

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
WORKERS' COMPENSATION INSURANCE COMMITTEE
AUSTIN, TEXAS
DECEMBER 12, 2019
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee met at the JW Marriott Hotel in Austin, Texas on Thursday, December 12, 2019 at 2:00 p.m.

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

Other members of the Committees present were:

Asm. Ken Cooley (CA)	Sen. Paul Wieland (MO)
Sen. Jack Tate (CO)	Rep. Tracy Boe (ND)
Rep. Martin Carbaugh (IN)	Rep. George Keiser (ND)
Rep. Matt Lehman (IN)	Sen. Jerry Klein (ND)
Rep. Peggy Mayfield (IN)	Asw. Ellen Spiegel (NV)
Rep. Joe Fischer (KY)	Rep. Tom Oliverson, M.D. (TX)
Rep. Edmond Jordan (LA)	Del. Steve Westfall (WV)
Sen. Paul Utke (MN)	

Other legislators present were:

Rep. Deborah Ferguson (AR)	Sen. Gary Dahms (MN)
Sen. Dan McConchie (IL)	Rep. Donna Pfautsch (MO)
Rep. Doug Gutwein (IN)	Rep. Bruce Grubbs (MT)
Rep. Chris Judy (IN)	Sen. Shawn Vedaa (ND)
Sen. Andy Zay (IN)	Sen. Cale Case (WY)
Del. Mike Rogers (MD)	

Also in attendance were:

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

QUORUM

Upon a motion made by Rep. George Keiser (ND) and seconded by Rep. Joe Fischer (KY), the Committee waived the quorum requirement without objection by way of a voice vote.

MINUTES

Upon a motion made by Rep. Keiser and seconded by Rep. Matt Lehman (IN), the Committee approved the minutes of its July 11, 2019 meeting in Newport Beach, CA and its October 10, 2019 interim conference call minutes without objection by way of a voice vote.

CONSIDERATION OF NCOIL WORKERS' COMPENSATION DRUG FORMULARY MODEL ACT

Rep. Matt Lehman (IN), NCOIL Vice President and sponsor of the NCOIL Workers' Compensation Drug Formulary Model Act (Model), thanked everyone for their work on the Model and noted that the Committee has been working on the Model since its introduction in February, and most recently on an interim Committee conference call in October. Rep. Lehman stated that he believes the Model is in a good place and proceeded to explain the changes that have been made to the Model since the Committee's last in-person meeting in July.

Section 3 of the Model was amended to provide states the option of developing their own formulary by rule. Next, in Section 3, language was added to add evidence-based guidelines among the factors that a state must consider when developing or selecting a formulary. Next, throughout Section 4, the wording of "included but not recommended in the formulary" was changed to "listed but not approved in the formulary" as that is a better description of the categories of drugs on the formulary. Further, in Section 4, the timeframe within which to notify the prescribing physician and the injured employee of the third party's determination of a request to use a drug that is listed but not approved in the formulary was shortened from five business days to three business days. Lastly, a new section – now Section 5 – was added titled "Third Party Conflict of Interest" in order to ensure that the third parties resolving formulary disputes are conflict-free.

Rep. Lehman noted that his goal when developing NCOIL Models is always to develop a framework for states to consider, knowing that states may need to make certain changes to reflect market and other realities. Rep. Lehman stated that he believes the Model is in a good place and does in fact serve as a good basis for states to consider adopting.

Upon a Motion made by Rep. Joe Fischer (KY) and seconded by Rep. Martin Carbaugh (IN), the Committee voted without objection to adopt the Model by way of a voice vote.

DISCUSSION ON POST TRAUMATIC STRESS SYNDROME (PTSD) COVERAGE AND OTHER EXPANDING BENEFIT CHANGES IN THE WORKERS' COMPENSATION INSURANCE MARKETPLACE

Professor Michael Duff of the University of Wyoming College of Law stated that it seems that the issues of PTSD coverage and firefighter presumption within the workers' compensation marketplace are growing in popularity. One might ask, why now? Prof. Duff stated that when covering these issues with his students, he often asks them what reservations they have with emotional injuries and he is surprised by what they tell him. Traditionally, we know that there is a history of our legal system going back to the early 20th century or earlier of resisting the concept of emotional harm when there is no accompanying physical harm, whether in tort or work comp. That boiled down to a few concerns such as too many fraudulent claims, too many trivial claims, and that the claims may be too hard to prove. What changes the situation is when you have a group of potential claimants who are especially sympathetic. The system really wants to do something to compensate people who are acting in the public service.

One of the things that really resonates with Prof. Duff's students is not that there will be too many fraudulent claims, but that there will be too many authentic claims which would

then be very expensive. There is a U.S. Supreme Court case written by Justice Thomas in 1994 and the issue was whether one could apply negligent infliction of emotional distress claims under a statute called the Federal Employers Liability Act (FELA) which is a railroad liability statute. There was no specific mention in the statute about whether or not it would cover mental injuries and Justice Thomas stated that he was not actually worried about fraudulent claims but rather authentic claims and how the system would deal with that. It is amazing how this issue has been with us for a long time. Prof. Duff noted that it looks like there will be hundreds of PTSD claims that could emerge from the Virginia Beach shootings. Prof. Duff again noted that his students often state they are not worried about fraudulent or trivial claims as the legal system has an obligation to remedy injuries – the system has to figure those things out just like it has to figure out authentic batteries or assaults from inauthentic batteries or assaults. We expect the judicial system and appropriate agencies to be able to do that.

Prof. Duff stated that he believes one of the things that is underappreciated is the extent to which PTSD has been driven by the viability of the negligent infliction of emotional distress claim. Once upon a time, if you were negligently harmed, but there was no physical harm, there was no recovery under tort law. Over a period of time, that began to change. When we think about the start of workers' compensation, we don't think about negligent infliction of stress as part of the quid pro quo – we thought about a broken arm and how that would be swapped out for a work comp statutory benefit. There was no question of a negligently caused emotional harm – it was not part of the quid pro quo. What started to happen, however, is that the idea of emotional harm starts to grow. Essentially, we wound up with something called the 'zone of danger' test whereby if you were never physically touched but harmed emotionally, that become a cognizable action under the law.

Prof. Duff noted that the quid pro quo we often think about is the swap of work comp for tort as it existed in 1911. However, as there are new kinds of negligence actions you must decide if you want to make employers liable in negligence or would you rather have the swap for work comp immunity. This is a conversation that never ends. A good example is from a case in Wyoming, Collins v. COP Wyoming, 126 P.3d 886 (Wyo. 2006), which involved a father and son being employed by the same company and the son was killed on the job by a track hoe. The father witnessed the death and brought a negligent infliction of emotional distress claim. The state and employer (WY is a monopolistic state) stated that the case was covered by the exclusive remedy rule and immunity. The WY Supreme Court allowed the action because under WY law, a definition of injury doesn't include any mental injury unless it is caused by a compensable physical injury that occurs subsequent to or simultaneously with the physical injury and it is established by clear and convincing evidence. That is often referred to as the physical-mental rule – if there is a physical injury, accompanying mental injuries, such as depression resulting from a bad back, are compensable.

Prof. Duff stated that if you agreed with what the state/employer was arguing in that case there would be no work comp remedy because work comp excludes mental-mental injuries, and there would be no negligent infliction of emotional distress. The WY Supreme Court said you cannot do that as a matter of state constitutional law. There are a number of states, about half of them, that have no coverage for mental-mental injuries. Accordingly, what do you do if there is no coverage for mental-mental but there is a viable action for negligent of infliction of emotional distress? There is an asymmetry there. Prof. Duff stated that he believes part of what is driving this issue is that there is a

recognition that tort liability exists – somehow you are going to have to give somebody a cause of action for this species of injuries because that cause of action has become more viable.

Prof. Duff stated that there are some parallels between PTSD and occupational disease. One of the similarities between those two expanding issues is that just as something like PTSD or mental-mental was virtually inconceivable in 1911, that has begun to change. Early English Act covered occupational disease and even had presumptions so that the idea disease-presumption is new in the law is not true. Essentially, there is a schedule set up which says if you get a certain kind of injury and it occurred in a certain kind of process, we are going to presume that the injury or disease arose out of the employment. That presumption existed from the beginning. Why? – because that was going to be very hard and expensive to prove. And if at the end of the day you have most plaintiffs losing what are you going to do about the cost? Insurance legislators know that costs never go away – they shift.

Prof. Duff stated that American states started adopting presumptive disease models in about 1920 in New York. However, there was no mention in those early statutes about what we mean as to what a presumption really is and how does it really operate. Prof. Duff stated that there are currently a variety of statutes that set out the criteria as to when a presumption is created and what the thresholds are. The crux of most of those statutes are that it has to be an individual in a statutorily designated job classification such as a firefighter, public safety officer, or first responder – they are defined different ways in different statutes. Secondly, the individual must have had a pre-employment physical which reveals no evidence of an illness or disease for which benefits are sought. Thirdly, the individual must have been employed for a statutorily required time period before presumption can apply. Prof. Duff stated that he believes in Texas that time period is five years. Fourthly, the individual must be seeking benefits for an illness or disease covered by the law that is discovered during employment in the classification – that disease must be the right kind of disease and it must have been discovered during employment. To put this in work comp doctrinal terms, these criteria are basically seeking to take out the notion of a pre-existing condition. Usually, these presumptions deal with cancers but there are heart-lung statutes that can be broader and cover tuberculosis, heart disease, or hypertension.

Prof. Duff stated that the idea is that the criteria are the establishment for the creation of a presumption. Now the question becomes what that means – it means that we presume that the workers' disease or condition was caused by work. It is a presumption of causation, but that does not resolve the issue. In evidence law there are various types of presumptions ranging from weak to strong. By weak, it means that the employer has to do the least to overcome the presumption. By strongest, it means that the employer to do the most to overcome the presumption. The weakest kind of presumption is something called the bursting-bubble presumption, also known as the Thayer-Wigmore presumption. The idea here is that once the presumption has been created, all the employer has to do is provide some substantial evidence that is counter to the presumption that has been created. What that exactly means is determined in case law from state to state. If that happens, the presumption falls out of the case completely – the bubble has burst. Once that bubble has burst, the position that the employee is in is that it is as if the presumption never existed so the employee would then have to show additional, expert evidence to show that the disease was caused by

work. That is the weakest presumption because the employer does not have to do a lot to overcome the presumption.

Prof. Duff stated that an intermediate position is the so-called Morgan presumption. The Morgan presumption is probably the type of presumption that most states are following now that have enacted presumptions. Under Morgan, after the presumption has been created, it stays in the case as positive evidence. Another way to look at it is if that when the presumption has been created, it is no different than if you had put an expert witness on as an employee and established that there was evidence in support of causation. Once that is created, it never falls out of the case – it is positive evidence of causation. Additionally, once that positive evidence exists, it shifts the burden of both production and persuasion to the employer. The employer then has to show that the disease is not caused by employment, so the shoe is on the other foot. The employee has positive evidence that the disease is caused by work, and the employer is in the position of having to disprove that it is caused by work. Just as it is hard to prove that a disease is caused by work, it can be very hard to prove that the disease is not caused by work. So, if you shift the burden to the employer, there are going to be more instances in which the employee is likely to prevail.

Prof. Duff stated that when he speaks about burden shifting and presumptions, they are all rebuttable presumptions meaning that if the other party wants to present evidence in opposition to the presumption they certainly can – but the thumb is being put on the scale one way or the other. There are also Morgan-like presumptions where there is a lot of control over what the employer is permitted to do to attempt to rebut the presumption. For example, the California Labor Code Section 3212.4 states that you cannot attribute the current disease-state to a pre-existing condition which Prof. Duff thinks means is that you are not automatically disqualified as an employee if you had a pre-existing condition. There are even presumptions that say it is not enough to show that it was not related to employment – you also have to prove a specific non-related cause. You get the sense that there is a great variety of how the presumptions are created, what they mean, and how they can be rebutted. Prof. Duff stated that another issue he has taught in his career is ERISA-employee benefits and one of the great motivators of the ERISA statute was to prevent disunity. You have a lot of disunity in the work comp presumption arena.

Prof. Duff stated that one of the things that he believes is missed in these discussions is that work comp expansion always simultaneously confers tort immunity. That is an important point because if you are going to do a full assessment and full cost-benefit analysis you are always simultaneously looking at tort liability avoided at the same time you are looking at work comp costs incurred. Prof. Duff stated that he encourages a full cost-benefit analysis of that type when considering the overall burden that presumptions put on the work comp system. Again – costs don't go away, they shift.

Robert Stokes, Esq. of Flahive, Ogden & Latson stated that he and fellow panelist Glenn Deshields, Legislative Director at the Texas State Ass'n of Fire Fighters (TSAFF), have worked on recent changes to the Texas statutory provisions involving presumptions. Mr. Stokes then provided some history on Texas presumptions. The first presumptive statutes were passed in 2005 in a major reform package that did a lot to Texas work comp. The presumption provisions were slightly buried in the reform and no one paid much attention to them for some time. For cancer presumptions – the marquee presumption that everyone seems to pay a lot of attention to, for good reason – the

statute said that the presumption would attach to any form of cancer that had been determined as possibly related to firefighting, according to the International Agency for Research on Cancer (IARC). The IARC is an arm of the World Health Organization and has studied cancer causation for decades and is a very well respected organization. The problem is that when that language was passed in 2005, there was no comprehensive study about the causation of firefighting and cancer at the IARC. They didn't publish their 98th monograph which looked at firefighting and cancer until 2010, so for five years after the presumption statute was passed, dovetailing into the IARC's determinations, there was no determination from the IARC.

Mr. Stokes stated that once that IARC made the determination, it was then realized that it was an 818-page document that started with A and went to Z and for 818 pages in between you had to interpret the document. Other states have adopted a list of cancers. The legislature in Texas felt like adopting the IARC's determinations was the process that made the best sense as it was scientific and based and grounded in a well-respected organization as opposed to going to a list that is subject to horse-trading and negotiation. The problem in Texas was that there was a fundamental disagreement about what the IARC had determined. Cities believed that the IARC had determined that there is a cause or relationship between firefighting and three types of cancer – prostate, testicular, and non-Hodgkin's lymphoma. Those cases were litigated for several years and it is no fun litigating cancer presumption cases. They are serious and tragic, and a position is taken that an employee in one of the most valued industries of service to the public is not entitled to benefits. They are hard cases to litigate and even harder for state adjudicators to decide down the middle. It is really hard for an Administrative Law Judge (ALJ) in a work comp case to rule against the firefighter or other public servant.

Mr. Stokes stated that there has been a lot of litigation going on since 2010 regarding what the monograph means. That has meant that in cases where people have serious diseases and illnesses, instead of getting the care that they need and getting back to work as quickly as they can to provide for their families, they have had to go into the work comp system, which is not a bad system, but it is not the best system for adjudicating these types of cases. There are some jurisdictions that have taken the presumption process and removed it from the work comp system entirely. That is a consideration for all jurisdictions that are looking at this problem. Mr. Stokes stated that if you are building a presumption process in the work comp system, you must look at two important things. The first is fundamental fairness to both sides – is it fundamentally fair to reverse the burden of proof and require the party who ordinarily does not have the burden of proof to bear it in a work comp claim. In some cases, it may well be. The argument is that these are hard cases to prove and when they are hard cases to prove and we want to compensate these diseases and illnesses, the way you do that is you either lower the burden of proof or reverse it.

Mr. Stokes stated that the counterargument to that is that some cases are very easy to prove, and we don't raise the burden of proof in those cases. The burden of proof is what it is and whether it's a hard case or an easy case it ought to be level. However, if you cross that policy threshold and say you want to do something to make these cases easier to prove, then you get to the three silos that Prof. Duff talked about. In Texas, the first silo requires that you have a clean bill of health, and that you have a duration of employment that is long enough so that it is fair to both sides to attribute the presumption to the employment. In Texas, the legislature deemed five years to be the timeframe for employment. Regarding the discovery of the disease during employment,

that is a line that the legislature drew because they did not want to make this a retirement benefit plan and have to face cancer presumptions from employees who may not have worked for the city for 15 or 20 years. So, you have to be diagnosed with the condition during your employment. Finally, Texas has an exclusion for tobacco use – if the employee is a tobacco user and the disease or illness that they are claiming the presumption for is known to be associated with tobacco use, then you don't get the benefit of the presumption; you get to prove your case conventionally using conventional forms of causation.

Mr. Stokes stated you then move to the second silo and that is where during this past legislative session, the Texas legislature did the Texas twostep – they removed reference to the IARC's research, but they used research that is found in that study to develop a list. The legislature developed a list of 11 types of cancer entitled to a presumption, 10 of which are solidly found in the medical research. Mr. Stokes stated that moves us to the rebuttal section which is where you have the city's opportunity to say ok, the presumption applies but because of something in your genetics or in your non-work related activity, we believe that suggests there may be another cause to the cancer and it is not fair for the presumption to apply. The bursting-bubble presumption is easy to understand and the other two are best illustrated by the movie My Cousin Vinny. The Morgan presumption is essentially the two characters in the movie saying, "we did not commit the crime and you need to balance our testimony with the prosecution's case." The strong Morgan approach is what the two characters ended up proving in the movie – not only did they say "we did not commit the crime" but they proved who actually did commit the crime.

Mr. Stokes stated that he would encourage states looking at work comp presumptions to look at all three silos and to try to apply an approach that match up well – if you create a weaker presumption then it is fair to have weaker precursors or a weaker rebuttal standard. If you give a city a situation where there is a presumption that is entirely one-sided, nobody knows what that is going to cost. That is a problem with managing risk – if you don't know what it is going to cost, you can't manage it properly and you can't finance it.

Mr. Deshields stated that the TSAFF represents 20,000 professional firefighters out of 180 locals in Texas. Regarding the 2005 Texas presumption legislation, TSAFF believed that the IARC was going to be a living document that was going to develop over time and it never really developed into anything that you could actually say which cancers were caused by firefighting. So, when TSAFF was actually going through the process with firefighters that had cancer, evidence was being used that showed what painters or roofers had to say that certain chemicals caused certain type of cancers. Those cases lasted two or three years and you would essentially have to prove causation to get a presumption.

Mr. Deshields stated that he was not a big proponent at first of having a list as he would presume that there were more than 10 cancers that could be caused by firefighting. However, in a broad field it is hard to get a path and that is where the problem was. It all boils down to money and cities were worried about going broke by paying for a lot of cancer cases and TSAFF was worried about litigation costs. Cases were starting to backlog as they go through an administrative process first and then they go into district court. Mr. Deshields does not believe one case has ever got out of district court. District court had not provided a decision that could be used going forward and going another 15

years following that path was untenable. Mr. Deshields stated that TSAFF's first shot at this during this past legislative session was basically a bill that gave the Texas Department of Insurance more authority to regulate providers such as cities and risk pools and allow them to get legal fees in the cases. That was sought because in going through the entire process, the firefighter would be able to get back their medical costs and their lost time but the attorney would then get 25% of that so it did not make a lot of sense that TSAFF could not get legal costs. That was the original goal but then it morphed into an omnibus bill that brought in presumption, legal costs, and other things into it and looked a lot different than what TSAFF originally wanted.

Mr. Deshields stated that TSAFF started with the World Trade Center list which he believes had a list of about 24 cancers. Through compromise, the list of 11 was finalized. Mr. Deshields stated that he believes it is going to take a long time before Texas knows how things will work out with the list. TSAFF's experience with presumptions thus far has actually been pretty negative. 90% of cancer claims are denied in Texas and a lot of treatment protocols in Texas are outdated although that is starting to get better. There is no standardized bureaucracy throughout the state and there was basically a resistance from cities and risk pools for any change simply because they did not know what the cost would be - \$10 million per year or \$100,000 per year? Those providers, especially a self-insured city, has to put money aside so that they can pay for the treatment. TSAFF was essentially in a worse position than if they were going with private insurers. Mr. Deshields stated that one of the authors of the bill, Rep. Dustin Burrows (TX), actually brought that issue up.

Mr. Deshields stated that it is going to be a long road ahead for everyone involved with this Texas legislation. It will probably be five years before it is known whether the bill has worked. Regarding PTSD, Mr. Deshields noted that he is from a generation that has known nothing but war and PTSD has always been on the forefront. A lot of Mr. Deshields' friends came back from war different people and a lot of firefighters were in the military. Accordingly, TSAFF started to notice a lot more focus being put on PTSD and people in their 40s now are starting to see the strain of a career involving seeing horrible things every day. TSAFF realizes that if you want to go get a work comp claim for PTSD, you basically have to file as mentally ill and no one is going to do that so they were trying to get treatment elsewhere or they just weren't getting treated. Careers used to last 20 years but now last 30-35 years. So, trying to carry that on for that long is a drag as it costs a lot of money. If someone is not performing as they should and not doing a good job, the taxpayers are not getting a good deal.

In 2017, TSAFF looked to just get PTSD as a compensable thing in work comp. That legislation was passed and there was one hang-up with one risk pool that wanted to define one single event as being the cause of PTSD. That went against what a lot of psychiatrists said but in order to get the bill passed, it was agreed upon. Psychiatrists said that they were just going to ask the firefighter for a specific event then. Prof. Duff stated that there is a reason for that which is that historically, work comp has focused on accidents arising out of the course of employment. So, if you have multiple events then by definition it is not an accident. That is one of the ways the work comp doctrine doesn't fit and is not coherent with certain situations such as PTSD. The same thing is seen with pre-existing conditions and you have some kind of combination between an event and a pre-existing condition – it is the hardest thing historically for the work comp doctrine to deal with. Mr. Stokes stated that you have to draw the line between multiple events and generalized work stress because every state that has had a court that has

adopted a system that compensates in the work comp system for generalized stress in the workplace has failed. Texas did find a way to draw the line as it adopted multiple events with language that was sought to be clear that is not an open door to generalized stress claims.

Mr. Deshields stated that during the past Texas legislative session, legislation was passed to be clear that it had to be multiple events which is a big deal for TSAFF. Mr. Deshields stated that he is not under any illusion that a lot of people are going to file these types of claims and he does not even know of one thus far. There have been a few cases that have tried to be filed and the big issue is that if PTSD or mental illness is preventing someone from doing their job, they can get taken in to see if they are fit for duty. A lot of people are worried that if they file a work comp claim then that is going to happen. Accordingly, a lot of people are probably not going to run through that door. TSAFF's major goal was to push departments in the direction of identifying these issues before they became serious problems. Some departments have done such and actually have psychiatrists that are on staff or paid for. Mr. Deshields stated that peer to peer support has not really worked which was pushed hard for, but it has not resulted in any decline in suicides.

Accordingly, TSAFF believes that there probably needs to be a heavier focus on PTSD on the front end by the city such as de-briefing after bad situations. Mr. Deshields again stated that he will probably only see one or two claims filed this year, if any, but it is something that needs to be pointed out because there are a lot of people suffering and every firefighter can tell you of a bad situation from 1987. That is PTSD but it does not need to be treated. Also, TSAFF has conducted research that has shown that PTSD is relatively cheap to treat as long as it doesn't go too far. TSAFF's issue is that if a person ends up with PTSD through work and they need to be medically retired, they must be able to still receive treatment after that.

Sen. Jerry Klein (ND), Acting Chair of the Committee, asked what the prevalence of cancer is among firefighters and also asked if they are going to be penalized, in the legal sense, for not being properly suited with necessary equipment. Mr. Deshields stated that the latter issue is a very big issue for TSAFF as it has been pushing for clean gear initiatives and measures were passed in Texas in 2018 through the Texas Commission on Fire Protection that strengthened the requirements on clean gear. The National Firefighter Protection Association just passed new, stricter rules on clean gear which every department in Texas that is regulated will have to follow. There are certain departments in Texas that have two sets of gear and if they make a fire, they are actually brought a new set of gear when they are on scene and the "dirty" gear is packed up and taken back to be cleaned. The issue of clean gear may be one of the biggest causes of cancers among firefighters. If you look at the aforementioned list of cancers in Texas, lung cancer is not on there because of proper gear. Firefighters actually have a lower rate of lung cancer, not caused from smoking, than the general public – generally because they are healthier and in better shape.

Mr. Stokes stated that the work comp system is a no-fault system so no employee should ever be penalized because the employee acted negligently that was part or all of the cause of illness or injury. Also, the nature of firefighting today compared to how fires were fought in the U.S. and across the world is important to consider as so much of the research took place quite some time ago. The studies that are looking at the way fires are fought today will tell you that the firefighter today is primarily an EMT that

occasionally fights a fire. And statistically, the largest study shows that approximately 4-5% of all runs that firefighters make today involve fighting fires. Mr. Deshields stated that the old fires referenced by Mr. Stokes involve basically wood and the stuff being fought now is plastic and tar – much worse stuff to be near. Sen. Klein noted that older communities often have asbestos present.

Sen. Cale Case (WY) asked Prof. Duff how the WY presumption law regarding “predominance” fits within the overall presumption landscape. Prof. Duff stated that WY has a particularly tough version because the predominance standard does not apply to mental-mental injuries. In other words, there is no coverage of mental-mental injuries at all. So, we are talking about a situation involving physical-mental injuries and you still have to show by predominance that the mental injury was caused by the physical injury.

Asw. Ellen Spiegel (NV) stated that there was an incident in her city in Nevada where a father and son were both firefighters. The father had PTSD from his line of work and committed suicide. The son who had been in treatment for PTSD as well also committed suicide. The city decided that they would count the son’s death as a line-of-duty death. Asw. Spiegel asked if that decision establishes a precedent that could be used in future work comp cases. Prof. Duff stated that it is tough to say without reading the case and knowing the basis for the decision, but he imagines it could be used as precedent and it is up to lawyers to parse the decision and argue.

ADJOURNMENT

There being no further business, the Committee adjourned at 3:15 p.m.