

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS  
WORKERS' COMPENSATION INSURANCE COMMITTEE  
PORTLAND, OREGON  
JULY 14, 2016  
DRAFT MINUTES

The National Conference of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee met at the Portland Marriott Waterfront Downtown on Friday, July 14, 2016, at 2:30 p.m.

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

Other members of the Committee present were:

Rep. Joseph Fischer, KY	Rep. Don Flanders, NH
Rep. Steve Riggs, KY	Asw. Maggie Carlton, NV
Rep. Bart Rowland, KY	Rep. Michael Henne, OH
Rep. George Keiser, ND	Rep. Bill Botzow, VT
Rep. David O'Connell, ND	Rep. Kathleen Keenan, VT
	Sen. Mike Hall, WV

Other legislators present:

Rep. Maureen Dakin, VT

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO  
Paul Penna, Executive Director, NCOIL Support Services, LLC  
Will Melofchik, Legislative Director, NCOIL Support Services, LLC

## MINUTES

Upon a motion made and seconded, the Committee unanimously approved the minutes of its February 27, 2016, meeting in Little Rock, Arkansas.

## CONTINUED DISCUSSION OF WORKERS' COMPENSATION ALTERNATIVES

Gregory Krohm, Director of Research for Workcomp Strategies and former Executive Director of the International Association of Industrial Accident Boards and Commissions (IAIABC) spoke first. Mr. Krohm began by noting the essential features of opt-out programs are hard to pin down because they differ from state to state. Using the Oklahoma law as an example, key features include a state mandates for equivalency of benefits and financial security; employer defines covered injuries and the claim process; and disputes are resolved by an employer designed "internal appeal tribunal."

He went on to state that some of the advantages given to employers in opt-out initiatives included: employers can define the conditions in terms of coverage; enormous control over the claims process; the internal-appeals process (for benefit denials) is under their control; and they can summarily settle and close cases. Mr. Krohm stated that he believes the proponents of opt-out have documented fairly well the faster return to work rates and the much lower costs to the employer.

He then reviewed the opt-out benefits to the employees which include: a.) benefits are communicated more clearly in a language the employee understands before injury occurs For example, ERISA only requires a summary plan to be distributed when the plan is adopted. However, Mr. Krohm stated that there is no effective enforcement or monitoring of plan communication. Therefore, the bottom line is that workers' comp may do a better job in certain circumstances; b.) employers discuss treatment options with employees – however, Mr. Krohm stated that discussion may be limited to reviewing plan requirements and the bottom line is that claims' adjusters (regardless of whether managing an opt-out plan or a standard work comp plan) differ on how much choice/flexibility they give or how claimant input matters; c.) medical care is prompt and of the highest quality – however, Mr. Krohm stated that there is no assurance that employers will choose good doctors and promote excellence and that choices for treatment and second opinions are controlled totally by the employer; d.) indemnity benefits are as good as or better than workers comp; however, Mr. Krohm stated that from a review of sample plans, only a small fraction of claimants are better off.

Mr. Krohm then noted some public policy considerations to consider when discussing opt-out provisions. The control of the claims process is extremely strong and they can set rigorous restrictions – sample plans often use very explicit language to give the company adjuster sole and complete discretion in making many claim determinations. Dispute resolutions in opt-out programs are also less than in workers' comp but that is arguably because plans eliminate many due process requirements and worker protections. Also, opt-out provisions have been under extreme scrutiny as to whether they are constitutional or not. Mr. Krohm noted that on its face, the Oklahoma mandates for benefit equivalency and security payment seem to be pre-empted by ERISA but proponents seem to think that the pre-emption will not apply.

Mr. Krohm summarized his presentation by stating that the popularity of opt-out is driven by clear advantages over the traditional workers' comp system and that there were four main lessons to be learned: a.) Early claims reporting is important and that state laws can be tightened up regarding early reporting; b.) prompt delivery of medical care can greatly improve the system; c.) Personal responsibility of claimants can be lacking and penalties can be strengthened for non-compliance/cooperation; d.) litigation costs and delays have burdened some states – strong ombudsman and mediation programs will reduce friction and the need for trials.

Frank O'Brien of the Property Casualty Insurers' Association of America (PCI) stated that this is a very important issue and there are lessons to be learned from continued discussion on it at NCOIL meetings. All systems can be improved and there are a lot of opportunities for costs, proper and improper, to be experienced as well as a lot of frustrations to be experienced by both the injured workers and the employers. The popularity of opt-out provisions is a reflection of the frustrations in the employer community relative to some of the weaknesses/problems of the workers' comp problems. However, while opt-out systems do save employers money, the costs do not go away and are going to be borne by someone in society. Traditionally, they are borne by the state workers' compensation system. Mr. O'Brien stated that in an opt-out system the costs are shifted and they would typically go to the state safety net. He continued by saying that most states are dealing with significant budget issues, including significant increases in the Medicare and Medicaid budgets and that is likely the place where workers who are injured and who are not receiving treatment under opt-out plans would go.

He stated that, going forward, PCI, who represents a significant number of companies that write workers' comp insurance, by no means suggests that the current system is perfect. It is important to have a discussion concerning various improvements to the system and, at this meeting, attendees have seen a number of lessons that could be learned from the opt-out experiment that has taken place. Further, going back to individual states it will be important to take a critical look at the workers' compensation system. At the basic level, the workers' compensation system as it exists now is to provide a safety net for workers. A cost effective, fair safety net and, to the extent that it works now, is great and If it needs to be improved, then we need to improve it.

Joe Thesing of the National Association of Mutual Insurance Companies (NAMIC) spoke and stated that there were bills introduced in 2015 in South Carolina and Tennessee that were still alive in 2016 and neither one of those bills have moved. NAMIC concurs that the workers' compensation system has been largely successful for over 100 years but there are solutions to improving the system that are well known like fee-schedules. He went on to say that Mr. Krohm stated in his comments that evidence suggests, so far, that in states like Oklahoma and Texas, the return to work rate is much faster but it was his understanding that under the opt-out system, there were a number of significant injuries that were carved out of that system so if you take some significant injuries out of the opt-out system, then it would be logical to suggest that the some of the return to work percentages would go up.

Ron Jackson from the American Insurance Association (AIA) stated that AIA has developed proposed principles for workers' compensation systems to have and offered to provide them to NCOIL. Mr. Jackson stated that NCOIL should not pursue an opt-out Model.

Rep. Keiser commented that North Dakota has the lowest rates in the country and has had for many years based on the Oregon study - significantly lower than opt-out states. Rep. Kesier stated that Mr. Krohm's presentation made a general assumption that opt-out states could make a lot of decisions along the way that you cannot do within the general system. He disagreed with that point stating that legislators can set the policy for their workers comp and they can design a program like they have in North Dakota. Rep. Keiser continued by stating that North Dakota has been on early intervention for many years and they didn't need opt-out to do it. He suggested that other states look at the North Dakota system and went on to explain that North Dakota has an automatic co-pay on every injury starting at \$250 per claim and goes up depending on how long you wait to report that injury. However, in North Dakota, that co-pay is waived if the injury is reported within 24 hours – or if it is a holiday or weekend – the following Monday or the day after the holiday. He added that North Dakota's back to work record is much better than the opt-out program so in effect, it is not opt-out that produces such results -- it is designing a good workers' comp system.

He continued by stating that the assumption, for example, by Montana, was because North Dakota's premiums were so low, the benefits were not very good. However, Rep. Keiser noted that the North Dakota maximum average weekly wage replacement is \$1,247 compared to Oklahoma's which is approximately \$700. North Dakota has a lot of benefits that others do not have - if there is a fatality or a total permanent disability, North Dakota pays for the spouse and the children to go to college. He noted that it has nothing to do with opt-out and legislators have to accept the responsibility of designing a program that does work as they have the authority to do it.

Rep. Keiser stated that his biggest concern is where are the reserves for an opt-out company and asked Mr. Krohm the question: Where is the reserve for an opt-out company in Oklahoma on a \$15 million exposure. Mr. Krohm stated that there was none; there were two possibilities – if insured, the insurance company carries the reserve as they are obligated to pay the benefit; if self-insured, the Oklahoma insurance commissioner establishes, at his discretion, what the security deposit has to be and that may or may not be adequate. He added that if it is inadequate, the standard is the average claims experience for the last three years which could mean nothing.

Mr. O'Brien commented that he felt that Rep. Keiser made the point that he tried to make earlier relative to cost shifting. The costs do not go away whether the injured worker is not being treated because the plan design does not allow treatment to continue for whatever reason or there is a situation where the injury is catastrophic and the reserves, to the extent there are any, aren't there. At the end of the day the health care safety net pays. As a society, these people are not going to be left on the side of the street.

Asw. Carlton asked whether the employee has the right to sue in an opt-out system? Mr. Krohm stated that all the states were different. Texas allows the right to sue for non-subscribers; Oklahoma says it is exclusive remedy so even if the person is severely injured and they deny the claim, there is no remedy in circuit court although that could be ruled unconstitutional. The Tennessee bill floated in 2015 did allow civil suits against the employer.

AJ Donelson of the Association for Responsible Alternatives in Workers Compensation (ARAWC) stated that ARAWC supports voluntary alternatives for workers' compensation and, based on experiences in Oklahoma and Texas, which is reinforced by data, ARAWC believes that all alternatives can benefit both injured workers and employers and that option plans can work side by side with traditional workers' compensation plans to improve a states' occupational injury benefit compensation system. In March of 2016, Professor Morantz of Stanford University issued her second report focused on Texas' alternative plans. The Stanford study found that Texas alternatives paid better wage of placement benefits and paid them faster than workers' compensation programs and that employers who sponsored alternatives reduced their program costs by half. ARAWC's industry experience is consistent with the Stanford study and that their employers find that alternative compensation programs produce fewer disability claims; a faster return to work rate; a lower frequency of claims dispute and a reduction in the cost per dispute and employers seem to like them. These positive results can be seen in Texas and Oklahoma, the only two states that have enacted alternative legislation.

Mr. Donelson offered to share ARAWC's data with the committee. He further stated that the Oklahoma litigation is specific to a provision provided for in the Oklahoma state Constitution and because of that, the outcome would have little impact on what individual states do in terms of their own alternatives. He concluded by stating that as the committee and the states continue to look into alternatives, there were four issues to keep in mind: 1) Better communications; 2) Responsibility to focus on the management of injury claims in the best interest of the employees; 3) More employer and employee and medical provider accountability; 4) Free market competition. Mr. Donelson stated that ARAWC

appreciates NCOIL's leadership role in opt-out discussions and offered ARAWC's help in any further developments.

Sen. Klein stated that Mr. Krohm's research was an unbiased opinion of opt-out programs. Mr. Krohm added that he was in favor of additional data being collected and disseminated and noted that the lack of research and data collection by Oklahoma is a key defect.

Mr. O'Brien stated that the workers' compensation community supports a system that is cost effective and fair. Whether it be traditional or an alternative system, it needs to provide for equitable balance and comprehensive injury compensation; needs to provide for an impartial adjudication process; needs to have benefit security and an equitable allocation of losses and needs to have state oversight.

## DISCUSSION OF WORKERS' COMPENSATION SUMMIT

Bob Wilson, President and CEO of WorkersCompensation.com spoke about the Worker's Comp Summit and what is being called the "National Conversation for Workers Comp." He stated that it came about based on a conversation with Abby Hutchins, the Director of the Tennessee Workers' Comp Division about the challenges facing the workers' comp industry. He noted that many might be familiar with the "ProPublica Series" which were very critical about the workers' comp system and received a lot of negative publicity. He added that letters had been received from multiple congressman, congressional reps and the Department of Labor demanding that the DOL intervene. At the same time that NPR and ProPublica issued their report, OSHA had put out a report that was very critical of the industry. He stated that he wrote an article on "Who Will Lead the National Conversation on Workers' Comp?" and that kicked off the Summit.

Mr. Wilson stated that there were approximately 40 attendees and that many aspects in the system were represented including regulators, employers, attorneys and insurance carriers. Mr. Wilson stated that he acted as the mediator and the goal was to identify items the biggest issues where workers' compensation needs to be reviewed and addressed. The Summit identified 29 imperative issues and came to a consensus that the system does work for about 85% of the those who go through the system. Problems arise in the more complex cases. He noted that out of the 29 issues, there were three priority issues that stood out: 1) Benefit adequacy; 2) Regulatory Complexity; 3) Delays in Treatment for Compensable Claims.

Mr. Wilson noted that there with regard to benefit adequacy, there is a great lack of responsibility and understanding regarding workers' compensation. Injured workers are sometimes uninformed or make uninformed assumptions about what they are entitled to. As to regulatory complexity, Mr. Wilson noted that some states are very difficult to navigate. He further noted that states update approximately 300 forms quarterly which is a daunting task and that the differences between jurisdiction often leads to unintended consequences. He further noted that if medical treatment is delayed, it costs the industry a lot of money due to extensive litigation. He stated that an employee could potentially wait months without medical care because a doctor has put in their mind that their injury might be a workers' comp claim and the employee needs to wait until the two insurance companies argue over the finances. Mr. Wilson further stated that a potential solution would be the following Maine statute -: *"Payment of benefits due a person under an insured disability plan or insured medical payment plan may not be delayed or refused because that person has filed a workers' compensation claim based on the same personal injury or disease"*

The Summit also discussed legislative issues vs. cultural issues. Mr. Wilson stated that we are in a constantly changing society. He added that many employers view workers' compensation as a mandated expense on their budget and don't understand the benefits they receive from the grand bargain/limited liability. At the other end of the spectrum, societal expectations have also changed – being dependent on disability or other welfare programs does not have the stigma it did years ago. Today, people have injuries that 40 years ago would not have led to a disability diagnosis. The current system is good at telling people what they can no longer do rather than telling people how to adapt. Mr. Wilson has spoken to claims adjusters who say their most important goal is to close the claim, not get people better and back to work. Mr. Wilson agreed with the notion that we cannot legislate cultural issues. An example is a discussion forum on his company's website that is heavily used by injured workers. Over the years he always sees people post on the forum: "how much will I make/what will my settlement be?" Mr. Wilson then noted that if you do not know or understand the system, and you entered the system, you get a workers' compensation adjuster and you get a workers' compensation doctor and the word that stands out is "compensation." Accordingly, he has long advocated that the system be renamed "Workers Recovery." By making one simple word change, he felt the dynamics of the system could change.

Rep. Riggs stated that a comment was made at the Summit that vocational rehab was a failure but the people that he knows in vocational rehab give examples of how it helped people and it worked. Mr. Wilson responded by stating that some vocational rehab states are more active than others and that by the time some states get the injured worker, it could be more than six months after the fact and they have to undo a lot of damage of a system that has dragged them through the mill. He noted that some states have had success with vocational rehab but generally speaking, vocational rehab is very poor in the industry.

Sen. Klein asked Mr. Wilson to address "Federalization" in the industry. Mr. Wilson stated that there were different views in the industry and that some wonder if the feds would come in and take over the system – he does not think that will happen but does think that one vehicle for the feds to come in and influence workers' comp is getting involved in social security disability (SSDI).

Rep. Henne asked if Mr. Wilson's Summit had any timelines as to when their ideas would come out. He noted that opt-out comes from employer trust issues stating that it drives a wedge between the employer/employee relationship - talk about the system keeps going on and no one seems to come up with any solutions. Mr. Wilson reported that it would be about a year before the Summit comes out with any guidelines to address the issues. The expectations of employers have definitely shifted and some of those issues can be solved with the appropriate legislation.

Rep. Keiser stated that he agreed that workers' "compensation" was a terrible concept. He noted that a number of years ago, ND changed the name to "Workforce Safety & Insurance" and emphasized safety – it has been a great success.

RE-ADOPTION OF MODEL LAWS

Sen. Klein stated that consideration of re-adopting the Model State Structured Settlement Protection Act will be held until the Annual Meeting in November in order for the committee to discuss possible amendments to it.

Upon a motion made and seconded, the Committee unanimously re-adopted the Trucking and Messenger Courier Industries Workers' Compensation Model Act and the Model Agreement Between Jurisdictions to Govern Coordination of Claims and Coverage.

ADJOURNMENT

There being no further business, the Committee adjourned at 4:00 p.m.