

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
 WORKERS' COMPENSATION INSURANCE COMMITTEE
 2024 NCOIL SUMMER MEETING – COSTA MESA, CALIFORNIA
 JULY 19, 2024
 DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee met at The Westin South Coast Plaza Hotel in Costa Mesa, California on Friday, July 19, 2024 at 9:00 a.m.

Senator Lana Theis (MI), Chair of the Committee, presided.

Other members of the Committee present were:

Sen. Larry Walker (GA)	Rep. Nelly Nicol (MT)
Rep. Matt Lehman (IN)	Sen. Jerry Klein (ND)
Rep. Michael Meredith (KY)	Sen. Bob Hackett (OH)
Rep. Michael "Sarge" Pollock (KY)	Rep. Mark Tedford (OK)
Rep. Brenda Carter (MI)	Rep. Tom Oliverson, M.D. (TX)
Sen. Paul Utke (MN)	

Other legislators present were:

Sen. Dafna Michaelson Jenet (CO)	Sen. Kirk Talbot (LA)
Rep. Joseph Gullett (GA)	Sen. Bill Wheat (LA)
Rep. Rod Furniss (ID)	Sen. Arthur Ellis (MD)
Rep. Matt Lockett (KY)	Sen. Jeff Howe (MN)
Rep. Dennis Bamberg (LA)	Rep. Bob Titus (MO)
Sen. J. Adam Bass (LA)	Sen. Joseph Thomas (MS)
Sen. Royce Duplessis (LA)	Rep. Forrest Bennett (OK)
Rep. Jason Hughes (LA)	Sen. Mary Felzkowski (WI)
Rep. Shaun Mena (LA)	Del. Walter Hall (WV)

Also in attendance were:

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

QUORUM

Upon a Motion made by Rep. Michael "Sarge" Pollock (KY) and seconded by Sen. Bob Hackett (OH) the Committee voted without objection by way of a voice vote to waive the quorum requirement.

MINUTES

Upon a Motion made by Rep. Mark Tedford (OK) and seconded by Rep. Brenda Carter (MI), the Committee voted without objection by way of a voice vote to adopt the minutes of the Committee's April 12, 2024 meeting.

“STATE OF THE LINE” PRESENTATION – AN UPDATE ON THE STATUS AND TRENDS IN THE WORKERS’ COMPENSATION MARKETPLACE

Jeff Eddinger, Senior Division Executive at the National Council on Compensation Insurance (NCCI) stated let me just start off by saying that the state of the workers’ compensation system is very strong. In fact, the state of the workers compensation system has been strong for many years. As you will see, and I think once I go through some of this information with you, I'm hoping you'll agree, we feel that the workers’ compensation system will continue to be strong for the foreseeable future.

One way of measuring the strength of the workers’ compensation system is by looking at the combined ratio which is simply the ratio of the claims that are paid out relative to the premiums that are taken in and the expenses that go along with that. You're looking here at a 20-year history of calendar year combined ratios. The latest combined ratio is 86%, up 2% from the previous year which basically means a 14% underwriting profit for the latest year. This is 7 straight years of the combined ratio being less than 90% percent and 10 straight years of underwriting profits. These are the components that would go into the combined ratio. As I mentioned, the loss ratio, underwriting expenses, and loss adjustment expense. Most of the components are staying very stable. Just the loss ratio ticking up slightly. But again, this is the 7th straight year of loss ratios being under 50% for workers’ compensation.

This just shows the gain on insurance transactions. The latest year being 9% on investments, a bit below the long-term average of 11% percent. But when you combine the return on investments with that 14% underwriting profit, you're looking at a pretax operating gain of 23%, down slightly from the previous year of 25% percent but still well above the long-term average of 13%.

Workers’ compensation profitability has to be driven by the premiums that are taken in and workers’ compensation premiums are based on employment and what those workers are paid in payroll times the rate that is charged by insurance companies gets you the written premium. The one thing that you would notice here is that during the pandemic the premiums did drop off due to slowdowns in employment that we all know about and remember, but for the latest year we're looking at combined premium between private carriers and the state funds of \$48 billion dollars and you can see they're basically back to the 2018 pre-COVID premium levels.

Premium is impacted by the payrolls that are paid to workers and for the latest year, the payrolls growth has been very strong with two things contributing to that. We see here a 6% increase in payrolls for the latest year being driven by a 4% increase in the wages that are being paid and a 2% increase just in the level of employment alone. The wage rate is pretty consistent across lots of different job classifications. The employment changes vary a little bit. There is strong growth in leisure and hospitality but not strong growth or even shrinkage and transportation and warehousing. So, it's been a very small change to the overall premium for workers’ compensation. I just talked about very robust growth in payroll. But the offsetting part of that has been what has happened to the loss costs or the rates that are being charged. We're seeing almost an exact offsetting between those two things. There are some other factors, which I won't get into, that slightly are driving up the overall premium but for the most part, staying relatively stable.

This shows what NCCI has been doing to the loss cost levels in our states. So, for 2024, most of our jurisdictions we've been filing lost cost decreases and overall, that has added up to a -9%

in the loss cost level in our states. And the previous year, it was about -7%. This just shows for all the states where NCCI makes a filing last year the changes in loss costs varied from -0.5% in Virginia to -19% in Maine. But all those filings were for decreases in the loss costs. It's also helpful to look at the residual market at this stage only because it can tell us how the health of the market is going because the residual market is where you would have to find coverage if you could not find coverage written voluntarily and there have been times in the early 2000s, where the size of the residual market was fairly large, over \$1 billion. The last year the the size of the market is \$700 million down from about \$800 million the year before. And that basically translates to a 5% assigned risk market share which is very manageable. This is telling us that 95% of the time based on premium coverage is being able to be found written voluntarily so the market is competitive.

So, that was premium. Now, it's helpful to look at the loss side of it, the claims payments that are going out. The first thing that we like to look at is what we call claim frequency, which is just another way of saying the number of workers that are injured relative to how many workers are on the job. For this 20-year history, most of the time we have seen the claim frequency drop from the from the previous year and the latest year, the claim frequency decreased by 8%, almost twice the annual average of about 3-4%. This is good news, showing us that workplaces continue to get safer, and injuries continue to go down relative to employment. The other side of a claim payment is once a worker is injured, what is happening to the average claim payments for both the medical component of the claim and what we call the indemnity or the wage replacement part of the claim. What we term medical claim severity is the average medical cost for each lost time claim. We are seeing there that in the latest year the average medical component went up about 2% and the previous year about 3.5%. So, we've been living in the last couple of years a high inflation environment where things like our groceries and some of our other insurance costs, like car insurance and things are going up at quite a higher rate than we're used to. But in workers' compensation, when we compare the medical average cost per claim, it has been tracking relatively close to the wage levels and relatively close to what we term kind of a medical Consumer Price Index (CPI). So, not exactly what we usually think of as a CPI, but we call it here, personal healthcare price index.

One of the reasons that the medical costs in workers' compensation have not gone up as much as you would think things go up in the general economy is that almost all states have medical fee schedules in place where the amounts that are paid for certain things are set up by statute. And that helps to control how much cost increase there is for medical in workers' compensation. Then on the indemnity, the wage replacement side. When a worker is injured, they get a certain percentage of their wages. So, you would think that as wages increase, then the indemnity claims severity would increase as well and it has been. So, the last 2 years up 7% and then another 5%. But again, when you compare that increase over time in indemnity versus wage inflation, it actually has increased much slower than wage inflation. Overall, when you add those two things together, the overall claim severities have been going up about 3%. I'm going to call that a pretty moderate increase in the amount of those payments.

So, let me just recap some of the things that we've seen here. The lowest combined ratios that we've seen in decades, under a 100 and now under 90 for 7 years in a row. A very slight change or increase in the written premium driven by strong growth in employment, strong wage growth, but we see loss cost decreases which are kind of offsetting that. Those loss cost decreases are being driven by safer workplaces. So, claim frequency decreasing. And then

moderate increases in the average cost per claim. And that is putting us in this environment where NCCI has been filing and expects to file decreases in the loss costs as the claim payments do not keep up with the increased premium as payrolls increase.

Rep. Matt Lehman (IN) stated a question that was not on your presentation, but it's an issue that we've had, and I've tried to work on this in Indiana is with experience modifications. We've had two situations now where someone had a claim, a large claim, not at fault in an auto accident, but it was work related. It hits their modification because it hits their workers' comp. They paid about \$60,000 in additional premium over the three years of their experience modification increase. It took five years to finally get subrogation. They got their subrogation, and no one is going back and recalculating the modification. So, what we found is there is really no mandate that you have to recalculate the mod. Well, the concern was that the carrier got all their money back, but how did the insurer, who paid out the additional \$60,000 on an experience modification that was not their fault, they didn't get their money back. Has NCCI ever looked at putting some standard in place that says if you are successful with subrogation within so many years you have to go back and recalculate their mod and refund them back any money that you collected?

Mr. Eddinger said it's an interesting scenario. I'm not aware of the time period, like you say, there is a time period where you can revise the data for up to a certain amount of time, but after a certain amount of time, I'm not aware if you can go back and do that. So, it is an interesting issue.

Rep. Lehman stated we tried to do this legislatively in Indiana, but there's always two parts of this. The other part was experience modifications driven by your claims and a lot of public contracts and large contracts will not allow you to even bid a project if your mod is over 1. So, you have some people who are very sophisticated, they're very large contractors and they're presented with a \$10,000 loss and they look at that and go if I calculated that into my mod, I'm going to have 1.02 modification, let's just pay that claim. And it's not that they're not allowed to, they can pay their own claim, but they have to disclose it which in fact could hit their mod. But they're doing this and I think it's tainting the modification process. So, we've tried to take out the bid requirement and then part of that was also with the recalculation of the mods. We hear from the carriers that they already do this, but they'll do it like back two years. So, in this case, the trucking company lost \$60,000 and would have gotten about \$25,000 back while the company was made whole. My only concern is we're making the carrier whole through subrogation. There's no time frame on subrogation. I could be successful 7 years from now and get my money back. Now that's money I didn't get interest on, etcetera. But I got all of what I paid out back and the individual who I paid that mod did not get that. That's something I guess I'd like to see NCCI maybe give some guidance to.

Mr. Eddinger said that we have been vocal and published in saying that the mod should not be used for those types of things, whether someone gets a contract. A mod over 1 does not necessarily mean that that is a bad employer or a bad risk. And so, we have tried to put some numbers behind that and some theory behind that as to why you can have a mod above 1. That is something I think if it can be handled legislatively to not allow that, we would be behind.

Rep. Tedford stated one observation that I had on this is the fact that the loss costs have been dropping over the last couple of years. It has made, in my opinion, the e-mods more sensitive to claims and now you're getting a higher mod from the same claim that you would have gotten

a couple years ago and it has made these contractors that have been under these type of provisions where they have to keep their mod under one very sensitive to that. So, you're saying that you would support any type of initiatives to prohibit that type of arrangement in a contract? Mr. Eddinger stated obviously we're not lobbyists, but we have published information on our website saying that the mod should not be necessarily misused for those types of purposes. That there are reasons why a mod above one is perfectly acceptable. And the other thing I will say is when loss costs decrease, it doesn't necessarily mean that now the mods are getting bigger. I mean everything adjusts along with it. So, that the experience mods overall should remain about the same even during a decrease in loss cost environment.

Rep. Lehman said a follow up to that is as they go through this process of recalculating things like that, one of the things that we've looked at from a claim standpoint and I'd like to know if you have data behind this. As you went through the fact that, and Indiana is no exception, we've lowered rates the last I think 11 years, create some disruptions of the market, but it's good. However, the one thing we did do 11 years ago was we capped reimbursement to hospitals because they had no fee schedules. And there were some of them that were 800 – 900% of Medicare. We capped everything at 200% of Medicare and things dropped like a rock. So, on some of these the rates or the premiums are the losses are going down, how much of it is better loss control, which there is, and how much of it is what states have implemented in some form of fee schedules? And do you know many states have a fee schedule on workers' comp? Mr. Eddinger said out of 38 states where NCCI files a loss cost, I would say roughly 36. I'm just going to throw that out there, like almost every state has some kind of fee schedule. There might be one or two that don't. When you look at the decreases that we're filing, very rarely is it due to a new fee schedule or you know, a large change. I think those changes are made all the time, we call them more tweaks here and there. But those things are not necessarily driving the decreases that we see here. It's really the experience itself.

Rep. Brenda Carter (MI) stated it's my understanding that NCCI provides a fair system of data to everybody involved. I want to know if this data is being given to the general workforce. In other words, health care providers, insurers, and even some injured workers in the system. What kind of system do you have for an output? So, everybody knows the end result of your analysis. I applaud the data, it's very good. Now I need to know if the workers are getting this data. Mr. Eddinger said the question is we get a lot of data, do we give it back? I would say, what I would call raw data, no, we do not collect data and provide raw data back to workers or to insurance departments, but obviously summarized data that you see here or even data used in research we provide back. But, it's important to keep that that information secure and private because a lot of that information is private information.

Rep. Carter said but just a general overview of what we have here, is that disseminated to average workers? Mr. Eddinger said yes, this information, by the way, we finished up our annual meeting in May where the results become available and we present that information to almost 1,000 industry people and as soon as that information is presented at our meeting, it is posted on our website where anybody can access it. You don't need a login, you don't need to pay any money. That information a lot of other useful information is available on our website to everyone.

PRESENTATION ON WORKERS' COMPENSATION PREMIUM FRAUD IN THE CONSTRUCTION INDUSTRY

Matt Capece, Representative of the General President at the United Brotherhood of Carpenters & Joiners of America thanked the Committee for the opportunity to speak and stated this issue of illegal employment practices in the construction industry is something I've been tracking since back in 1989. If any theme comes out from this presentation, I hope you understand that the status quo that we are facing in the construction industry with workers' compensation premium fraud is unsustainable and I'm hoping that this is a beginning of a conversation with NCOIL. So, how does this happen? How does a construction labor provider operating through a shell company identity that claims 4 workers at \$43,000 of payroll in 15 months get 450 certificates of insurance issued to it by an insurance broker? How does this company make \$11 million in 15 months without the insurer knowing anything about it. How does this happen? A labor provider that operated out of Tennessee into Colorado and up through Pennsylvania was finally arrested in the State of Tennessee for workers' compensation premium fraud. And when the investigators talked to him, they asked him, "well, do you ever declare your full payroll at the beginning of a policy term? What do you put down in the application?" He said, "I never tell them what my real payroll is going to be." And then he was asked, "well, what do you do when it's time to renew your policy, when the audit comes around?" And he simply said, "I just don't answer the phone. I don't set up an audit. And I just go to another insurance broker and get another policy." How does this happen? We're facing an issue in the construction industry where law abiding employers are being squeezed out of markets because they're not engaged in unlawful practices that lower their labor costs that allow them to underbid law-abiding employers.

So, what are some of the numbers? A study was done by the Coalition Against Insurance Fraud and the United Brotherhood of Carpenters as a member, of fraud in the construction industry and claim of fraud is a problem. It's a \$9 billion dollar problem. But employer premium fraud is a \$25 billion dollar problem. It's much, much more severe. And unfortunately, it seems like claimant fraud gets the bulk of the attention. Now in the construction industry, the premium fraud loss numbers to insurers are at a staggering \$5 billion dollars a year. Now this is not just a loss of premiums to insurers. This is a loss in premiums to the administration of state workers' compensation systems. Because a lot of our systems in the states are funded by assessments on premiums. In the State of Tennessee alone, that state loses \$13 million a year to fund the administration of its workers' compensation system and their Tennessee Occupational Safety and Health Administration and uninsured employers fund.

How do the contractors do it? Now the picture you see on the slide is intentional. There is a thought, an assumption, that the illegal part of the construction industry is isolated to the single-family home construction. Well, home residential construction is probably the worst of it. But what we are seeing extends to military bases, hospitals, public schools, universities, legislative office buildings, luxury condominium towers. And we're seeing this in every phase of the construction industry, every type of project, in every state in the Union. And I'm going to run through the fraud scheme and as you'll see this isn't a case where you have people that are confused about definitions of employment. This is organized crime. The construction industry is what we're calling a fissured industry, they're layers, as you know of contractors and subcontractors.

You have general contractors and owners who hire specialty subcontractors that actually do the hands on work, the excavating, the pile driving, the electrical, the HVAC, painting and flooring. And what we're seeing is a lot of these specialty subcontractors are now getting their labor through subcontract labor providers, labor brokers. And at times, these labor brokers will operate through a shell company identity. The labor brokers will 1099 misclassify the workforce. But most of the time, for every one worker that gets a 1099 who should get a W-2, two are being paid off the books. So, this is just out and out fraud. So, the specialty subcontractor will use a labor broker to supplement its labor force and it will act, if you apply your employment laws in your states, you will see that those specialty subcontractors are just as much an employer of the labor brokers workforce as the labor broker. Oftentimes, the labor broker simply recruits the labor and pays them. Especially, subcontractors who will be doing the daily supervision, even transferring from job site to job site, could even fire them and have some impact on the wages that they're paid. And in the cash pay system, you could put into this flow chart the use of check cashing stores or bunny service businesses. And a fair question that has to be asked, is the cash pay system we're seeing growing in the construction industry a way for organized crime to wash dollars? And we have seen a case of a member of a New York City crime family going down to Florida and opening a check cashing store that was being used in this type of organized crime scheme.

Now as you can imagine, workers' compensation costs are very expensive in the construction industry and those specialty subcontractors realize an incredible decrease in their labor costs which allows them to underbid law-abiding employers. And on these job sites that I've mentioned, we have seen some of the largest general contractors, construction managers, and specialty subcontractors in the country, where these types of schemes are occurring on their projects. As you can imagine there's a cornucopia of laws being violated, not just workers' comp premium fraud, but tax fraud, child labor, immigration. The system is very, very good for hiding the employment of undocumented labor that's easily exploitable. We see money laundering, mail fraud, wire fraud, labor trafficking, child labor and conspiracy charges. If you don't believe that this is a problem, take a look at this. The Financial Crimes Enforcement Network which is a part of the US Treasury Department, has issued a notice to banks and other financial institutions like check cashing stores that they need to start sending suspicious activity reports to them when they see suspicious transactions being undertaken by construction contractors because of the high degree of tax fraud and workers compensation premium fraud that they're seeing in the construction industry.

Every year, the US Department of Treasury issues a national money laundering risk assessment report. The construction industry has been cited as being prone to child labor trafficking and for tax evasion and workers' compensation premium fraud. Something I failed to mention when I got to that chart is that \$450 number in some of the more sophisticated schemes like we see in Florida, once that Certificate of Insurance (COI) is issued, that shell company labor broker operation will rent it out to other labor brokers in the region. So, this is how insurers that think it's on the risk for four people for \$43,000 worth of payroll is actually on the risk for hundreds of people with millions of dollars of payroll happening. The bad guys know what the insurers do and don't do and they're driving a truck through the opening. So, some changes needed, and we have some suggestions on what the insurance industry should be doing to play more of a role of not seeing itself being taken advantage of and stopping this problem. One thing they could do is they could start tracking the COI's being issued by their insurance brokers. This way they could catch the fraud before it becomes too large.

Right now, there is no tracking, and I don't know if I need to explain this to you, you probably already understand that COIs lack integrity and they could be easily forged. We think these insurance certificates should have some indication of the payroll being paid, being declared, because these certificates are used as a shield against liability for those upper tier contractors. They say I got this COI. I'm covered right? Everything looks fine to me. Now, when law enforcement comes around, they are focusing on that labor broker shell company operation. They're not pushing up the contract chain any of the accountability and that's why this problem is mushrooming. Because right now when law enforcement gets involved, they are disrupting the fraud scheme, they are not dismantling it. And those upper tier specialty subcontractors simply get another law-breaking labor broker to fill its shoes or that labor broker will change its shell company identity and keep on rolling. And the COI's play a role in this. So, it would be good if the COIs had some payroll amount on them. If they always had classification codes for the type of work being performed and for safeguards to prevent forgery. And how about putting a QR code on them so and so a company that's getting these certificates in order to verify that they're actually real can use the QR code to go someplace and see that yeah, it's a real certificate because we also have a problem with employers of upper tier contractors getting fake COIs or getting a COI and the policy was terminated by the holders of the certificate.

Other impactful reforms. We think insurers should ask their contractors coming in for policies, well, how do you get your labor? And since the use of labor brokers increase risk, if you're going to use a labor broker you should pay a higher premium. Also, they should start tracking bad employers. Why was that guy in Tennessee able for a decade to get another policy? Because insurers don't track bad employers. I broke my foot working for the carpenters union back in the late 90's and I'm sure if I got injured again, the insurer can go into the ISO and see that I had a previous injury. But there's no tracking of bad employers. And something else that's not on the slide that needs to be mentioned because these slides are focusing in on internal stuff. Externally to improve enforcement, we think there should be a grant funding mechanism to state district attorneys to pick up these cases. Because right now we're not seeing enough meaningful criminal enforcement. And they have a very good system in California for that.

Rep. Tedford stated when I heard your scenario it triggered me a little bit because I've seen exactly what you've talked about here. Some of the comments and some of the fixes as far as the certificates of insurance, is that certificate that you're requesting being sent that has a payroll was that from the insurance broker or the labor broker, so to speak or all certificates of insurance through the industry? Mr. Capece said when the specialty subcontractor wants to see a COI, the labor broker will get the COI from its insurance broker and give it to the drywall contractor or concrete contractor is that you're asking? Rep. Tedford said what I'm trying to make a distinction from is who is sending this certificate is it the insurance brokers who is sending the certificate who's not going to have necessary knowledge about the payroll unless given it by the underlying contractor themselves. So, what I'm suggesting is if the fraud is coming from specifically labor brokers, are you suggesting just those handling the insurance for labor brokers are to do that? Or just for throughout the industry as a whole to list payroll on certificates of insurance? Mr. Capece stated if you want to focus just on the construction industry, that would be a good thing to list the payroll. And insurance brokers have been arrested as part of these schemes. Unfortunately, there is a crop of insurance brokers that do this as part of their business, get involved in these schemes as part of their business.

Rep. Tedford said do you know if there is among the property & casualty insurance industry, a discussion or a push to create a database of contractors who are refusing to respond to audit? Mr. Capece responded no but it should be looked at. And on the QR code thing. These fixes, this is stuff I'm not making up. I've been doing presentations like this for about a decade. This is stuff I'm hearing and the audit side as well as from insurers.

Sen. Arthur Ellis (MD) stated this past session I was the primary sponsor on legislation to attack one part of this problem. Going in, I had a lot of support from the unions and by the time we got to the hearing, only one union showed up to testify because the word went out to not show up to testify against this bill. This is a huge problem, wage staff, premiums in this space with wage brokers and the contractors. It seemed like there was a fear among the unions to really go in and be forceful and supporting legislators who want to attack this problem. Have you seen that particular aspect of what I saw? And if you have, what do you think are the reasons behind it? Mr. Capece said I can't speak for other labor organizations. I know I've been hired specifically to focus on this issue. And I know our carpenter regional councils are focused on this issue. And if you're looking for a friend to tackle this problem. We're all in. So, contact us. This is an existential problem for us. When you see contractors working on legislative office buildings and this is happening. You know, something is terribly wrong.

Rep. Carter stated I come from the labor movement, and this is disturbing to me to hear that this is going on. What kind of effort is being made to make sure that the workers understand what's going on? Because they're impacted by these premium hikes and these shell games, ghost policies and everything else impacts their safety. And safety is number one. What efforts being made to make sure that the worker understands what's going? Mr. Capece said we are on thousands of construction sites a week talking to workers and we talk about this to the workforce. And I know we're doing our darndest and we have lots of public information available on this for employers to look at and workers. We have Spanish versions of what's on our websites. We're out there spreading the word.

Sen. Larry Walker (GA) stated in Georgia, and I don't know if this is nationwide or not, you can go on our State Board of Workers' Compensation's website and verify workers' comp coverage by doing a search on the name of the employer. And it's real time. A certificate is just a snapshot in time, as you know, and policy could cancel the next day. I think we endeavor to let the certificate holder know but that's very hard to do. But this is a real time verification of coverage. It seems to me at that point it's on the insurance carrier to do a good audit and verify payrolls. I think in Georgia the carriers ought to ask for 1099s and all that stuff when they do their audit and if the company, the insurer is going to be just totally fraudulent and be a criminal about it and dishonest I don't know how much you can do. Even if you legislate stuff, you can't legislate people, you know, are going to break the law no matter what you do. But the labor unions in Georgia are very much pushing for the type of things you're talking about, and I have discussions with them every session. But I think our system in Georgia is working pretty well. There could be more surprise type audits on companies from maybe the Department of Labor or something to see if they're just totally violating all kind of laws as far as whether they're considering their people, you know, independent contractors or employees and we have kind of a seven point thing to look at and determine whether they're an employee or not.

Mr. Capece said if for instance our suggestion that the insurers be notified of the number of certificates going out would certainly queue them up a lot earlier. And I hate to say it, and please don't take offense but Georgia is one of the worst places for this problem in the country.

And the enforcement level of the law in this regard not just in Georgia, but in other states it hasn't proven to be very effective. The status quo is unsustainable for the law abiding part of the industry.

PRESENTATION ON DEVELOPMENTS IN THE CALIFORNIA WORKERS' COMPENSATION INSURANCE MARKETPLACE

Rena David, Senior Vice-President, Research & Operations, CFO And Treasurer at the California Workers' Compensation Institute (CWCI) stated I'll be focusing today primarily on trends we've been seeing in pharmaceuticals and 5 years out what the impact has been since the adoption of the California formulary. I'm going to start just by describing a little bit about CWCI. We are a nonprofit research institute and our goal is to improve the California workers' compensation system. You can see we've been around since 1964, so I guess we haven't accomplished that yet. I also wanted to make you aware of our website where we have both public and member only research on a variety of topics I'll be getting into. As legislators and your staff, you are welcome to give us a call and get copies of our member only research. We like to support the legislative efforts even if it's not just in California. So, you're welcome to come there. We also have a repository of all regulatory activity that's taking place in California, every round of hearings and comments. And that's open to the public. So, you're welcome to go there just to see how California has approached different topics.

We also have on our website research that we've done recently and back in years. What we focus on is claim reporting activity, trends in average payment, and medical treatment. In particular over the last year, we've done research on inpatient utilization. Especially the shift of spinal surgery and major joint replacement from the inpatient to the outpatient setting and I'm not sure if that happens countrywide, but it's quite accelerated in the last couple of years in California. We also conducted a major study on cumulative trauma claims. Which my understanding is a California issue, but I invite you to look at that report. We also often look at regulatory or legislative change and try to measure the impact some of which I'll be talking about today on individual proposed legislation and then our new medical legal fee schedule.

With that as background, let's go ahead and go into the California formulary. In October of 2014, the institute did a study where we modeled California utilization against two existing formularies. The Texas formulary and the Washington State formulary and just measured what the impact would be had California had that into effect. Both were based on national direct NDC which is a particular identifier for a drug that even includes manufacturer. With Texas they allowed more drugs into their formulary and with Washington, they were quite exclusive, really eliminating many drugs that typically weren't used for workers comp injuries as well as some higher priced drugs. The conclusion from both analyses was that there could be quite an impact of a formulary for California and not necessarily just related for that reason from our report, but also from other stakeholders. In 2015, AB 1124 was passed that proposed or mandated the implementation of a statewide formulary for workers' comp and we had two intended goals. The primary one was to ensure that the medications provided followed our treatment guidelines and were evidence based. It also intended to assist with frequency, duration and strength along with the appropriateness of the drug and you'll see I'm not sure if it quite addresses those areas. And then the second intent was to reduce friction costs associated with the provision of pharmaceuticals in terms of UR independent medical review with the hope of reducing both the costs and delays associated with that.

So, some of the key aspects of the formulary, the primary one I'm going to be discussing a fair amount today, is that it is not based on that National Drug Code (NDC) that gives you manufacturer frequency, strength and dose. It's based on just the drug ingredient name. So, it is not as specific as the Texas and Washington formularies. To be on the formulary, it needs to be mentioned in our medical treatment utilization schedule which is our treatment guidelines for California. And then once they're in there, the drugs are either exempt from utilization review based on the drug ingredient or nonexempt. Then we have everything else that's not on the formulary. In the traditional group health world, if it's not on the formulary you'd really have to go through quite an appeal process to prescribe that drug, the initial thing would be not to reimburse it. But in this system, the only difference between not listed and nonexempt drugs they both have to go through prospective UR. But for not listed because they are not part of the treatment guidelines, theoretically, the request needs to bring with it the evidence that this is needed for the patient and so higher level of requirement to get approved. The first few days of treatment has some exemptions to UR as well as perioperative drugs. So, what do we see five years out? In green is the share of utilization that was for exempt drugs and then in kind of the gold color is this year for nonexempt drugs. You can see since the implementation in 2018, we really saw a trend of shift between the use of exempt drugs and nonexempt drugs. Not listed stayed pretty flat going down a little bit. So, ultimately, the goal of exempting more activity through UR was achieved. Now there are other factors that come into play on the shift. But I'll talk about that in a moment.

When you look at the payment side, you can see that the share of dollars for nonexempt drugs went down as the share for exempt went up and the exempt tend to be lower price drugs generally. But you can see that the brownish line there where it says not listed, even though they only represented 12% of the volume in 2023, they represented 45% of the total drug spend in that year. So, those drugs that are really not in the treatment guidelines and in theory shouldn't be part of treatment, they do represent still a large portion of the dollars. As we look at drug utilization in general by drug group, we've seen a tremendous change in the mix of drugs prescribed. Opioids were at one time almost 45 - 50%, of the utilization. It's now down to about 30%. So, a tremendous change and really the treatment has shifted from opioids to anti-inflammatories.

I'm going to take a little side note here on our fee schedule in California. In 2004 there were reforms to have workers' comp payments be based on the Medi-Cal fee schedule, which is our Medicaid program in California. That caused a considerable drop in the average unit price paid for any given drug. They also allowed for generic substitution unless the prescriber said dispensed as written. And it had some limits on repackaged drugs. Then in 2012 they put caps on pharmaceuticals dispensed by physicians and actually, pending right now our new set of regulations to adopt some additional changes that Medi-Cal made in terms of a two-tier dispensing fee and other ways of pricing the drugs. I bring this up because in many formularies there's a dual purpose. First of all, just having only a certain set of drugs being prescribed as appropriate drugs. But it's also to limit costs where if you have the same drug from different manufacturers with same efficacy but different pricing, you would only want to prescribe the lower priced drugs. That's true of group health and other workers' comp systems, where price is a factor in the formulary. In California that's not the case. It's strictly the ingredient and because it's not NDC based, there is no tie between choosing what's on the formulary and a lower versus higher price drug doing the same thing. We've done several studies on high-cost drugs within the system, this slide is an example of anti-inflammatories. Of them there are certain drugs that

are just 1% of the volume but represent that first drug 33% of the anti-inflammatory costs. This is an exempt drug, and it has the same efficacy as any anti-inflammatory. It's just it's not part of the Medi-Cal fee schedule and therefore it has gone from a \$169 to about \$1,500 a script. Pricing again is not part of the California formulary. It is impacted by the fee schedule, but there are a lot of loopholes in this category especially in dermatological and we looked at other drug groups as well. So, you can see more of our studies on that.

Back to the trends we've been seeing in pharmaceutical treatment. It's just incredible every time I see this graph, that tremendous change in practice in the use of opioids. We were again up to the almost the 50% level back in the early 2010's and now we're down to 5% of indemnity claims having opioids as part of the treatment plan. The same is true of the number of scripts people get once they start using opioids as well as the strength of those opioids. We think whether that is actually due to the formulary and the fact that opioids were nonexempt and really demanded more scrutiny perhaps than before or just the general trends and treatment. I think it's probably both. But clearly this trend in drops in opioid use continues. And we'll show you some statewide data across pairs in a moment.

Back to the second intent of the legislation. It was to reduce friction costs. We did see an immediate drop in the number of disputes going to the independent medical review process after the implementation of the formulary, about 30% of the UR denials go to independent medical review in California. And again, there was an immediate effect. The fact that not listed drugs can go through as well limits how much that can go down. Also, the share pharmaceuticals within the independent medical review process went from 50% of the disputes to 33%. All along for the last from 2005 through 2023, we've seen that once a pharmaceutical request goes to the independent medical review over 90% of the time, really throughout the time period, those requests have been upheld by the independent medical reviewer. And just another point is that opioids as a share of pharmaceuticals has also dropped over the time period. So, I'm going to end with a discussion of some research we've just embarked in on using the statewide PDMP which is it's a monitoring program for controlled substances. Through this data, we're able to look at use of opioids across payers and we are especially interested in looking at well are people stopping opioid use in the workers' comp area and getting it through group health or other means? So, when we see the drops and workers' comp, do we also see it in other areas? We're just starting the research. We'll have this published probably in the next few months. But I just wanted to go through a few statistics here.

Again, using statewide data, not just our own database you can see the tremendous change in the opioid use in California for workers' comp and then comparing that to total California. Including group health, you know, California is about 1 - 2% of the medical activity in California. But you can see that all payers in all sectors opioid uses dropped 30% from 2017 to 2022. But for workers' comp, the reduction has been even greater. Almost double that. When we look at that by the acuity of the patient whether they just need it for a short time, a middle timer on chronic use, again, tremendous drops for all payers, but more so in comp. And then here is just the start of our look at overlaps.

In 2017 data we found, unfortunately for the same date of service, we found about an 8% overlap in the days on opioids from between, you know, somewhere workers' comp only and then other payers they were also receiving pharmaceuticals or opioids for that same day for that same patient. So, that has dropped down to about 3.5% in 2022. But it's something we'll be looking at and it's the PDMP itself is supposed to prevent overlapping treatment, but even if it

was just the transition period between workers comp coverage and other, it does seem to be that people are having treatment paid for in the comp system and then again additional opioid treatment from these other payers. We'll have more on that over the next course of the next couple of months.

In conclusion after the formulary was implemented, there's definitely a shift in patterns from drugs exempt to drugs exempt from UR from the nonexempt categories and just the tremendous change in practice with the decline in opioids. I think we have to think it was somewhat accelerated by the implementation of the formulary and perhaps the higher scrutiny to those opioid prescriptions. And then in general, we're seeing it across all payers this drop in opioids. And in our prior research, we did find and especially for less acute treatment like low back pain, the introduction of opioids actually worsened the outcomes for the injured workers. Also, we did see the decline in independent medical review that the legislation had hoped for. And just another, again, if you don't have a formulary and you're thinking of implementing it, when it's not based on NDC, there's very little controls you can do over price. Over the especially within the same category, the same efficacy. If you're not setting the restrictions or the view on a specific drug based on the manufacturer and the dose and all of that, it just limits how much it can be used for cost controls in addition to just efficacy.

Rep. Lehman asked has there been any study done as to what's been the impact of medical marijuana in that space of opioid and pain management? Ms. David stated this is a difficult issue. We did do a kind of a study of marijuana laws across the states, but because marijuana has been a controlled substance, I think it's Class 4 if I have that right. It can't be studied in a clinical setting and even the studies that were done in the past had to use like three strains that were developed by the National Institutes of Health. Also, because we can't use the banking system to pay for marijuana even though it's legal in California. It's not legal federally for a bank to be used in the payment of it. We just are restricted on how much we can use. There has been some research on methadone. I think some of the research abilities have been loosened up in recent years. If a payer is even paying for marijuana for particular patients that is really going to show up in our data as just a cash payment reimbursement to an individual worker and we can't identify it in the administrative data because it doesn't have a fee schedule and isn't identifiable because of those federal laws. So, it would be great to measure, and hopefully that will change in the future.

Rep. Lehman said I think it would because in Indiana we do not have medical marijuana do not have recreational, we are an island. Ohio, just expanded, Michigan's expanded, Illinois expanded. Kentucky, I think is medical only. But I would say work comp becomes the issue because I'm a border community so I'm 6 miles to Ohio line. I can have somebody who has a legal prescription, even now can use it recreationally, they get injured in Indiana. It's illegal. They could lose their job. I don't know how we're going to manage this data around opioid and pain management when you're seeing more and more of pain management go the route of medical marijuana. And yet, as a schedule one drug federally, and then I think they're moving to take that off the schedule one so you can begin to do these studies, but I think it's marijuana sometimes really tipping the scale when it comes to workers' comp. To the extent we just don't know. Ms. David said I would say that just the combination of Advil and Tylenol instead of opioids has become more of the practice norm even after surgery. And I think that alone has proven to be at least equally effective. With marijuana, I think the other challenge is to have it be regulated, it's a little bit less able to control the quality is my understanding. So, I think those

will all be the challenges, but I think that definitely is in theory something that needs to be studied for pain management. I think there hasn't been enough study to say whether that's true or not. That it's an effective treatment.

CONSIDERATION OF RE-ADOPTION OF NCOIL WORKERS' COMPENSATION DRUG FORMULARY MODEL LAW

Sen. Theis stated last on our agenda is the consideration of the readoption of the NCOIL Workers' Compensation Drug Formulary Model Law. You can view the model in your binders on page 163 and on the website and app. Per NCOIL bylaws, all model laws must be readopted every 5 years or else they sunset. This model or something substantially similar to it has been adopted in 11 states.

Brian Allen, VP of Gov't Affairs at Enlyte Pharmacy Solutions thanked the Committee and stated I have about almost 40 years of experience in the insurance world and workers' comp, the last 20 years spent advocating around the country for workers' comp issues primarily around pharmacy and medical care to injured workers. I am a former State Representative in Utah so although I am a recovering politician, I'll be remarkably brief. I just want to just enlist your support for reauthorizing the Model Law. About a third of the states have adopted some form of a formulary. We are very supportive of that. We have seen in our own data, and I'll echo what Ms. David said, that we see a reduction of opioid use. We also see just an overall reduction of drug use. And which we think is important. And one of the goals that I think should be in any workers comp system is that we're delivering the right care at the right time for the right reasons. And a formulary as it relates to pharmacy care does that. And there are things that you can do with the formulary to help reduce some of what we see as outlier abuses. Like for example, in Texas, which introduced its formulary and was going along really well. We suddenly started to see an increase in very expensive topical creams. We were seeing bills for \$14,000 or \$15,000 for a month supply of a topical cream. Which is ridiculous for something that you can probably buy at the local drug store for \$20.

We were able to use the formulary to implement some restrictions to make sure that the prior authorization is required. There's some checks and balances that happen up front before that happens. So, there's some very positive things that come from using a formulary and it's kind of funny we're here advocating for this because we make our money when a drug is dispensed, but yet formularies actually reduce the number of drugs that get dispensed so, we're sort of cannibalizing our own business. But the reality of it is just the right thing to do. I mean, the bottom line is it does save costs, if it's done appropriately, you can save costs. But the bottom line is on a drug formulary, you're doing the right thing for the injured worker. And we think that's important. And we support that. And we urge your support for the readoption of this model law.

Hearing no further questions or comments, upon a motion made by Rep. Carter and seconded by Rep. Michael Meredith (KY), the Committee voted without objection by way of a voice vote to readopt the Model.

ADJOURNMENT

Hearing no further business, upon a motion made by Sen. Walker and seconded by Rep. Nelly Nicol (MT), the Committee adjourned at 10:30 am.