Deborah Ferguson (AR)
Sen. Mathew Pitsch (AR)
Sen. Jason Rapert (AR)
Asm. Ken Cooley (CA)
Rep. Jonathan Carroll (IL)
Rep. Matt Lehman (IN)
Rep. Joe Fischer (KY)
Rep. Rachel Roberts (KY)
Sen. Paul Utke (MN)
Rep. Hank Zuber (MS)

Other legislators present were:

Rep. James Kaufman (AK)
Sen. David Livingston (AZ)
Rep. Stephen Meskers (CT)
Rep. Tammy Nuccio (CT)
Rep. Susan Westrom (KY)
Sen. Lana Theis (MI)
Sen. Mike McLendon (MS)
Sen. Walter Michel (MS)
Sen. Charles Younger (MS)
Sen. Jim Burgin (NC)
Sen. Eric Neslon (WV)

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Will Melofchik, NCOIL General Counsel

QUORUM

Upon a Motion made by Rep. Matt Lehman (IN), NCOIL President, and seconded by Rep. Joe Fischer (KY), NCOIL Secretary, the Committee voted without objection by way of a voice vote to waive the quorum requirement.

MINUTES

Upon a Motion made by Rep. Hank Zuber (MS), and seconded by Rep. Lehman, the Committee voted without objection by way of a voice vote to adopt the minutes of the Committee's July 15, 2021 meeting in Boston, MA.

PRESENTATION ON TEXAS OCCUPATIONAL INJURY MANAGEMENT

Amy Lee, President of Steadfast Policy Strategies, thanked the Committee for the opportunity to speak and stated that I'm also a recent retiree from the Texas Department of Insurance where I spent 27 years researching and providing policy assistance on the workers compensation

system in Texas. So, I'm going to talk to you today a little bit about the Texas workers compensation insurance market, give you an overview of the statistics involved with employer participation in the Texas workers compensation system, and then I'm going to turn it over to Lucinda Saxon of Texas Star Alliance on behalf of the Texas Alliance of Nonsubscribers, who will talk about occupational injury management programs from the employer perspective. So, a little bit about the Texas workers compensation insurance market - it's a very healthy insurance market. We have over 300 insurers actively writing coverage in Texas with direct written premiums at about $2.5 billion. The residual market is very small in Texas. It's less than 1%, and it's been that way essentially for the last 20 years. The projected accident year combined ratio is profitable for underwriting and it has been profitable for Texas insurers for the last decade. And insurance company average return on net worth is about 10% in Texas compared to the average nationally about 7.1%.

So, part of what you need to understand about the Texas workers compensation insurance market is that it wasn't always as healthy and profitable. We've had several legislative reforms just like other states have had. We had a major reform in 1989 which a lot of states had similar reforms in the late 1980, early 1990s. Then we had another reform in 2001 and 2005. And those last two reforms were mostly centered on medical costs - trying to decrease medical costs in Texas because according to the Workers Compensation Research Institute (WCRI), Texas had some of the highest medical costs per claim and some of the poorest outcomes in terms of return to work and patient satisfaction compared to other similarly situated injuries in other states. So, in 2005 there was a reform that passed that introduced managed care and introduced evidence based treatment guidelines and also required a lot additional data collection and reporting on the impact of those legislative reforms.

And so, part of that was a reduction in insurance rates that the Texas employers started to see, including a 73% reduction in the average premium per $100 of payroll. So, it is now cheaper to buy workers compensation in Texas than it's ever been essentially and the insurance rates have dropped also about 72% percent. So, the coverage requirements in Texas are kind of different compared to other states. For private sector employers we've had an optional system since the beginning, since 1913. And what that means is it's your decision as a private employer whether to purchase the insurance or not. If you want to purchase the insurance you have an option of purchasing a commercial policy, and if you meet certain requirements you can be a certified self-insured. Or you can have a group self-insurance as an option as well. Public sector employers in the state of Texas are required to have workers compensation coverage. Most of them are self-insured. Although, political subdivisions do have an option of buying a commercial policy if they so choose.

So, for those employers that choose the route of not having workers compensation insurance, and we refer to those employers often as non-subscribers in the workers compensation system, it doesn't mean that they don't have certain requirements that they need to meet. They do have to report their non-coverage status not only to them – but to their employees but also to the state. And that's because, most states have proof of coverage information that's available through a portal that anybody from the public can access and understand like a healthcare provider for example wanting to know when they treat a patient, is there workers compensation coverage and who is that coverage through? So, they have a way of billing it and contacting that insurer. The same thing happens with non-subscribers. You have to report to the agency when you terminate workers compensation coverage and then you have to report annually your coverage status - whether you are a non-subscriber or not.

You also have to post in your workplace in a conspicuous place your coverage status and then provide copies of the notice to any new employees that you hire, and then obviously if your coverage status changes if you terminate coverage, you need to provide copies to all of your employees. And then if you're an employer with at least five or more employees, you have a duty to report your injuries to the Division of Workers Compensation. And that includes occupational diseases, fatalities and injuries with more than one day of lost time and those are the same reporting requirements for employers with workers compensation insurance as well. A lot of people are curious about why that injury reporting requirement exists and it's because the Division of Workers Compensation, although the Division does not regulate workplace safety, the Occupational Safety and Health Administration (OSHA) does, it does have a workplace safety education and outreach component to its statute. And they provide those workplace safety services to all Texas employers regardless of whether they have workers compensation coverage or not.

So, that injury information is reported so that the agency can use it to help tailor it's workplace safety and outreach services to those employers that may need those services the most. So, to understand coverage in Texas, it's important to understand that if you're a private employer you have the option of purchasing workers comp or not. A lot of people ask how many employers make that choice of not having work comp. Well, in Texas we've been tracking this number consistently since 1993 and we do the study every other year in Texas. It's the Department of Insurance Division of Workers Compensation who conducts the study and as of 2020 about 29% of private year round employers did not have work comp insurance and they employ approximately 19% of the private sector workforce. So, a little bit about who these employers are. These are the non-subscription rates broken down by the size of employer and it's important to remind ourselves that even though Texas is a non-mandatory state, many other state also have coverage exclusions in their statutes including numerical exceptions.

For example, if you're an employer with less than five employees you are not required to have workers comp insurance in certain states. So, this is a breakdown of the non-subscriber rates by year, by the size of employer and what I would take away from the slide is not surprising a lot of smaller employers tend to have a higher non-subscription rate. And then it's bifurcated with the larger employers, the very largest group of employers also tends to have a slightly higher non-subscription rate and those are the employers that tend to employ the majority of the non-subscribing employees. So, here's a breakdown of non-subscription rates by industry sector and this is at the one digit, next level and again, this just gives you an understanding of the non-subscription rates varying by industry. Healthcare tends to be one of those industry sectors that has the highest non-subscription rate and that would include hospitals and doctor's offices and things of that sort.

The lowest rate, not surprisingly, is in the mining construction sector and that's because in order to do business in public projects, by statute, you have to have workers comp insurance. So, part of the study is not just focused on trying to estimate coverage, it's also trying to understand what's influencing employers' purchasing decisions and that includes why employers choose to have workers comp coverage and why they choose not to have it. And so, I'm comparing here for two different surveys, and again this is right after the 2005 reforms. The main reasons why employers gave for not purchasing coverage, and remember in 2005 the reforms were primarily focused on reducing medical costs in Texas and improving outcomes. So not surprisingly, the employer reasons were premiums were too high. They felt they had too few employees and medical costs were too high.

Now, in 2020 again, many of those same issues are still present but the order of magnitude is different. It's more focused on I don't think I have enough employees, I don't think I have enough injuries, I don't feel like the coverage is required versus the coverage is no longer affordable or the medical costs are too high. So, I wanted to give you some resources if you want to look at more detailed information about non-subscription rates including for those employers that do not have work comp insurance, what percentage of those employers have an occupational benefit plan, and also what percentage of those non-subscribing employees are covered by a non-subscriber occupational benefit plan. And in 2020 that's about 60% of non-subscribing employees are covered by some form of occupational benefit plan. So, when you look at the work comp coverage rate, plus you look at the percentage of employees that work for non-subscribers that have occupational benefit plan coverage, you get the vast majority in the 90% range of those employees that are covered by some sort of benefit plan if they're injured on the job. I'll now turn it over to Ms. Saxon.

Ms. Saxon thanked the Committee for the opportunity to speak and stated that I represent one of the non-subscriber groups in Texas. There are a couple of us that represent employer groups that work on these issues in Texas and we represent a lot of employers of all different sizes, but most of our employers are midsize employers to very large employers. We have hospitals that are part of our employer group. We have employers that are fifty employees all the way up to really large employers. Hospitals, large grocery store chains, you name it, they're probably members of our association. We have a little bit of everything. We were looking at our breakdown of our membership the other day and I think the only thing we don't have in our kind of employer mix is construction but one of the main things that's really important to be part of our group in Texas is you have to have some sort of an occupational injury program. We don't prescribe what your benefits need to be. We have a few requirements, but we don't want to prescribe what your benefits are in Texas for our employers and our group anyway.

One of the things that really works for our employers in Texas is if you've got to data entry in your company, your injuries are going to be vastly different than if you run a hospital. So, for their networks that they put together they want to put together the best network possible. If they want to put together the providers for data entry, they're going to have a lot of carpal tunnel type surgeons versus orthopedic surgeons. If you're going to do lots of back injuries, you're going to have lots of spinal surgeons and those types of doctors in your networks because your injuries are going to be very different. When I started working with non-subscribers in Texas in the early 2000s and learning about the different medical costs, they were outstanding in Texas. And that's why a lot of our employers were going to non-subscription. The medical costs and the medical treatment that these employees were getting were just, it was incredible the way that these employees were treated and the incredible medical care that they were getting and that kind of continues in Texas in the non-subscriber world.

So, it's very important for our members in the non-subscriber world and in our non-subscriber networks to get that kind of medical care. Regarding our non-subscriber history, it's kind of a carrot and stick. Our guys kind of see and are the ones that put together the plans and they kind of see it as somewhat of a little bit of competition. They want to have a little bit better programs than the workers comp system. They want to make sure that it's a really good program and a good option for employers to have to go to. We do not advocate for anyone to go bare. Going bare in Texas means not having any program whatsoever. We know that there are companies out there doing that. For our group, it's not an option. But non-subscription has been an option in Texas since 1913.

So, there's some really great options and benefits plans that we cover as most employees are covered in Texas. About 90% of employees are covered either through work comp or non-subscriber plans. With most non-subscriber plans in Texas you have immediate wage replacement benefits on day one of missed work. They provide 85% to 100% of wage replacement. So, it's not 75% as there's a wage cap in Workers Compensation. They cover that. They have access to really good medical specialists, and quality medical care and overall their non-subscribing employees report very high satisfaction with the medical care that they receive and for employers they receive lower insurance premiums and they are mostly self-insured. They get fast return to work rates and that's important for them. They have less impact on their existing workforce whenever there is an injury. They have very robust safety programs because for them if you're outside of the work comp system they're at risk of being sued. There is no exclusive remedy if you're outside of the work comp system.

Here are some of the statistics that Amy did when she was at the Division of Workers Compensation in that research group on the satisfaction rates. As Amy mentioned, there are regulations out there. All of the medical benefits are regulated by the federal Employee Retirement Income Security Act (ERISA) programs. They are very involved with OSHA. At the Division of Workers Compensation, there they have access to all of the safety programs there. They do have very robust safety programs, and that's very important to them because of their tort exposure. It works for Texas.

Rep. Lehman stated that you ended with it works in Texas and I believe Texas is the only state that does this. I think New Jersey might not but they have some other quirky things that basically make it mandatory. But is Texas the only state that does not have a mandatory requirement? Ms. Saxon stated that I think most states have some level or not all states, but some states have some level of non-subscription. Some have it based on size, some have farms of a certain level but as an overall any size of employer I believe Texas is the only one that allows it at this level. Rep. Lehman stated that I think you answered one of my questions which was the whole point of the sole remedy is takes it away from any tort action. This opens them up now to a tort action. Ms. Saxon replied yes, it does. Rep. Lehman stated so, if I don't want to participate in the program, I want to subscribe to self-insured type plan, are there statutory requirements in Texas on how much you get a for a lost finger or are there really no statutory rules in Texas?

Ms. Saxon stated all the way up to the courts there are programs that have arbitration agreements in them and they can go to mediation. There are programs that have some of that in there but they are totally open to the courts. Rep. Lehman stated that my final question is part of the issue of payment comes down to, I think Ms. Lee made the comment, of whether it's work comp or health insurance. So, has there been push back from the health industry of paying for work related injuries when really it should be the responsibility of the employer?

Ms. Saxon stated that the employers under the occupational injury programs, they actually come to agreements with the medical providers and they put together their own networks. The medical providers seem happier as there's no medical fee guideline under the non-subscriber agreements and the non-subscriber programs. So, they negotiate their agreements outside of the system. Under the Texas system there's a fee guideline and they can negotiate only under a network situation. This is a totally different network type situation where there is no fee guideline whatsoever. And so, frequently employers will go in and if there's a specialist that they would like to see or there's a specialist in their area most employers will just pay whatever it takes to hire that physician.

Ms. Lee stated that one thing I want to add is if you are an employer and you do not have work comp coverage not only are you subject to the tort liability, but you cannot assert certain common law defenses as well. And those are statutorily prohibited. You also are prohibited by statute for you're not allowed to have pre-injury liability waivers by statute. And there are limitations on post injury liability waivers. So, those are additional guardrails in the statute.

Rep. Stephen Meskers (CT) stated that Texas is probably as far away, apart from California or Hawaii, from where I sit over in Connecticut. So, I guess the question I have is first the assessments on satisfaction on work comp that is privately provided versus mandated. Is that a survey of claimants or is that a survey of workers who have not claimed into the system in terms of satisfaction? Ms. Lee stated that the employer numbers that were put up there were from the employer survey on their satisfaction. I'll defer to Ms. Saxon on the employee satisfaction. Rep. Meskers stated that the reason I asked the question is it was the same comment we had in one of the last sessions which is no one likes the insurance carrier until they have a claim. So, I just wanted to know how that settles out. Ms. Saxon stated that she'll have to go back and look at the survey to confirm.

Rep. Meskers stated that I'd be concerned in terms of, is it the claimants and the reaction on both types of optional policies? The second question I have is if you're not in the work comp group and you're basically providing either self-insurance or purchasing a policy, you're not necessarily entering into any of the larger pools or laying off some of the risk. So, I would be concerned about the qualitative aspect of the coverage when you're using more discreet pools of workers that you're insuring where you may be negotiating your cost at a better ratio and therefore it might be cheaper but if you can't pool the risk, how are you getting to that price satisfaction if you're providing comparable work comp rates or quality? Ms. Lee stated one of the interesting things that has evolved over the last 20 years is new insurance products have evolved that are focused on the non-subscriber market. And so, depending on the size of the employer and the type of risk that they're able to self-fund, there are insurance options that can actually help spread some of that risk out. Rep. Meskers stated so, you're using pooled risk, it's just a different function? Ms. Lee replied yes. Rep. Meskers stated that was the kind of question I was trying to understand how the model gets built without pooled risk. Ms. Lee stated but it's written by a non work comp insurance company.

Rep. Rachel Roberts (KY) stated that she has two questions. The first is I'd just like us to talk a little bit more about worker outcomes, and perhaps if you could let us know what the data is in Texas as far as maybe perhaps an increase in something like long term disability claims or anything along those lines. I have a little concern when you say they have a pool of great providers to choose from but it certainly sounds like it's a narrower pool. So, if you could talk a little bit about the outcomes. And then the second question is can you talk to me about what happens if a self-funded employer for instance goes out of business what would happen to anyone with a claim at that time?

Ms. Lee stated that in the case of it's a self-funded employer there's not necessarily a guaranty fund that exists for work comp but if the insurance product does provide some ability to spread the risk out that insurance product will still be there to pay out. The employer may or may not be around but the insurance product is still there. Ms. Saxon stated that and unlike work comp in Texas which has lifetime medical they do settle claims on the non-subscriber side like they do in other states. Ms. Lee stated that in Texas, compromised settlement agreements are barred by statute and the work comp system. Outside of the work comp system you can settle lifetime medical out. Again, that might be through a legal agreement that's not regulated by the state at all, that's completely outside.

Rep. Zuber stated that my question is for Ms. Lee - as we all know a comp claim is medically or doctor driven. With that being the case, sometimes the administrative process is somewhat slow or unresponsive, so what do you do in Texas if the employer untimely authorizes medical treatment, or if the claimant refuses or delays to have medical treatment? Ms. Lee stated that's a tricky question. If an employer, keep in mind that outside of the work comp system if there's an occupational benefit plan, that occupational benefit plan will have directions on the types of services that employee is covered for and how to obtain those services and whether there's a network that that employee needs to use so if that employee follows those instructions and seeks medical care there shouldn't be an issue. If there is no network or any instructions like that, the employee would seek medical care just like they normally would and then there would be conversations with the employer and anybody who's administrating that claim on behalf of the employer about payment but it's not regulated by the state at all.

Rep. Zuber stated that I guess my follow up question is, is it part of the administrative process? What do you do if the employer refuses to authorize medical treatment? Ms. Lee stated that's where the tort liability comes in essentially. So, that's part of the carrot and the stick that the employee has is if they feel like they are not treated properly then they can use that tort liability. Rep. Zuber stated wow, that could take months or even a year, if not longer to have that authorized by a Court. In Mississippi, we have an extra administrative step that you must go through and I was just wondering if it was a little bit more efficient in Texas. Ms. Saxon stated that I believe that in the ERISA medical plans there are administrative appeals built into the plans via ERISA. Ms. Lee stated that if the employer has an arbitration agreement that is pretty common for the larger non-subscriber plans, usually that is the avenue that they handle those agreements through.

Rep. Meskers stated that having worked in the financial industry for too many years, I'm confused between the tort liability and arbitration. So, if the arbitration is binding then the risk in the tort is nonexistent, no? Ms. Saxon stated that it depends on the plan as each employer sets up their own plan. Rep. Meskers stated that you'd have to fire your lawyer if he wouldn't push you to arbitration if you were going to have tort exposure. I mean, there must be almost nobody subjecting themselves to tort risk and you'd cover it with arbitration. So, I'm not sure that the workers have as much access if it's arbitration, right? Ms. Saxon stated that I think it really depends on the employers and how they set them up differently depending on kind of how they decide to go about things. Ms. Lee stated that and keep in mind that not every claim can be handled through arbitration. There's still tort liability even for employers that have arbitration agreements.

DISCUSSION ON FEDERAL WORK COMP PREEMPTION DEVELOPMENTS AND CONSIDERATION OF RESOLUTION OPPOSING FEDERAL MONITORING OF THE STATE BASED WORKERS' COMPENSATION SYSTEM

Rep. Oliverson stated that as the sponsor of this Resolution, I'd like to say a few words. First of all, I'm particularly appreciative of my colleague from Kentucky, Rep. Susan Westrom for partnering with me on this and sponsoring this along with me. You will find this resolution on page 128 of your binders. It's pretty simple and straightforward but it's really important and the impetus for creating this Resolution came on September 10th of 2021 when in Congress the House Education and Labor Committee voted to approve language proposed for inclusion in the reconciliation bill for 2022 that would provide funding and authority for the U.S. Department of Labor's Office of Workers Compensation Programs for "monitoring of state workers compensation programs in preparation of an annual report."

Friends, we believe such monitoring and reporting are unnecessary as it would create unnecessary imbalances and unintended consequences for a system which has been operating fairly effectively and fairly flawlessly for quite a few decades. And so, at this juncture we felt that it was important in keeping with our strong support of the state-based system of insurance regulation that we put our marker out there. It's come to my attention that the latest version of the bill may not have this language in it but since it's out there, we felt as though it was incumbent upon us to comment and just sort of raise the red flag and say, "Hey you know, this system has been in place for the better part of a century. The grand bargain has worked extremely well across many different states, different demographics, different sizes, different pools of risk and we don't think it should be messed with." And at this point, I'd like to turn it over to Rep. Westrom your comments.

Rep. Westrom stated that I'm proud to sponsor this Resolution alongside you after an absence of a few years of my attendance here at NCOIL. As some of you may know, a similar issue arose in 2009 if you've been coming to NCOIL for a period of time. And that Resolution opposed the establishment of a federal commission to examine state workers compensation laws. Luckily, that Resolution met its intended goal of avoiding the establishment of such a commission and that's why I believe it's important for this committee to again pass a Resolution to make sure that this unnecessary monitoring of state workers compensation programs does not take place. As both the 2009 Resolution, and the current Resolution state, the state-based work comp system, it's administration, legal precedence, funding, and fiscal accountability is intricately linked to each state's economy and provides the ability to experiment creatively and to borrow from experiences of other states. There simply is no need for federal monitoring of the proven state-based insurance system as the State work comp systems are already subject to robust monitoring and reporting requirements at the state level.

Frank O' Brien, VP of Sate Gov't Relations at the American Property Casualty Insurance Association (APCIA) stated that APCIA is a national trade association that represents a substantial number of work comp carriers. There's very little that I can add to the comments made by the Chair and Rep. Westrom regarding this particular issue. We are grateful to Congress and our advocacy partners who have seen the wisdom, and through their efforts, this particular provision is no longer in current legislation. But it could be. This is an issue that's particularly within NCOIL's wheelhouse as continuing to maintain vigilance concerning the oversight of our state based insurance system by state legislators is a primary purpose of this organization and your voice has been heard on this issue and it will continue to be heard and NCOIL's expertise is indeed welcome in Washington on this issue. We thank you for putting this Resolution forward and we wholeheartedly support it and we urge it's adoption.

Upon a Motion made by Rep. Lehman and seconded by Rep. Zuber, the Committee voted without objection by way of a voice vote to adopt the Resolution.

GRAND BARGAIN UNDER SIEGE? A DISCUSSION ON MATILDE EK V. SEE'S CANDIES, INC.

Jeff Adelson, General Counsel at Adelson McLean, stated that I am an attorney from California and my firm represents the insurance companies, self-insureds, and municipalities in the defense of work comp acts and related matters. My experience goes back about 43 years in this area. This is a very interesting case, and I'm going to tell it to you a little in story form. We are fortunate in that I've been able to discuss the matter with the defense attorney for See's Candy and I watched the appellate arguments yesterday. So, what I have to bring you is as current as it

gets. I grew up in Los Angeles and in Los Angeles one of the greatest things you had other than the Los Angeles Dodgers was See's Candy.

So, when I saw this case come up I was intrigued by the facts surrounding it. In order to understand this, let's talk about the grand bargain a little bit. Because this case in my opinion and the opinion of many others is an absolute attack on the grand bargain. Not just in California, but you could be just about anywhere. So, in this case we are going from the joy of See's Candy to eat in which the Plaintiff's case refers to the employee, Mrs. Eck, as a vector. So, before the modern work comp system, we had tort and back in England in 1835 there's a case Priestly vs Fowler, and that was the first known case of someone suing their employer for an injury. And the employer was not liable for the injury of one employee caused by another. And ultimately in England, they thought about it and gave rise to the English Liability Act of 1880 and it was replaced in 1897.

In the United States, before work comp came to be, what was necessary? It was tough for an employee. An employee had to prove that their employer was negligent. They had to prove the employer was negligent in order to gain compensation for lost wages and medical bills. Now, this was beyond difficult. And it was heard in Superior Court or Municipal Court in California and juries heard it. So, the employers had these defenses and one was assumption of the risk. So, the Courts assumed at the time that if the employee knew of the risk, the employer was thereby removed from the duty of care. So, the employees were believed to understand the risk and if they got hurt too bad for them, they got nothing. Pretty harsh. There was contributory negligence and this asserted that if the Plaintiff was even partially culpable in causing the injury they would be barred from recovery, another absolute defense. And lastly, the fellow servant rule. The injury by one employee to another employee was just not the employer's fault. So, people were being injured, the industrial revolution was on and there was just really no sufficient remedy for a working person. And these defenses ultimately were considered harsh and they tried to use different acts, Employers Liability Act of '06, '08. But still, even under that more enlightened view these cases were heard in front of juries.

Finally, in 1910 in New York, there was a law trying to create a work comp system but it was struck down for violating due process and surprisingly those against this law were the unions. So, on March 24th of 1911, this law was declared unconstitutional. Now, why is that interesting? On that very day, the Triangle Shirtwaist Factor Fire occurred. For those who may know about it, it was one of the most horrible things in American industry. People were working in a factory. They were on the ninth and tenth floor. If a fire occurred, they were unable to get out and 146 employees were killed, some from the fire, many from jumping out of a window nine to ten floors above the street. And you would think that something as horrible as that would have created some degree of liability where these people could have been the survivors and dependents could have been made whole or something.

But the manslaughter case against the owners resulted in an acquittal. And the civil suit against the owners netted each family who had lost someone dear to them, $75. That was what life was like before the grand bargain. And by 1913, New York had a work comp statute. So, where is the bargain? The bargain was an agreement between labor and industry. The employers agreed to pay medical bills and lost wages regardless of fault. You know even up to this day as a defense attorney in California, it's difficult to explain to certain clients what this means. You don't get to not pay benefits because somebody maybe is not paying enough attention, to be polite.

The employee agreed to give up the right to sue in civil court subject to certain exceptions and ultimately, the United States Supreme Court in New York Railroad vs White, finally said, "Yeah these work comp programs are constitutional. We do appreciate the grand bargain - compulsory insurance requirements are fine." But as I sit here today with you, and based on my experience and discussing the grand bargain with my own clients, and different insurance carriers, and being very active in claims litigation management throughout the country, they don't understand it. They still think they're paying too much for work comp. They still think they are not given adequate protection and predictability that work comp provides. They don't like it. Which brings us to the case of Mrs. Eck. Mrs. Eck's first name is Matilda. Her husband was named Arturo. A complaint was filed in Los Angeles Superior Court on December 30, 2020. It was filed on behalf of the survivor, Mrs. Eck. The date of injury set forth in the complaint is interesting because it says Mrs. Eck was sick sometime between March 1, 2020 and April 20, 2020.

What did Mrs. Eck do? What happened here? Mrs. Eck worked for See's Candy. She worked in one of the distribution type factory settings where she put the boxes together. And she worked based on the allegations closely with other employees, and alleged not enough distancing, not enough mitigating actions to make sure people didn't get sick from one another. Well, low and behold Mrs. Eck unfortunately got COVID. Now, in California at the time, there's certain presumptions of compensability but whether Mrs. Eck qualified for them or not, I do not know. But I can tell you that Mrs. Eck did file a work comp claim against See's on her own behalf. Mrs. Eck went home to quarantine and to get better because she did have a case requiring medical treatment. And it is interesting to note here, for the basis of what happens on appeal, is that the definition of injury in the California work comp scheme can include disability and can include medical treatment without disability. The medical treatment is sufficient for there to be a legitimate claim of injury. Now, it's subjective to defenses, but it can and is defined as injury.

Mrs. Eck got home and exposed her husband to COVID who was about 72 years old and unfortunately he passed away from COVID. They had a younger daughter living at home, she also got COVID but recovered. Mrs. Eck recovered. The Plaintiffs alleged that See's should have known that proximity of work would result in employees getting infected and consequently would take the virus home and would infect family members. The lawsuit filed in Superior Court is not filed on behalf of Mrs. Eck as a result of her getting COVID. It's filed as a result of the death of Mr. Eck and her loss, property liability. Mrs. Eck had an injury, and that's important to know. Mr. Eck had never been to See's and had no reason to have anything to do with See's other than he lived in the same house as Mrs. Eck who became sick while working at See's.

As you would expect, and for non-lawyers in the room, a demurrer was filed by the attorney representing See's Candy. It basically said, there is no separate cause of action by anybody for the death of Mr. Eck. This is precluded by the exclusive remedy of the labor code and the California Workers Compensation Act and the grand bargain. So, the general negligence claim should be preempted by the Work Comp Act. The premises liability claim should be preempted by the Work Comp Act. And the exclusive remedy for any damages arising or any injuries that may have occurred to the family member are derivative or collateral to Mrs. Eck's injuries. This is very important because the derivative rule is what is at stake here, which is part of the grand bargain. The derivative rule says, in California, any claim that would not have existed in the absence of the work related injury to the employee falls within the exclusive remedy of the Workers Compensation Act.

To me this is very clear. Having done this a long time and of course have some bias on one side, based on what I do, it's very clear. And it was very clear to a lot of people. And a lot of observers of the Court except the trial judge did not find it clear and did not find it persuasive.

And all of sudden out of the blue the demurrer was denied. The Judge said, this was not a derivative injury. The Plaintiff's attorney said, this is foreseeable. It's foreseeable that Mrs. Eck would go to work and if the employer did not maintain a safe workplace and she became a vector, she'd go home and she would transmit COVID. They also claimed on the Plaintiff side, in their initial opposition, that Mrs. Eck was not injured. But Mrs. Eck was injured, and Mrs. Eck claims injury by filing a work comp claim before the Workers Compensation Appeals Board. So, they're wrong.

And they argued that as a vector, someone who brought on this infection, brought it out, that this was in line with an earlier California case. There's a case in California by the name of Kesner. And the facts in Kesner are what both sides of this case are relying on. In Kesner, the employee worked in a facility that used lots of asbestos to make different brake related drums and other things containing asbestos. And Kesner went home every day for years with asbestos fibers on his clothing. And although Mr. Kesner never got or suffered from mesothelioma or any asbestos related disease, his nephew who lived with them got mesothelioma and of course died from it. And in that case, the California case said, "Yes, this is something you can collect on. We understand this because one, Kesner never had an industrial injury. Two, premises liability, the employer should have known not to allow the employees to come home and bring the asbestos fibers home with them. They should have warned them, they should have done something about it. And there's something they could have done about it and they didn't." So, they said, "this is not a work comp case." There was no derivative injury because there was no work comp by Kesner, he never got sick.

So, in my opinion, it's different. Based on the Plaintiff's view of this, Mrs. Eck was the same asbestos fibers on clothing, she was a vector. The Judge who heard the demurrer believed it. The Judge said that See's owed a legal duty of care to all third-parties. Well, even the Plaintiff's attorney thought this was a little broad. And said, "Well, we don't really mean all parties. We don't really mean, you can go out into the world and make everyone sick, and you'll have to pay for it. We just mean your family members." I don't know where they came up with this. Kesner used that type of language but Plaintiff's attorney just kind of pulled it out claiming that foreseeability only goes so far. Which of course, we would agree. But, that doesn't mean that future Courts and future cases would self-limit it as Plaintiff's attorney did.

So, the Defendant's file a reply to memorandum and they restate their claim, they again state that Mrs. Eck's injury is vital to the case while the Plaintiff's attorney is saying it doesn't matter if she was injured or not. She was a vector. So, what does the Court do? At the trial level, the Court says, "well it's premises liability, See's didn't exercise due care. And Kesner rules because Mrs. Eck was the asbestos in the mix." They said what they shouldn't have said, they said that, "well the science is such that it's foreseeable." But that's part of the underlying claim, not part of what really happened and that shouldn't have been even commented on during the course of the demurrer. So, a Writ of Mandate is filed. In the Writ, the defense attorney finally comes up and says, "Look, it's the grand bargain guys. There's a benefit to the employee by creating this statute on not having them have liability. This is an absolute defense, this is a derivative injury. If the case goes forward there may be no end to it. And the process will be extremely slow and difficult to prove, and costly. And the work comp system is supposed to be quick and efficient."

Finally, come the oral arguments for the demurrer and the Judge, surprising to me, says "I don't think Eck's injury in the workplace has anything to do with this." But based on the definition of derivative claim and based on the cases relative to derivative claims it does. The Judge was also concerned there was no remedy here. Well, if there's no work comp coverage, then there's

no remedy. And sometimes, there is no remedy and it's really unfortunate about Mr. Eck but it's not within purview. So, let's go to the amicus curiae brief. I'll tell you who filed it and why. The amicus curiae brief was filed by the Chamber of the United States of America, California Chamber of Commerce, California Work Comp Institute, Restaurant Law Center, California Restaurant Law Association, National Association of Manufacturers, National Retail Federation, National Federation of Small Businesses.

So, oral arguments on the appeal were heard before the Second District Court yesterday. I was fortunate enough to watch them. Here are my concerns, the Judges were engaged, however one Judge said "this is a case of first impression", which clearly it's not. Another Judge said, "Well this is like the but for rule" which if you've gone to law school, you know that's tort not work comp. And another Judge cited the Palsgraf of all things and whoever went to law school can laugh about this one that talks about foreseeability and zone of danger. I don't think the Judges got it. One Judge asked a hypothetical that basically said, "Someone works in a laboratory and the laboratory negligently allows a virus to escape. The person who works at the lab gets on a bus and gets everyone on the bus sick. Should they not be sued?" And the defense attorney for See's just said, "it's nothing like what you're asking for in this case." And that's where it ended. So, with that I'm open for questions and because I've cut this a little short I am available to anybody who wants to talk about this afterwards.

Rep. Zuber stated that in most states you have either a statutory or administrative definition of a covered employee. In California do you have that language? And if so, why doesn't that supersede the common law doctrine of the derivative action? Mr. Adelson stated that we absolutely have definitions of employees and what constitutes an employee and then under what circumstances but work comp under the grand bargain the derivative rule basically helps the employer. It prevents a case such as this. It says, if there's an industrial injury and there's a consequence from it to someone else who's not injured, who's not employed then there's no remedy, you cannot file. It's covered by the exclusive remedy. It prevents a civil action.

Rep. Meskers stated that I'm sympathetic to the case you describe but on a policy basis, on the back of the SARS epidemic the insurance industry decided to exclude pandemics. The analysis of asbestos in the workplace versus a pandemic illness is discreetly different in that no one can certify to me that the disease was contracted at the workplace whether it had unsafe conditions or not because people were at the supermarket, people were on public transportation, people were in communication with other people. So, I think it's significantly different from, I picked up asbestos in the one location it's located at my workplace and brought it home. And I had family members who suffered. Apart from that, the bigger picture in question is will the workplace compensation programs support this, if we agree that the disease is always contracted at the workplace, is the system prepared to handle a pandemic? So, that's a different question, I don't want to muddy the waters. The first one is, can you prove to me that the disease was contracted versus there's potentiality?

Mr. Adelson stated that the narrow answer is that when a demurrer is filed, it's filed based on the fact that there is no cause of action. But when a demurrer is filed, it is the understanding of the parties and it is the law that the facts set forth in the complaint are accepted, for that narrow purpose. If the case were to become litigated beyond the demurrer, then all the questions you ask are part of it. The science will be involved and there will be many, many defenses to the case. But at this point, it's as if someone's got their hand over a hole with water coming through saying this doesn't belong, this doesn't belong in this system. It doesn't belong anywhere unfortunately for the family. Rep. Meskers stated that as I take it then, the first question is you believe it belongs in the system. And then the second question I would take is subsequently,

should it be in the system? So, you're arguing for remedy under the existing system and I'm concerned where the system is headed on pandemics and how can the system survive them?

Mr. Adelson stated that's been the subject of the last year and a half of conversation in every state, particularly California. California created a number of presumptions to deal with the pandemic. The state compensation insurance fund in California early on said, "You know, it's far better to accept these claims and provide quick treatment and get them in there than to fight every one of them." But we now have these presumptions within the system, in California that will find that if you work under certain conditions or if you work in certain occupations it's going to be presumed, rebuttably, that it is industrial in nature. So far, California has not had as many claims as they feared. And it's been working. But, to your point, another point is, one of the other attacks that I view on the grand bargain are just the multitude of presumptions that have come along finding injury since COVID.

CONSIDERATION OF RE-ADOPTION OF MODEL LAW

Rep. Oliverson stated that lase on the agenda, we have consideration of the readoption of the Model State Structured Settlement Protection Act.

Sen. Paul Utke (MN), Vice Chair of the Committee, stated that the Committee can re-adopt the Model today but I would like us to bring this back in March of 2022 because we have some additional language that we will be working with in Minnesota to adjust the language we currently have in statute. And there have been changes recently made in four other states around the United States here and we think with what they have done and with what we are looking at in Minnesota that there's some positive things that we can add to this Model and we would like to have that option to bring back those changes as amendments in March.

Upon a Motion made by Rep. Zuber and seconded by Rep. Lehman, the Committee voted without objection by way of a voice vote to re-adopt the Model until the Committee's March meeting at which time amendments to the Model will be discussed.

ADJOURNMENT

Hearing no further business, upon a motion made by Rep. Deborah Ferguson (AR) and seconded by Rep. Zuber, the Committee adjourned at 4:30 p.m.