NATIONAL COUNCIL OF INSURANCE LEGISLATORS
WORKERS' COMPENSATION INSURANCE COMMITTEE
2024 NCOIL ANNUAL MEETING – SAN ANTONIO, TEXAS
NOVEMBER 22, 2024
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee met at The Westin Riverwalk Hotel in San Antonio, Texas on Friday, November 22, 2024 at 2:15 p.m.

Michigan Senator Lana Theis, Chair of the Committee, presided.

Other members of the Committee present were:

Sen. Justin Boyd (AR)
Rep. Toby Overdorf (FL)
Rep. Brian Lohse (IA)
Rep. Matt Lehman (IN)
Rep. Rachel Roberts (KY)
Rep. David LeBeouf (MA)
Rep. Brenda Carter (MI)
Rep. Nelly Nicol (MT)
Sen. Jerry Klein (ND)
Sen. George Lang (OH)
Rep. Mark Tedford (OK)
Rep. Dennis Powers (TN)
Rep. Lacey Hull (TX)
Del. Walter Hall (WV)
Del. Steve Westfall (WV)

Other legislators present were:

Sen. Josh Carnley (AL)
Sen. Clint Penzo (AR)
Rep. Rod Furniss (ID)
Rep. Peggy Mayfield (IN)
Rep. Deanna Frazier Gordon (KY)
Del. Mike Rogers (MD)
Sen. Roger Hauck (MI)
Sen. Mark Huizenga (MI)
Sen. Michael Webber (MI)
Sen. Jeff Howe (MN)
Rep. Bob Titus (MO)
Sen. Dennis DeBar (MS)
Sen. Hillman Frazier (MS)
Sen. Walter Michel (MS)
Sen. Joseph Thomas (MS)
Rep. Greg Oblander (MT)
Sen. Bill Gannon (NH)
Rep. Ellyn Hefner (OK)
Sen. Roger Picard (RI)
Rep. Joe Solomon (RI)
Sen. Mary Felzkowski (WI)
Sen. Eric Nelson (WV)

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Will Melofchik, NCOIL General Counsel
Pat Gilbert, Director, Administration & Member Services, NCOIL Support Services, LLC

QUORUM

Upon a Motion made by Rep. Brenda Carter (MI) and seconded by Sen. George Lang (OH) the Committee voted without objection by way of a voice vote to waive the quorum requirement.

MINUTES

Upon a Motion made by Sen. Lang and seconded by Del. Steve Westfall (WV), the Committee voted without objection by way of a voice vote to adopt the minutes of the Committee's July 19, 2024 meeting.

PERSPECTIVES FROM THE BENCH ON STRUCTURED SETTLEMENTS

Sen. Theis stated that we'll start today with a continued discussion on structured settlements. Before we begin, there's a little bit of background here. NCOIL has an existing Model State Structured Settlement Protection Act (Model) which you can view in your binders on page 107 and on the website and app as well. The model was amended during the summer of 2022, and since that time, there were some requests to have the topic back on the agenda to further educate the committee on structured settlements. We did discuss this topic at our spring meeting in April, and now we're going to have some new perspectives on the topic as we're going to hear from some presiding judges. We'll start by hearing from David Rose, VP of State Gov't Relations at Aflac, speaking on behalf of the National Structured Settlement Trade Association (NSSTA), alongside The Honorable Victor Lopez, a New Mexico District Court judge.

Mr. Rose thanked the Committee for the opportunity to speak and stated that MetLife and other members of the NSSTA are grateful for the continued discussion of the Model. And we especially thank Sen. Paul Utke (MN), NCOIL Treasurer, as this is something that's near and dear to his heart as he's worked on it closely in Minnesota and here at NCOIL. We look forward to continuing the discussion at NCOIL. Today, we're going to hear the perspective of the judiciary. I am pleased to introduce Judge Victor Lopez, a district court judge in New Mexico. Incidentally, the original sponsor of the Model was former New Mexico Senator Carrol Leavell. Judge Lopez's biography is before you so I won't go into that in detail but I will just point out that as a part of his judicial work over the years, on a monthly basis he considers at least two to three petitions to approve structured settlement transfers.

Judge Lopez thanked the Committee for the opportunity to speak and stated that as a district court judge, I regularly hold hearings to try to determine whether a structured settlement payee, which we can also call a transferor because they're the ones that are going to eventually or possibly transfer their settlement to a factoring company, should be allowed to receive from the factoring company a deeply discounted payment in exchange for the transfer of these benefits to the company. I'm here to provide the committee with an understanding of the information that judges should be provided so they might make an independent determination as to whether it is in the payee's best interest. That's the fundamental concept that we consider is what is in their best interest. It's a sort of paternalistic role. We don't have a lot of information given in this process. But let me put it in this way. I was having breakfast this morning and a person sitting next to me was talking about an auto accident she had recently that required her to purchase a new vehicle. She was fortunately not injured in the accident but if she had been injured and if she had sustained damages of say $1 million dollars to compensate her for her injuries, her settlement might have been placed into a structured settlement which would include a future stream of fixed periodic payments. Those are the kinds of situations that we deal with and that this statute deals with. Because after you receive such a settlement, factoring companies might learn about the accident or they might solicit her generally in the media with regards to selling her settlement rights. Normally, you receive a long stream of payment over many years. The idea there under federal law and under state law is to make sure that those funds are not dissipated over time. And so there are some built-in protections but possibly one of those

protections is having the judge review the situation. But a factoring company might learn about this and offer to purchase the rights to meet immediate needs.

I've had many people come before me where they need to repair a transmission or pay credit card debt or pay down a home or pay for a down payment on a home. The reasons are quite varied. At this point, after the original tort case, the victim has probably discharged her personal injury attorney and just hears from the factoring company, either by telephone calls, internet, or television commercials. I have seen requests where factoring companies might offer to buy a $1 million dollar structured settlement for pennies on the dollar, some as low as 50% or 30% of the future payout if received over time. And these tort victims can only see dollar signs and are happy to get a fractional payment to meet immediate needs rather than having the patience to wait for the stream of payments to be paid out. This is an unfortunate situation in many cases because it's hard for the judge to have enough information to know whether this makes sense or not. The primary problem with structured settlement transfers in this area is the disparity of bargaining power between the injured tort victim and the factoring company that seeks to purchase the victim's structured settlement. The factoring company has an attorney while the victim has neither an attorney at that point and also doesn't have an advisor or even a guardian ad litem to speak up in my court about the advisability of the transfer. The judge serves in the paternalistic role of deciding whether the proposed purchase is in the tort victim's, and I'm going to call them the tort victims, but we can also call them the transferor, best interest for that money to be paid out and for them to take such a big hit on the value of that. Essentially, the judge is there to make a best interest decision with his or her hands tied behind their back. The factoring company's attorney only presents the bare minimal facts about the terms of the transfer but says nothing about the tort victim also known as the transferor. We sure could use an option within the statute and I think NCOIL is talking about this, to appoint an advisor or a guardian ad litem to review the case before the hearing and provide the judge with a report so that we can prepare for the case and be prepared for that and ask questions.

In New Mexico, we do have the authority to appoint guardian ad litem's prior to holding a hearing on approving settlements involving minor children or incompetent adults. Usually, the guardian ad litem will recommend approval of the settlement, but other times they may say no because of lack of information, medical care issues, or it's just inadequate to fairly compensate the minor child. Certainly, judges tasked with deciding structured settlement transfers can use such a procedure to appoint guardian ad litem's and review their reports in advance of the hearing to make sure that we consider necessary facts in advance of having to decide the petition. But we need the statute to be amended to allow the judge the discretion to make such a guardian ad litem appointment paid for presumably by the transferring company. Under federal law, a fundamental goal of structured settlements is to set up a stream of future payments to protect against the victim becoming a burden on the social benefit and medical programs that we have. The problem is that judges only hear from the factoring company's attorney at our hearings, without input from a professional to present toward victims' interests. For example, how did the original accident occur? How was the victim injured? Was there a head injury involved that might affect the victim's capacity or decision making? Does the victim have dependents, children, a spouse, a mother, for example, who would be affected by a transfer of the negotiated future payment stream? The payee's current and future living medical and other needs, and those of the dependents need to be considered. Did the payee attempt to do prior transfers of structured settlements? Because we do see a lot of repeat business in this area, and some of these initially are turned down. And so they try another judge by refiling. And these victims normally do avoid these discussions when that does happen. Judges just don't know why prior petitions were denied. But it would be helpful to have that information so that

we can figure that in and put that into our overall decision making with regard to maybe the other judge had a real good reason for denying it at that point. We'd like to know that.

And so the judge just does not have the facts at this point. During the hearing, we hear from the injured victim only vague recollections of the past incident. But they will explain how they need the money today to fix a car, to start a business, or to pay credit card debts. Judges need sufficient information in the petition process and the guardian ad litem report testimony including the victim's sworn testimony in affidavit and other essential factors if we're going to be able to engage in the meaningful best interest review which is hard to do at this point. We're just not receiving the information and some inexperienced judges might decide to accept what little they get while other judges may just deny the petitions. And this process, in my view at least, makes no sense. So I'm here today to ask you to bring some reason to the process and to consider amending the model to help improve the fair administration of justice by getting judges more information so that we might make the best interest decision guided by necessary facts at hand.

Sen. Bill Gannon (NH) stated I don't like the best interest standard in this case. I would think as long as I'm a competent person then it's ok. If I was incompetent or you had some reason to think that I was under duress or something, I could understand you're getting involved but if it's my decision why shouldn't it be my money to take and do as I please? Judge Lopez stated that's true and that's one of the views that is being presented, especially in the advertisements on television. I hear it all the time. But what you have to realize is that there's a strong lobby there that really promotes this process because this is a billion-dollar industry and so the person that we receive information from, well we receive very little information and we hear them at the hearing. These hearings are by telephone or by video generally and so you don't see the whites of their eyes essentially and it's hard to judge their credibility as there's no adversarial process involved where you have an attorney on one side or the other developing the facts. You just have one attorney and they're the attorney representing the factoring company. So it's hard for the judge to assess that. But the federal intent originally was to make sure that the stream of payments were going to be sufficient to carry this person into the future and that is totally defeated by allowing these payments to be terminated before the time and at a hugely discounted rate. That is the problem. It becomes a social problem.

Sen. Theis stated that we're going to wait on other questions until the rest of the speakers are finished.

Brian Dear, Executive Director of the National Association of Settlement Purchasers (NASP), thanked the Committee for the opportunity to speak and stated that NASP, as many of you are well aware, has been working with NCOIL and others during the recent legislative cycles in Minnesota, South Carolina, and other states on this issue. And I certainly understand some of Judge Lopez's perspectives. Before going further, I did want to touch on the best interest standard and the comments made by Sen. Gannon as it is important. And one of the things I think is very important that we never forget on these types of cases is that every single one of these cases involving one of these structed settlement transfers is someone's story. Every person comes from a different walk of life. You have some people involved in these transactions who are injured in an accident, some minorly, some severely. You have some people who are receiving these structured settlements as a result of a wrongful death case. And we have people in these transactions that come from all walks of life. In this last week, I had a person here in Harris County on a case that one of my clients brought to court and the payee in that case was an attorney. She had her own consulting business. She entered into a transaction to sell a portion of a structured settlement that she received as a result, unfortunately, from the wrongful death of her mother in a plane accident. And after essentially

exploring her options, she discovered she could get a far better deal selling her structured settlement at an 8% rate than she could from hard money lenders to expand her business.

There's a lot of talk about people taking advantage of folks in this industry but I do want to make sure that we focus on each individual because every person's story is different. We have people who absolutely fall on hard times that are trying to lift themselves out of a difficult situation. We have very sophisticated people involved in some of these transactions who are lawyers, who are doctors, who are accountants. Those are people who do not necessarily need to have a guardian ad litem review everything about their lives and tell them what's best for them. Now, in certain circumstances, when the court finds it appropriate, we absolutely support an ad litem appointment and that's something that judges have the existing ability to do. And if a judge wants to have an ad litem, they can absolutely appoint it. Our clients are the people who are paying those fees. I do want to make sure that everyone is very aware that's an existing power judges have right now. I don't think it's something that we need to necessarily force into a statute. There's a lot of people who focus on pennies on a dollar. This is a very hyper-competitive industry. There are many companies in this space. And we supported an amendment to the NCOIL model suggesting that all payees get multiple offers before they enter into an agreement. We have tried to do as many of those safeguards we can to make sure people are educated that they have a lot of options here. Similarly, with the comments about prior transactions, in the existing NCOIL model right now, there are disclosure requirements for prior transactions. There are disclosure requirements to make sure that people are aware of all the people's dependents and all of that information. So the NCOIL model has a lot of protections right now that address some of those very concerns. I'd now like to introduce The Honorable Omar Maldonado, a County Court judge in Hidalgo County here in Texas.

Judge Maldonado thanked the Committee for the opportunity to speak and stated that in 2014, I became the first elected judge to serve in County Court No. 8 in Hidalgo County, Texas and it is still where I preside today. I have overseen and currently oversee criminal, civil, and family matters and I have directly overseen countless proceedings involving the transfer of structured payments. As such, I have become familiar with reviewing the sale of such payments and fully understand all aspects, positive and negative, associated with selling a portion or all of the individual structured settlement payments. I've seen the benefits of selling these payments and how it affects individuals. Often, this is one of the largest assets that people may have and it is my duty as a judge to oversee and determine after reviewing the facts that any of the sale is in the individual's best interest. That is always how it has been and the Model adopted by NCOIL in 2022 provides all the resources and tools for any member of the judiciary to be able to fully and effectively review the facts to determine whether the sale is in the best interest of the person seeking to sell their structured settlement payments. Our law here in Texas was adopted based on previous versions of the NCOIL model and in compliance with the federal law requiring a court to make a best interest determination. In my opinion, there is no need at this time to adopt additional changes to the 2022 NCOIL model. When Congress authorized these sales, they placed the responsibility on the court to gather the facts and information and to decide the best interest and I believe that is how it should remain.

Every member of the judiciary who reviews these matters has the ability to personally inquire about the facts surrounding the individual circumstances to determine if it is in their best interest. As a judge, I am free to appoint a guardian ad litem or another advisor to represent the individual seeking the transfer if I, through questioning and reviewing the court's filing, determine that there is a lack of capacity to adequately determine if the sale is in their best interest. In the case of a minor, the appointment is wholly of course warranted. However, not all individuals warrant such an appointment. When Congress enacted the federal law requiring

such sales, they placed the burden to make these findings solely on the court. And it is the judiciary's duty to make the finding and to avail itself to any civil procedures necessary to make that finding. Therefore, at this time, I would urge you to not adopt any changes and to review such needs when scheduled for review in 2027. And by doing so, it allows the members of NCOIL the opportunity to consult with members of the judiciary to see if any additional changes are of course warranted. I was having this conversation with Judge Lopez earlier and we were talking about how many cases I specifically handle. I am a court of general jurisdiction. On an average day, we handle about 50 criminal cases and another 20 civil cases. So about 70 cases a day. And we handle that in a matter of about three hours. Every day I make decisions that I have to use my gut instinct. And it is our job to do that. And with the experience that I have over the last ten years, I feel like I have been very proficient in doing so. Whether a person's mental competency is an issue is something that I can determine within seconds sometimes in particular cases, especially in criminal cases. This is no different. I think that if we take that ability away from judges, I think that we're basically stripping them and us of what we train ourselves to do every day. And so I just wanted to make sure that you all understood that as judges, we handle cases every day. I am a court of general jurisdiction. We hear hundreds of cases on a weekly basis and decisions are made that often involve these type of decisions about what's in the best interest of the litigants and the parties that are in front of us.

Rep. Brenda Carter (MI) asked what kind of protections are in place to ensure that the structured payment settlements are in the best interest of the payee and their dependents? Mr. Dear stated that in each of these cases, and I represent a lot of these companies, what we generally do and when we're making our presentation to the court is I solicit questions directly from the person involved in the case. I will typically give the court a very brief overview of the transaction, but it's not my story to tell. It's the person who's involved in that story to tell. And we will go over everything from their age, if they're married, if they have any children, if they're working, if they're in school. I've spent quite a bit of time letting the judge know this stuff because this is typically the judge's first introduction to a person. As Judge Maldonado mentioned, they're kind of used to seeing a lot of people over time but I always want to make sure that the court has a background of who they are, what they're doing, if they're working, if they're recently out of work, if there's someone who was injured in an accident and can no longer work - we always elicit that just because that brings in a little bit more of a need for a judge to pay attention in those cases. As opposed to others like when I have an attorney who owns their own business. Pretty early on, you get to figure out where do the courts need to be focused at to make sure they're getting that information. We will tell them through questions to that person. We want to make sure that the judge has the answers about that person. We want to give the judge information of who that person is, what's going on in their lives. That will then turn into what was the underlying reason that they're receiving this money because there are certain cases that's a wrongful death case or a case where I was bit by a dog and I've completely recovered from those injuries. There are some people who still have issues and we elicit that so that the court knows. Because again, that brings an extra little cue to the judge to put a little bit of more kid gloves on it.

We'll go over the terms of the transaction. We'll spend quite a bit of time on what they're paying and using the money for. It’s not necessarily required, but a question I always try to ask is, what alternatives have you looked at outside of this transaction before you've gotten to this point? Under the NCOIL model, our clients are required to advise people that they have the right to go speak to a lawyer or a financial advisor if they want to choose to do so. In some states it is required that they do so before they move on. I'll ask if they've done that. And then if they haven't done that, I'll then make sure they understand. I'll always go to the fact they understand I'm not their attorney. I obviously can't give them any kind of legal or financial advice and that

they absolutely have the right to go talk to a lawyer or financial advisor if they want to do so. And I will always cover that even at this very moment in this hearing. If you want to take more time and you want to take a pause to go do that, you absolutely have that right. So we cover all of those things. If someone's done prior transactions, I will bring those up because I want the judge to know because we do have repeat sellers. Some people sell once and they're done. Some people will occasionally come back. I had a very sweet lady who had completed a number of transactions. Unfortunately, her daughter had some criminal issues. She ended up having to take care of her grandchildren, and that brought a lot of other necessary things that she never expected to have to deal with. Her last transaction, she said she'd taken care of her grandchild and she never expected to and had never been 20 miles outside of Dallas County and she said she wanted to go on a vacation as she always wanted to see Las Vegas and wanted to do it while she still could. And I walked up to the judge, whom I know and anytime she has a concern she routinely appoints an ad litem, and I said before we get started I'm going to let you know that this lady wants to do this transaction because she wants to go on a cruise and she wants to go to Las Vegas. I'm going to tell her story now, and then you're going to probably say yes to it. And she did. So we have people from all walks of life and when I say every person's story is different, it is and we have to be cognizant of that.

Sen. George Lang (OH) stated to Judge Lopez, you talked about some states that have put guardians in place. Who pays for that? Is that the taxpayer? Judge Lopez replied no. It's usually the defendant who is offering the settlement and that's in the context of minor settlements. So, it's whether it's the insurance company or the attorneys for the defendant who caused the injury.

Sen. Theis thanked everyone and stated that if anyone has any further questions on this topic, please reach out to me or Sen. Utke.

PRESENTATION ON THE STATE OF WORK COMP COVERAGE FOR MENTAL INJURIES

Michael Duff, Professor at the St. Louis University School of Law, thanked the Committee for the opportunity to speak and stated that what I want to do is summarize and update how mental injuries, of which post traumatic stress disorder (PTSD) is one, are covered throughout the country but I think more importantly is to give you my sense of why mental injuries are being covered at all. That is really the hardest thing to be thinking about. A lot of things happen in the law because there are legal movements that develop and there's not a better explanation than that. So if anyone in this room were to say to me workers' comp doesn't cover a series of injuries because that's just the way it is, that's not going to be very effective with my students who are the up and coming lawyers. The question is, why is it the way it is? Why is it that for time immemorial almost, it seemed like workers' comp didn't cover mental injuries? And I'm going to explain what I mean by that in a minute. And the long and short of it is because tort didn't cover mental injuries. That's really the bottom line because everything that is done in workers' compensation presumes a kind of quid pro quo, a grand bargain, one set of rights for the other set of rights.

Well, what I'm going to tell you is that there was no such thing as something called negligent infliction of emotional distress. It did not exist in 1910 when the quid pro quo originally originated at least in the U.S. So there was nothing to exchange. The problem is that as that theory expanded, tort liability expanded. And so all of a sudden you have situations where emotional injury is arguably tied to work and if you don't cover it with workers' comp, what you're going to get is a tort case. That's not speculative. Why injuries are covered is another part of this. There's obviously a political dimension too. We see more and more PTSD discussion as a

matter of public policy. And I cited in the slides here a typical article from the Journal of Public Health Policy basically talking about the extent to which PTSD is increasing particularly with respect to first responders who see horrible things and do horrible jobs and how there was this upswell of support for the idea that I see something horrible at work and frankly I am psychologically impacted for some period of time thereafter. That's a very simple fact pattern. And now I attribute a lot of what's going on to the pandemic and the reason I do is because during the pandemic we had things like workers' comp causation presumptions that you probably all know about and the question is why did we have those? And the reason is because we didn't have anything else and there's not a better reason than that. You could say that probably work played some role in the development of COVID-19 but I'm not going to go through all that but I think what that did was loosen up people's minds and think about workers' comp coverage differently. I'm not going to read the statistics to you, but there is this sense that there are more instances of people developing psychological disability as a result of work-related traumas of one type or another.

And as a matter of public policy, we know that there are high-stress jobs. And we also know that people that have high-stress jobs are, the rates of depression are going up and suicide is going up. All of these things are happening. So there is this upswell of psychological injury. Now the question is, as you well know, how much of it is related to work and why should workers' compensation cover this? Historically, we have three kinds of compensation of mental injury that we talk about in workers comp law. One is called physical mental, another is called mental physical, a third is called mental mental. Physical mental, most of us are aware of this type of situation. Somebody suffers a really serious back injury and they're at level seven pain for a year. And they get depressed. And it's been uncontroversial for many years for that, even though it's a psychological disability that results to depression, to be compensable. And PTSD falls into the third category - purely psychological or mental stimulation causing mental or psychological disability. Thirty-four states cover mental mental injuries which means obviously that 16 do not. What I'm going to explain is that of that 34, nine states cover mental mental injuries only for first responders. Now, they don't just cover it. It has to arise out of and in the course of employment, the standard formula that we all know. However, you'll notice there's something I left out of that arising out of and in the course of employment, and it is accident. There is not an accident qualifier there. So what states do is even though theoretically they cover PTSD, they have conditions that have to be satisfied by the claimant before they can be eligible. So, for example, the situation that freaks everybody out is the idea that there is a personnel action, somebody's disciplined, they're fired, something like that happens. They develop some kind of psychological trauma and file a workers' comp claim. There are many states that say, no, that is not the qualifying event or accident that will allow you to file a successful workers' comp claim. Disciplinary actions, job transfers, demotions, layoffs, you get the idea. The idea is we don't want to open up Pandora's box and cover everything that just seems like the normal way that a business is operated. Some states, like Maine, have enhanced proof standards. So whatever the event is at work, it has to be the predominant cause of the psychological disability that results. Not a cause, not a significant cause, not a substantial cause, the predominant cause. Well, that's another way you can say it's covering mental-mental injuries but not in a sweeping way because you have to get over that standard.

Twenty-five of the 24 states that cover mental-mental generally cover them for any employee. So any employee that can meet the standard that's developed, it's covered. Having said that, there are still criteria that the event that caused the injury usually has to be unexpected, unusual, extraordinary, and not just something that upset me. Something really unusual. Some states are even narrower and they say that the mental injury must have been caused by a specific type of event like a violent crime, witnessing someone's death, those are really

traumatic things. And notice what's happening. Mental-mental is covered, but it's narrowed significantly so it's going to be very hard to cover. First responders, this is where most of us have heard about this. There is a political drive on the part of labor organizations, emergency medical services and firefighters, and so forth, to cover these types of disabilities. Some mental-mental states use separate criteria altogether for first responder claims. And 11 states have a rebuttable presumption and this is the part that really becomes stick. So if you have a rebuttable presumption of PTSD, what does that mean? It means somebody accurately diagnoses a person with PTSD, and you just have a diagnosis and once that happens and it's tied to some work-related event, what happens is that the burden shifts to the employer to prove that it didn't happen because of work. Now try thinking about proving a negative and how difficult it can be to prove a negative as it is to prove a positive.

So when you shift the burden of proof like that, very often that can result in coverage. So that group of 11 states, the rebuttable presumption criteria is really the one that's going to lead to enhanced coverage. Nine states generally prohibit mental-mental claims, but they make an exception for first responders. A lot of states aren't doing that and I would tell you that I think there's sort of constitutional problems lurking in that division. That's all I can say about it. People are alarmed by Connecticut. I don't know if you've been hearing about Connecticut – they have an act expanding workers compensation coverage for post-traumatic stress injuries for all employees and that sounds dramatic until you get into the small font here and you have a series of really dramatic events that would have to happen. And I'm not going to go through them all, but they have to be serious events that occur. And if that happens, then yes, theoretically that is an employee that qualifies. But look at the next slide. It's not a presumption. It's very different from those other standards that have a presumption. The PTSD must directly result from the event. So you have really a difficult causation standard there. It's not anywhere near as dramatic as it looks in the news because I wouldn't want to be the claimant's attorney trying to prove the case under that standard. New York is really the more serious one where a worker files a claim for mental injury premised upon extraordinary work-related stress incurred at work. Now, what I want you to notice about this is that you could theoretically have someone who had a cumulative psychological injury over time. And that originally applied to first responders. It was expanded, it's passed both Chambers. I don't know if the Governor has signed it. That is the one that is dramatic. That's the one that suggests well suppose I'm at work and over the period of five years I'm just getting more and more stressed because you're a bad boss and then one day that's it, that is extremely problematic to defend and potentially very expensive because when does it end?

Rep. Matt Lehman (IN) stated that everything you talked about is all about the presumption of the injury and when, where, how, and why. My question is how do you calculate the compensatory damage? When I break a leg, I go have surgery, I get so many days off work, and all of that is statutory, either you get a certain amount of dollars or you get the medical bill paid. How do you calculate the compensatory damage on a mental claim? Prof. Druff stated that it's not a problem with temporary total, it's not a problem with permanent total, because that's all a function of the average weekly wage so that's just math. The problem is permanent partial disability and when that permanent partial disability is scheduled and you have some combination of scheduled injury and unscheduled injury. That is a great question because if you have partial disability that's not scheduled, that could go out into time. How do we even know when the disability ends? You have problems with intervening causation that are really significant.

Rep. Lehman stated that would be my concern is there's other factors that go in potentially to mental illness. We had a gentleman who was going through a traumatic time in his life and then

witnessed a death at work. I'm a broker in the insurance business. And the mental stress was caused by which? Which had a greater impact on his mental stress? The life issues or the incident at work? And then how do you say what category that's in? Is it permanent, partial? And that really shed the light on we can begin to statutorily say what is the cause but I think we really need to be working also on the end of what bucket do you put that in when it comes to the compensatory side? Prof. Duff stated that I think you're going to have rules like that that deal with the extent of time that a particular kind of claim would be paid and those kinds of things.

Rep. Mark Tedford (OK) asked if you could talk a little bit about the New York law and the cumulative trauma kind of approach they're taking and how it would be dealt with in a workers' comp policy setting where the coverage trigger is by an occurrence and how they deal with that. You could have trauma that goes over multiple policy periods, multiple carriers, how are they dealing with that? Prof. Duff stated that how they're dealing with that of course isn't clear because it's new and the whole concept really is new. But there is a big difference between a serious one-time event that causes somebody psychological disability and something that's more like over a period of time the person is just experiencing high anxiety in a workplace and at a certain point the there is the straw that broke the camel's back. And you have what we call in torts the eggshell skull plaintiff. You can have the eggshell skull person with respect to psychological injury so somebody is just experiencing more cumulative anxiety than somebody else and how do you deal with it? These laws are going to have to be tailored. And by the way this is all a factor of non-coverage. That's basically what's driving this. People woke up one day in the pandemic and said, “Oh this isn't covered and this isn't covered and this is isn't covered.” So now we're rethinking and the same thing has happened in tort law for over 100 years.

PRESENTATION ON THE TEXAS WORKERS’ COMPENSATION INSURANCE SYSTEM

The Hon. Jeff Nelson, Commissioner of the Texas Dep’t of Insurance Division of Workers’ Compensation, thanked the Committee for the opportunity to speak and stated that I was asked to talk a little bit about what has made the Texas workers' compensation system successful and what has made us unique and I think those two things go hand in hand. I think a lot of the successes we have in Texas have been thanks to some of the political fortitude over the years and some of the major changes that the legislature has undertaken to put us in such a good position today. Before I get into all that, I wanted to just give a brief sort of snapshot of who we are as an agency and then sort of what the workers' comp market is like in Texas. So, for starters, we are the Texas Division of Workers’ Comp. We are the regulator of the system. We're neutral. We do not advocate on behalf of injured employees. There is a separate state agency called the Office of Injured Employee Council who does that. We have over 400 full time employees in our agency. They're spread out across our 20 field offices across the state. although most of them are in our Austin field office just across the street from the Capitol. We are funded by a self-leveling maintenance tax on workers' comp carriers that is capped at 2%. We have five main legislative directives given to us and those are dispute resolution, healthcare management, claims to customer services, workplace safety, and then of course compliance and investigations since we are the regulator. Now, what's the market like in Texas? Texas has a very healthy workers' comp insurance market. We have over 300 insurance carriers that write comp and they write about $2.6 billion in direct written premium every year.

Now, even though we do have those 300 carriers, the top ten carriers make up about 75% of the market and Texas Mutual is by far our largest carrier. They make up about 41% of our whole market. Since some of the reforms that I'm going to get into in a little bit, in 2003, workers' comp rates are down 81% and that's something we're very proud of while we're seeing better outcomes for injured employees. One of the signs of a healthy workers' comp market is how big

or small the residual market is and we are very fortunate in Texas that our residual market is below 0.3% of the overall system. And it's been good for insurance carriers, too. Workers' comp has been the only consistent, profitable line of insurance for carriers in the state for at least the past decade. So, what makes Texas different, what makes us unique? And like I said, it's really about the legislative reforms that have gone on since workers' comp started in 1913 but really since 1989. So, that's what I was going to dig into a little bit today. So, I'm going to tell you, there's always legislation going on with workers' comp just like any other system but what I wanted to focus on today are these three changes. First, when workers' comp started in 1930, some major reforms in 1989 and 2005. And then it wasn't really until 2010, 2011 that all of those 2005 reforms got implemented. So, those are going to kind of go hand in hand together. So, for starters, in 1913, that was the first workers' comp law that was passed in Texas. And since 1913, we've been unique. Workers' comp has been optional for Texas employers since then. I think we're one of only two states where it's optional for employers and it's really worked out well for us, I think. Employers that do not have coverage, we call them non-subscribers, and we do track those numbers. Now, even though employers have a choice to get coverage or not, 76% of all private sector employees do carry workers' comp and they cover 87% of all private sector employees in the state.

So, it means that these employers think workers' comp is the best route to go for them and for their employees. And I know this makes us very unique. And when I talk to other states about this, they think it's kind of weird. But it works out well for us. And I think it's been a driver for some of the changes that we've had. One of my old bosses, Governor Rick Perry, used to talk often about how competition among states drove innovation. He would call them the laboratories of innovation and I think that's sort of what's happened in Texas. We don't have a captive workers' comp market. Employers don't just have to get comp coverage. They can choose to go another direction and because of that, the legislature has put in programs and policies years ahead of sort of what the standard has become now. So I really want to give an appreciation to the work that the legislature has done and the foresight that they've had to put us in such a good position today. So, the first major reform was in 1989 and these were significant changes to the point that anything prior to 1989 we call old law and anything after 1989 we call new law. They wrote an entirely new code. Of course, there were a ton of changes there. I really want to focus on three and I'll be quick in it. First, they eliminated pretty much all lump sum medical settlements. They created a new dispute resolution process. And they limited attorneys fees to 25% of the employees recovery. And that first one eliminating settlements has had a huge impact that's been lasting today. The Workers' Compensation Research Institute (WCRI), a national organization who does workers' comp studies, recently published a study comparing 17 states and their overall claims costs. What they found is that Texas has the second overall lowest claims cost of all these workers comp systems. We were 32% below the average and they directly attributed our low claims cost to the fact that we do not allow lump-sum settlements in our system.

The other thing it did is it created our modern dispute process. This was another effort to sort of bring attorneys out of the system and to reduce litigation cost to really simplify that process. This is very similar to how it is now in most states - informal mediation, we call a benefit review conference, a formal contested case here and in front of an administrative law judge. And then go into our three-judge appeals panel. From there, you can of course go to district courts, but these changes have really had lasting impacts on our system, especially the changes with settlements. At that time in 1989, costs were out of control, businesses were fleeing the state and 70% of claims were going to litigation and ending in settlements. Injured employees weren't getting back to work. They didn't want to get back to work. So, that one change has really had a lasting impact on our system. Things kind of cruised along for a while, then in 2005

we had another set of major changes that really drove some of those significant cost savings that I was talking about. Again, there are multiple changes to this bill, but the major changes I want to touch on is it created the Office of Interim Employee Counsel and required us to develop treatment and fee guidelines. And it had us adopt a pharmacy formulary. So, the Office of Injured Employee Counsel is a separate state agency that's very unique to Texas. This is an agency that is funded by the workers' compensation maintenance tax and it is made up of a team of ombudsman across the state whose job it is to assist injured employees through the dispute resolution process. It's an alternative to them having to hire attorneys to navigate the system. These ombudsman are not attorneys but they are specialized in the dispute process. They know the ins and outs to the point where 50% of all injured employees in Texas choose to use an ombudsman rather than a higher representation to take them through a case.

The Office also offers various educational opportunities and just helps with the claim, helps with how to file paperwork and reminders that they have doctor's appointments coming up. And it's been really beneficial to the injured employees in Texas. And it's been a cost saver as well. And that was a difficult thing to do creating a new agency to essentially advocate against insurance carriers funded by an insurance maintenance tax. But it's actually been a cost saver for all parties in the state and it's been very beneficial. But I think the biggest change during those reforms was instituting treatment and fee guidelines. The treatment guidelines created a standard way to handle the medical portion of claims. It said what treatments would be pre-approved and what required pre-authorization and it really just brought in a standardization of care. It also introduced fee guidelines. And by statute we were required to make those Medicare based. And I thought that was very smart for two reasons. First, health care providers understand Medicare billing. Their front offices are familiar with it. It wasn't much of a change. The second thing is, we tied it to an inflation factor, the Medicare Economic Index. So, every year our fees are automatically adjusted. And this has helped tremendously. We don't have to go to the legislature every five, ten years to have a big fight about what the fees are. We don't have to undertake a three-year rule project to discuss what fee changes need to be made. They're automatically changed every year. And workers' comp systems around the country are struggling with health care providers in the system. And I'm not saying we don't have those challenges but doctors in our system know they're going to be paid. They know the fees are going to consistently be updated, most likely increased. It's been very helpful in that regard and I thought that was a very kind of prescient decision that was made. So even with all the health care inflation going on, there has been a 30% reduction in overall health care costs, a 20% reduction in total claims, a 26% reduction in professional services, a 20% reduction in hospital, and a 71% reduction in pharmacy fees. I think we can be held up as an example for how to have a successful system and it's thanks to the legislature for working to get it done.

ANY OTHER BUSINESS

Rep. Nelly Nicol (MT) stated that I wanted to mention that this week is National Kids Chance Awareness Week. I'm on the board of the Montana Kids Chance and it's a great organization. I just want to make sure everybody knows what it is. We give money to kids that have had parents injured or killed in a workplace accident. It's a great program and I wanted to let you know about it. Please look it up and if you would like to donate any money go ahead and contact me.

ADJOURNMENT

Hearing no further business, upon a motion made by Rep. Tedford and seconded by Rep. Lehman, the Committee adjourned at 3:30 p.m.