

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
WORKERS' COMPENSATION INSURANCE COMMITTEE
INTERIM COMMITTEE CONFERENCE CALL MEETING
MAY 29, 2020
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee held an interim meeting via conference call on Friday, May 29, 2020 at 1:00 p.m.

Representative Bart Rowland of Kentucky, Chair of the Committee, presided.

Other members of the Committees present were:

Asm. Ken Cooley (CA)
Rep. Matt Lehman (IN)
Rep. Peggy Mayfield (IN)
Rep. Joe Fischer (KY)
Rep. Edmond Jordan (LA)

Asw. Ellen Spiegel (NV)
Rep. Ryan Mackenzie (PA)
Del. Steve Westfall (WV)

Other legislators present were:

Rep. Deborah Ferguson (AR)
Sen. Matt Lesser (CT)
Sen. Andy Zay (IN)
Rep. Deanna Frazier (KY)
Rep. Chris Humphrey (NC)

Sen. Bob Hackett (OH)
Rep. Mark Willadsen (SD)
Del. Kaye Kory (VA)
Rep. Bill Henderson (WY)

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Will Melofchik, NCOIL General Counsel
Cara Zimmermann, Assistant Director of Administration, NCOIL Support Services, LLC

QUORUM

Upon a motion made by Rep. Matt Lehman (IN), NCOIL President, and seconded by Asm. Ken Cooley (CA), NCOIL Vice President, the Committee waived the quorum requirement without objection by way of a voice vote.

INTRODUCTORY REMARKS

Rep. Bart Rowland (KY), Chair of the Committee, stated that he knows that everyone is very busy dealing with the global health crisis and thanked everyone for their participation. COVID-19 has had a significant impact on the insurance industry with some lines of insurance being impacted more than others. The impact of COVID-19 on the workers' compensation insurance marketplace has been an issue that has garnered significant national attention. In addition to the overall health and viability of the workers' compensation insurance marketplace going forward, one issue that has been subject to intense discussions has been the actions several states have taken to expand access to

workers' compensation coverage for COVID-19 to include certain categories of employees with some states expanding access to all workers deemed "essential."

Rep. Rowland stated that the panel gathered here today will discuss this in more detail, but this type of legislation, and executive order, creates a rebuttable presumption for certain categories of workers who contracted COVID-19 during statewide shutdowns. Put more simply, the burden of proof is flipped, so that employee workers' compensation claims within these classes of employees and related to COVID-19 are presumed to be covered. Employers can typically rebut claims under certain conditions, including if they can demonstrate the workplace was following current public health guidelines prior to when the employee claims they contracted the virus; and if they can provide proof that the employee was exposed by another source outside of the workplace.

There has also been action on this issue at the federal level. Legislation was recently introduced titled the "Pandemic Heroes Compensation Act" which is modeled after the September 11th Victim Compensation Fund (VCF). The new fund would provide compensation for injuries to any individual, or their families, who are deemed an essential worker and required to leave their home to perform services and who have become ill or died as a result of COVID-19.

Rep. Rowland stated that the impact of this type of legislation on the workers' compensation marketplace has the potential to be extremely significant, with some arguing it to be unwarranted and misguided. As NCOIL is the national insurance legislative policymaking and educational forum, he requested that this hearing be scheduled today so that legislators and interested parties have an opportunity to discuss these issues as they continue to arise in the form of legislation and executive orders.

Rep. Rowland noted that in his home state of Kentucky, Governor Andrew Beshear issued an executive order in April that created a COVID-19 presumption for workers in grocery stores, child-care centers, domestic violence shelters and rape crisis centers, in addition to first responders and healthcare workers. Accordingly, Rep. Rowland stated that he is interested in learning more about these issues and how other states are dealing with them and will deal with them going forward.

DISCUSSION ON IMPACT OF COVID-19 ON THE WORKERS' COMPENSATION INSURANCE MARKETPLACE

Jeff Eddinger, Senior Division Executive at the National Council on Compensation Insurance (NCCI), stated that in early March of this year, NCCI posted its first article on COVID-19 talking about the issues with compensability and the fact that compensability is administered by individual state statutes and most of them require that injuries must arise out of the course of employment and injuries that the general public can be exposed to are generally not covered. However, NCCI did say that there are occupational groups that arguably would have a higher probability for exposure such as healthcare workers. Mr. Eddinger stated that COVID-19 claims are only one issue that the workers' compensation industry is facing. Other issues include mass telecommuting, furloughed workers, extremely high unemployment, and a recession. All of those issues impact the workers' compensation insurance market.

NCCI had to address a couple of different situations. First, NCCI had to make a filing to exclude payroll for furloughed workers that were continuing to be paid even though they

weren't working – those payrolls were then excluded from premium calculations. Second, NCCI made a filing to exclude COVID-19 claims from experience rating and merit rating. Even though there is no claim data that will be seen until the fourth quarter of this year, we all know that claims are occurring but we don't know at this point how many claims are being accepted and denied. States have been attempting to address coverage in a variety of different ways. NCCI is tracking more than 20 states that have put forth bills or Executive Orders that are generally categorized as presumption bills which range anywhere from presumptive coverage for only healthcare workers, only frontline workers, to all workers. NCCI has been tracking all of this on its COVID-19 resource page on its website.

Mr. Eddinger stated that to assist in quantifying the potential impact on the workers' compensation system in NCCI's 38 states, NCCI developed an interactive tool for everyone to use on its website. The tool basically marries NCCI's claim costs data with frequency assumptions related to infection rates, hospitalization rates, death rates, and compensability rates. The tool results in a wide range of potential impacts on the workers' compensation insurance system. At the low end of the range, the tool shows somewhere around \$3 billion and at the high end of the range, around \$80 billion. The good news is that the industry is facing this pandemic from a position of strength. However, there are still many unanswered questions and as Summer arrives, NCCI will have to make decisions if and/or how to reflect COVID-19 in its rate filings. In the meantime, NCCI continues to track and update information on its COVID-19 resource page on its website available to everyone.

Mitch Steiger, Legislative Advocate at the California Labor Federation (CLF) stated that he would be speaking to the Executive Order (EO) recently issued in California which CLF viewed as some rare good news in the ocean of bad news that has surrounded everyone the past few months. CLF views the EO as a big win and is something that CLF supported. Mr. Steiger stated that it is helpful to discuss how things existed in CA before the EO was issued. In CA's workers' compensation system, the burden is on the employee to show that something did happen at work and with an occupational disease claim that is something that can be very difficult to do. The workers' compensation system has always struggled with that and for a lot of workers that do come down with an occupational disease or illness, depending on the employer and who is administering the claims, they find themselves in the middle of it and they find the claims difficult if not impossible to win.

Mr. Steiger stated that like most states, CA has a Governor that approved stay-at-home orders that required workers to stay-at-home. It is not known exactly how many workers in CA were counted as essential – somewhere probably between one-third and half – and still had to go to work at their typical place of employment. Some employers had already started fighting claims. CA had severe personal protective equipment (PPE) shortages at a lot of places of employment and a lot of employers were struggling in trying to figure out how to best protect their workers. Frankly, there were some actors in the system that weren't even trying and were pretty hard on their workers so it was a cauldron of a lot of forces really putting workers in a very dangerous situation. A lot of employees did contract COVID-19 and did file claims which struggled to get through the system. In the middle of that, the Governor signed an EO on May 6 that applied to all essential workers that started from the date of the stay at home order that was in mid-March and ended 60 days from enactment of the EO – July 5. The EO is rebuttable so if employers do believe that they have strong evidence to rebut the claim that contraction

of COVID-19 is work-related, they do have an opportunity to present that. Employers have 30 days to approve or reject the claim and after that if new evidence comes to light they can still rebut the claim but it has to be something that came to light after that 30 day period has expired. The EO also only applies to workers for 14 days from the last day that they worked.

Mr. Steiger stated that CLF believes that the measures implemented by the EO are important things to do not just in an effort to take care of those workers but also to take care of their co-workers and the public. It is a very scary situation right now for a lot of workers and there is only so much that can be done to keep them safe. While everything that can be done to protect them is being explored, at a minimum it needs to be certain that when those workers get sick or God forbid die from COVID-19, they and their families are taken care of. CLF believes that the EO was a great start and a great way to do that. CLF wishes that some of the EO's provisions were stronger and accordingly CLF is in discussions regarding developing legislation that would shore up certain things in the EO while its in place and after it ends.

CA's history with rebuttable presumptions is that it represents somewhat of a thumb on the scale that does usually mean that the worker is able to get coverage for their illness but it does open the door to some delays and gamesmanship from some actors in the system. Given the time sensitive nature of COVID-19, those opportunities should be minimized and therefore CLF is pushing for a conclusive presumption in statute. Everyone is also aware that COVID-19 is not going to go away on July 5 and there are going to still be healthcare workers and grocery workers exposed to some pretty severe hazards so CLF would like to see something that continues to cover more people. One things that CLF would like to see to strengthen the EO is that there are a lot of workers that didn't fall into the general category of essential but are still at a very high risk of exposure to COVID-19. CLF would therefore like to have a deeper conversation about who the EO covers.

Mr. Steiger then touched upon cost-estimate issues. Before the EO was signed, the CA workers' compensation rating bureau released a cost-estimate that put the range at somewhere between \$2 billion and \$34 billion for a presumption that lasted until the end of the calendar year and presumed that 100% of workers with compensable claims would file them. CLF believes that range highlights the difficulty in guessing what the cost of these are going to be. The bureau released an updated study following the EO's release that brought the mid-range estimate down to around \$1.2 billion which is about 7% of the overall cost of the workers' compensation system. The more specific a presumption statute or EO is, the easier it will be to estimate costs but it is a very difficult thing to do as there is a lot we don't know about COVID-19, how the system will respond to it, who will come to work, and who won't. Despite that difficulty, CLF believes that in the context of stay at home orders, the vast majority of COVID-19 illnesses are going to be work related so a presumption makes sense.

Mr. Steiger stated that the bureau passed a few regulatory changes to respond to the EO. The biggest change is that the bureau chose not to experience rate COVID-19 claims which CLF believes works well with the workers' compensation presumption to make sure that employers that just happen to be in an industry where COVID-19 is a major concern, it helps minimize the impact to them and their work comp costs to say while there is a lot of things employers can do with PPE and social distancing to reduce worker exposure to COVID-19 there is only so much that can be done and certain

employers are going to be hit harder than others. In the interest of fairness CLF stated that it made more sense to spread the costs out across the entire system.

Richard Marcolus, Chair of the New Jersey Council on Safety & Health (COSH) stated that in addition to his position at COSH he is also a plaintiff's lawyer in NJ, a carpenter by trade and a member of the carpenter's union in Essex County, NJ. One of the things that he has found fascinating in NJ is that despite having the second highest rate of COVID-19 infections and deaths in the country, NJ has a wealth of different types of industry. In addition to being called "the garden state", NJ has fishing, wildlife, beaches, all types of tourism, and a lot of travel. Accordingly, NJ has been working on trying to figure out in a fair manner how to get people who have been sick and injured by COVID-19 the proper medical treatment. Mr. Marcolus stated that on April 3, a worker in NJ went into the warehouse where he worked about 25-30 hours per week. Because of his part-time status he was not offered health insurance, and he did not have health insurance. He noticed that some of his co-workers wore masks while others did not and a few days later he got sick. He went to his employer and said he did not feel well and did not want to get anyone else sick and asked what he should do. He was directed to the HR office where he was given a form to fill out for unemployment benefits and was told good luck.

Since he had no health insurance and was not even sure if he was entitled to unemployment benefits, the gentlemen – who ended up having COVID-19 – continued to work and invariably infected other people at the facility. The man ended up being ok but the problem that the NJ legislature has tried to address is how to get people who we believe were infected with COVID-19 while working fair compensation when there really is no avenue for them at this point. Most people when dealing with their employer end up being whisked into some type of program that the employer wants them to go through and it's generally not workers' compensation. Fortunately, NJ already has a law called the Canzanella Act which deals with workers' compensation benefits for first responders following 9/11. The Act was just recently signed into law and it basically says that for any first responder that contracted cancer as a result of their work there is a presumption that the cancer was work-related. Mr. Marcolus stated that someone had inserted "pandemic" into the bill so those first responders now have the presumption applied to them if they contract COVID-19.

However, the law leaves out all the other essential employees in NJ that were categorized as such by an EO issued by the Governor. That basically included anyone who was required to go to work such as gas station attendants, food delivery employees, and grocery store staff. A bill is currently pending in NJ that would give those employees a presumption which essentially says that if you contract COVID-19 during the time period we are in a state of emergency it is presumed that said contraction is work-related. It is intended that the bill gets the insurance companies involved – NJ has a private insurance industry that handles workers' compensation – to come to the table to be able to at least pick up the claims rather than litigating them and arguing over where the contraction took place. Without the bill, very few claims have been picked up by insurance carriers and unless you are a first responder there is really no avenue. Courts are open but only remotely and this is causing a hardship.

Mr. Marcolus stated that the bill is important and should be signed into law. It is also important to note that the presumption is rebuttable so employers can present evidence that the employee contracted the virus elsewhere. If the presumption is overcome, then

you go back to a level playing field with the burden back on the employee. Mr. Marcolus stated that he is hopeful that the bill will be signed into law and it is good to hear that other states have enacted similar legislation and EO's. So many employees are ignorant when dealing with this and they are looking to their employer for help. Mr. Marcolus stated that several people have come into his office asking for help who are on unemployment and that is a drain on another system and that is not where the risk should be considering that the likelihood that the people who are going to work every day and dealing with the public contracted COVID-19 while working is very high.

Dr. Robert Hartwig, Clinical Associate Professor, Finance Department and Director, Center for Risk and Uncertainty Management at the Darla Moore School of Business University of South Carolina, stated that in his current academic role he looks at the workers' compensation situation in the context of the impact on the overall property & casualty insurance marketplace. The impact on workers' compensation is potentially very large but so are the potential impacts on business interruption claims and other potential claims that are out there. In terms of magnitude, workers' compensation is either the largest or the second largest impact for insurers depending on which scenario you subscribe to – some say business interruption is the largest. It all depends on the severity of the event and the recovery and those things remain largely unknown at this point.

In terms of potential losses, Willis Towers Watson has released a comprehensive analysis of global impacts and they have asserted that potential impacts for losses for workers' compensation in the U.S. range anywhere from about \$2 billion to \$23 billion. Within that are ranges. The \$2 billion range is relatively optimistic with the virus being relatively contained and a strong recovery occurring. \$2 to \$7.5 billion is a range forecasting a moderate type of COVID-19 event. For a particularly severe event the range is \$7.5-\$23 billion. When you start talking about those sums, and couple them with sums that are much larger than that for potential business interruption losses what concerns insurers is the fact that this ultimately becomes a systemic risk for the property & casualty insurance industry. If you accumulate all of these losses across all lines of insurance it becomes potentially destabilizing if you wind up in a situation where the presumption in workers' compensation goes uniformly against the insurance industry across the country. If you couple that with a situation where, for instance, the virus exclusions for business interruption claims are overridden it becomes a systemic issue of the overall insurance industry. Accordingly, when thinking about these issues it is important to remember that the workers' compensation insurance industry does not live in a vacuum and is a large and important line within a large and important industry.

Beyond the presumption issue, there is also the issue of the revenue of workers' compensation. This will certainly be the largest and fastest drop in premiums that this industry has ever seen, at least on this side of the Great Depression, as we see payrolls plummet and we know what types of industries that will most likely occur in such as service sectors. We're looking at several billions of dollars potentially exiting the workers' compensation market. On the revenue side of things, there is a concern obviously as insurers rely on revenue for a variety of different reasons such as paying claims and investing premiums to generate investment income. Dr. Hartwig stated that there has been some discussion as well as to whether or not the COVID-19 experience should be experience rated: should the experience employers are seeing today in 2020 with respect to COVID-related claims be in some way shape or form or at all reflected in rates going forward. Given that we are not looking at a vaccine for the virus being widely

available at least until the middle of 2021 the reality is that the virus will be with us at least for a year and probably beyond that. Accordingly, those realities could lead one to believe that it makes sense to include the experience of COVID somewhere in the rating structure. Insurers would absolutely need to reflect the fact that the flip in presumption could have a very material impact and that may be idiosyncratic by state.

Dr. Hartwig further stated that it is important to keep in mind that with workers' compensation, many employers have very large deductible programs and there are employers that are largely self-insured for this particular exposure as well. That is important to keep in mind when thinking about flipping the presumption. There is also a lot of interaction that is likely to occur in the months ahead associated with The Occupational Safety and Health Administration's (OSHA) role – and state equivalents of OSHA – and other regulatory agencies that are charged with regulating workplace safety. We are only at the tip of the iceberg with those issues. For instance, OSHA just recently issued guidance essentially asking employers to investigate the genesis/origin of COVID-19 claims among employees. There have been several accusations against OSHA as to whether they are doing enough and being proactive enough with these issues. There is a huge role for federal and state occupational and safety and health administrations out there to help establish guidance in this area.

Erin Collins, Vice President of State Affairs at the National Association of Mutual Insurance Companies (NAMIC), stated that the workers' compensation system has been in place for over 100 years in this country working to provide compensation to employees directly impacted by injuries on the job. One of the hallmarks of the concept of the workers' compensation system is that workplace injury and disease have to be specific and peculiar to a particular job. A communicable disease like COVID-19 is a worldwide pandemic that everyone is subjected to. None of this means that U.S. citizens impacted by COVID-19 either financially or by virtue of contracting the illness itself cannot get help. It does not follow though that such help comes from a specific business sector that isn't meant to contemplate these types of events like pandemics. In fact, some of the prior panelists were talking about the impact of COVID-19 on the public at large and hoping to get the insurance sector involved in that impact which is not what the workers' compensation system is designed for.

Ms. Collins stated that some states have taken steps to force workers' compensation for COVID-19 to a broad array of people. The challenge in that, apart from what has been discussed in terms of the nature of the pandemic, is that some of the actions seen have been so broad that they can be construed to contemplate people working remotely or off of work when the virus is contracted or even presumed to have the illness without any confirmation. Additionally, some of the actions taken are tied to states of emergency as opposed to the length of stay at home orders and in the insurance industry it is known through experience and prior crises that states of emergency can stay in place for extremely long periods of time – sometimes years after a crisis.

The retroactive nature of actions like this are also concerning not just from a constitutional perspective of impeding contracts but also on the basis of solvency as Dr. Hartwig noted. Insurers have reserves for their existing claims based on preexisting actuarial calculations of exposure. Paying these retroactive and uncovered claims restricts their ability to pay claims for their existing contracted risk. That is something that neither the workers' compensation system nor the broader insurance industry is built to contemplate. In terms of what the answers are, NAMIC is in favor of anything the

federal government can do to assist the economy and certainly COVID-19 victims through the crisis. NAMIC believes that the federal government is the only entity large enough and broad enough to assist in times of pandemic and NAMIC is in favor of any activity in that regard, but the workers' compensation system is not the right answer to a pandemic crisis.

Rep. Bart Rowland (KY), Chair of the Committee, stated that Ms. Collins' last point brought up an issue that he is curious of regarding federal government activity. Rep. Rowland asked if something similar to the Terrorism Risk Insurance Act (TRIA) enacted following 9/11 should be enacted by Congress to deal with these types of workers' compensation claims. Ms. Collins stated that she is aware of the federal bill titled the Pandemic Heroes Compensation Act but has yet to see the language of the bill. However, certainly the outline of it in creating federal assistance for citizens impacted by COVID-19 is certainly something that would fall in line with what NAMIC is discussing in terms of federal government assistance.

Rep. Matt Lehman (IN), NCOIL President, stated that he is curious if by creating conclusive presumptions in this area the workers' compensation system is being turned on its ear especially regarding diseases. If this box is opened up with COVID-19, what will happen to future cases of catching a really bad case of the flu? Mr. Marcolus stated that NJ's Canzanella Act only lists specific cancers and the presumption in the pending legislation is strictly limited to COVID-19 – it will not include the flu or anything else. The state legislature or the federal government can always decide what it wants to cover and not cover.

This is really not a case of turning the workers' compensation system on its ear but rather putting another nail in the coffin. The workers' compensation system was designed to deliver benefits in a fast, efficient manner without any controversy. It was designed such that the injured worker cannot sue their employer but if they get injured while working benefits must be paid and the worker should not have to go through two years of litigation to get those benefits. The pending NJ legislation is an effort to say to the industry "time to pick up the ball on this." Even though the legislation calls for a presumption the case still has to be proved and without the presumption you can still win the case but it just makes it more difficult. If the insurers are not going to come to the table and pay for the medical and time out of work under a presumption they certainly are not going to pay if there is no presumption so you might as well stop all the cases and have a law that says COVID-19 is not work-related as a matter of law because you cannot prove it. Mr. Marcolus again stressed that NJ's pending legislation is limited to only COVID-19.

Mr. Steiger stated that in California there was a bill introduced a few weeks ago in the Senate Labor Committee that contained a rebuttable presumption for COVID-19 for healthcare workers. The bill also included a few other conditions such as muscular and skeletal conditions. The bill did not get a single "yes" vote in Committee which is fairly typical of CA's experience with workers' compensation presumptions where even if there is fairly overwhelming evidence in favor of one the CA legislature is fairly hostile towards them. Accordingly, when CLF believes it has a pretty strong case for a presumption it almost never passes. Mr. Steiger stated that the presumptions that currently exist in CA pre-date his time in CA. In his experience, CA legislators start from a place of skepticism with these presumptions and the only real reason the current bill is being considered is because of the extreme situation we find ourselves in. Accordingly, Mr.

Steiger stated that he does not believe the concern of opening up “pandoras box” is one that is much to worry about going forward.

Ms. Collins stated that she believes Rep. Lehman made an excellent point and agreed with him in that establishing presumptions for diseases turns the workers’ compensation system on its head. What we’re talking about is going from a system that is based on the fact pattern of particular cases to presumptions that deal with burdens of proof. When you talk about rebuttable presumptions you are talking about having to create a higher burden – clear and convincing proof – to overcome a rebuttable presumption which in the case of a disease like COVID-19 is almost impossible. Also, if it is a conclusive presumption that cannot be overridden. Ms. Collins stated that going down the road reconsiders in a dangerous way what the purpose of workers’ compensation is and would endanger the system itself.

Dr. Hartwig stated that as a follow-up to Ms. Collins’ remarks, presumptions will establish precedent maybe not for COVID-19 but for COVID-20 and any other diseases down the road and the reality is that there is no way that insurers at this point or that point are going to be able to assess doing anything other than pricing this in to the base rate for workers’ compensation. They will then have to have the expectation permanently that a presumption could potentially occur for a disease like this or with precedent the bar could even be lowered in time. This directly results in higher costs for businesses; it would be passed on dollar for dollar to businesses large and small all across America. There has been a lot of discussions about the Walmarts and Amazons of the world but the reality is that the burden will fall on small and medium sized businesses all across the country.

Sen. Matt Lesser (CT) stated that he understands that there may be a moral hazard associated with these issues and that he heard earlier that NJ does not allow for experience rating for this. Clearly there are some categories of employers that are inherently risky such as hospitals and nursing homes and within those categories there are employers taking aggressive measures to mitigate risk and invest in PPE and to employ CDC guidelines in office settings and it seems unfair that if you don’t want to allow for rating of an experience then you are basically asking irresponsible employers to be subsidized by responsible employers. Sen. Lesser asked if any of the panelists had any thoughts on that and whether that would affect employers decisions to re-open or invest in PPE.

Mr. Steiger stated that he is not sure if they disallowed experience rating in NJ but they did such in CA and CFA had the same concern noted by Sen. Lesser. CFA didn’t necessarily agree with all of the arguments in support of that proposal that sort of treated it as an inevitability that workers were going to contract COVID-19 and nothing could be done to prevent that. The reality is that there are a lot of things employers can do to limit exposure and in some ways prevent it and CLF believes that there is still plenty of incentive for employers to treat these illnesses. From a pure cost perspective, high deductible plans are very common so even though it is not going to affect their x-mod there are still definitely going to be costs for a lot of those employers and for a lot of self-insureds.

Also, there is the fact that these are people that they care about and don’t want to see get hurt and will do what they can to help keep them safe. There has also been a lot of guidance released by the California Department of Public Health that CLF believes does

have the force of law and can be enforced under CA's safety regulations. So, if an employer decided to flout those standards there will likely be some sort of citation action against them. Finally, there is the argument that a lot of employers, especially those heavily populated by the public like grocery stores and hospitals, that have other liability concerns besides workers' compensation where other people are coming into their place of business where they may be some sort of risk of being sued if you are especially egregious in not keeping people safe. All of those things will help encourage employers to help do what they can to help stop illnesses.

Mr. Eddinger stated that NCCI filed to exclude COVID-19 from its experience rating in all of its 38 states. NCCI's feeling in doing so was that even though there are some things that employers can do to mitigate exposure, it was not necessarily predictive and there were way too many other types of variables which wouldn't necessarily mean that hospitals or employers that are hit harder that it was necessarily due to a lack of controls. There could be other random factors involved.

Asw. Ellen Spiegel (NV) stated that she has been thinking about all of the employers that do not enforce social distancing for either their employees or customers and asked if someone could speak to the impact that said lack of enforcement would have on the presumption. Mr. Marcolus stated that in NJ that would not matter. The statute, and most workers' compensation statutes are no-fault statutes, which means that it does not matter if the employer took precautions and in NJ the statute states that unless it is an intentional act it does not matter. And the intent must be clear as in NJ there have been cases where somebody takes the shoring out of a ditch and the ditch caves in and the person gets killed but it was ruled to not be intentional but only negligent. In this instance, unless it was shown that there was an intent for someone to get the virus then it would not affect the case at all. It would be evidential but without the presumption there are still other issues with those types of cases which is going to make it very difficult. Everyone is not socially distancing so you could certainly bring that in as evidence but quite frankly you don't need that.

The problem with COVID-19 is that there are so many different ways to get it and the fact that you wear a mask may not even prevent you from getting it – it may only reduce your risk. Mr. Marcolus stated that he does not believe that type of evidence is going to win or lose a case. Without a presumption you have a very difficult burden of proof but you are not going to have a separate cause of action in NJ if the employer was not social distancing; a worker will be stuck with the same type of case as with an employer that does have social distancing and uses masks and uses PPE.

Mr. Eddinger stated that the conversation has been about a presumption for any worker that reports to work and there may be a more measured way to look at "out of or arising in the course of employment." In other words, there are a class of workers whose job it is to deal directly with sick people and even within the healthcare industry there are people whose job it is to deal with COVID-19 patients. On the other end of the spectrum there are people whose job as a grocery worker is not necessarily to deal with sick people but we all know now that they come in contact with sick people. Measures are being taken in grocery stores and other places to minimize or stop that direct contact. Accordingly, there is a class of workers where you can say it is recognized to be part of their job and it is presumed that if they catch this disease it is because they deal with and treat people with the disease. That is perhaps a more measured way to look at this.

Asm. Ken Cooley (CA), NCOIL Vice President, stated that these are very important issues and the problem with the fact pattern is that there are so many variables. We've seen the collapse of the economy and so many businesses are closed and you have units of government saying for safety purposes people should be quarantined. But certain businesses are not put in quarantine because there is a public good associated with them; these are businesses where the worker is employed and doesn't have access to workers' compensation so they need to take care of themselves by going to work in an environment where even though we are now in June we are still asking questions about how the virus spreads and things of that nature. This is an extraordinarily complicated and unusual fact pattern and therefore what is being done on COVID-19 will not spill over to more run-of-the-mill diseases/ailments. There are a lot of factors that make this very unique and you end up trying to figure out how best to help people in the context of how the system works.

Asm. Cooley stated that he thinks a lot of people are at these jobs but afraid of being there and there is such little known about the virus. However, they are still going to work by reasons of public policy as in many states certain jobs are deemed "essential." Those workers are therefore bearing a risk for some public policy good in an environment where the precise details of how you get the virus are unclear. With regard to PPE and safety protocols, people are not really sure of what assures them of protection. There is somewhat of a level of magic thinking that if you do "x" then "y" will occur. Asm. Cooley reiterated that this is a good conversation to have and that it is unlikely that the COVID-19 measures will spill over to other diseases as this is a unique fact pattern and it is complicated by the fact that we all don't want the whole economy to collapse and we want businesses opening with their employees who are then interacting with the public. Balancing the equities is very difficult and important. It is very constructive to have a conversation at this point. It is hard to believe that in February there were no deaths and now we are over 100,000.

Sen. Bob Hackett (OH) stated that a lot of states are also trying to develop some type of liability protection for businesses. Ohio is trying to incentivize its businesses to come back and operate. It is important to be very careful in how this subject is addressed and to make sure we don't really hurt the economy resulting in businesses not coming back. That is why Ohio is trying to develop liability protection legislation at the same time of developing other measures.

ANY OTHER BUSINESS

Rep. Rowland apologized to the interested parties on the call since all of the time dedicated to questions was taken up by legislators. Accordingly, Rep. Rowland stated that if interested parties have any comments or questions they would like addressed or feel that it would be a good idea to have a follow-up conference call to please let NCOIL staff know. The Hon. Tom Considine, NCOIL CEO, reiterated Rep. Rowland's statement and noted that if interested parties would like to have a follow-up call it could be scheduled soon.

ADJOURNMENT

There being no further business, the Committee adjourned at 2:05 p.m.