

NATIONAL COUNCIL OF INSURANCE LEGISLATORS  
WORKERS' COMPENSATION INSURANCE COMMITTEE  
ALEXANDRIA, VIRGINIA  
SEPTEMBER 25, 2020  
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee met at the Hilton Alexandria Old Town Hotel on Friday, September 25, 2020 at 10:00 A.M. (EST)

Representative Tom Oliverson, M.D. of Texas, Chair of the Committee, presided.

Other members of the Committee present were (\* indicates virtual attendance via Zoom):

Rep. Deborah Ferguson (AR)*	Rep. Edmond Jordan (LA)*
Sen. Jason Rapert (AR)	Sen. Jim Seward (NY)*
Asm. Ken Cooley (CA)*	Del. Steve Westfall (WV)
Rep. Matt Lehman (IN)	
Rep. Peggy Mayfield (IN)*	

Other legislators present were:

Sen. David Livingston (AZ)	Rep. Brenda Carter (MI)
Sen. Travis Holdman (IN)	Asm. Kevin Cahill (NY)
Rep. Jim Gooch (KY)	Sen. Bob Hackett (OH)
Sen. Kirk Talbot (LA)	Rep. Carl Anderson (SC)
Rep. Kevin Coleman (MI)	

Also in attendance were:

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

## 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.

## MINUTES

Upon a motion made by Rep. Deborah Ferguson (AR) and seconded by Asm. Cooley, the Committee voted without objection by way of a voice vote to approve the minutes from the Committee's March 7, 2020 and May 29, 2020 meetings.

## STATE OF THE LINE – AN UPDATE ON THE STATUS OF AND TRENDS IN THE WORKERS' COMPENSATION INSURANCE MARKETPLACE

Jeff Eddinger, Senior Division Executive – Regulatory Business Management at the National Council on Compensation Insurance (NCCI), stated that he will be discussing today somewhat of an overview of the past year in the workers' compensation insurance marketplace.

Accordingly, while COVID-19 will certainly be a part of the discussion, more information specific to COVID-19 and work comp can be found on the NCCI website. Mr. Eddinger stated that 2019 was another year of unprecedented results – a combined ratio of 85 meaning an underwriting profit of 15% and it is the fifth year in a row of underwriting gains and the third year in a row of underwriting combined ratios in the 80s. The theme here as we go along is that the workers' compensation industry is in a very strong position and has been for several years and is in a good position to address any claims that will come out of COVID now or in the near future.

Work comp investment gains on insurance transactions in 2019 show an 11% investment gain. That is very good – still below the long term average of 12.6% but is a very solid result given the low interest rate environment. Work comp pretax operating gain is basically combining underwriting profit of 15% and adding a gain on insurance transactions of 11% you get a pretax operating gain of 26% for the second year in a row. Those results from the recent two years are well above the long term average of 8% but also keep in mind that you can see the cyclical nature of work comp results so just 4, 5, and 6 years ago the operating gain was almost nothing so it is important to look at the long term results when you talk about how work comp has been doing over the long term. The work comp premium in the latest year has dropped a little bit – it had been increasing year over year since the great recession when a lot of the premium dropped precipitously due to large unemployment. The drop from 2018 to 2019 has nothing to do with the current situation. Obviously, premium is going to be one area where we are going to see a very big impact indirectly due to COVID and its impact on employment levels.

Mr. Eddinger stated that the residual market has been very stable and manageable at about \$1 billion dollars. It began to increase after 9/11. We don't know yet what the impact on the residual market will be due to the pandemic but that is something NCCI is monitoring since there was an impact when it was realized that terrorism was a new work comp risk. Now, we realize that the pandemic could be a future work comp risk. That billion dollars in the residual market, to put it in perspective, is about 7% of the whole market. You can see that it has been very stable – anywhere between 7-8% over the last six or seven years. So, looking backwards the residual market has been very stable and manageable.

Mr. Eddinger noted that when speaking about the slight premium drop from 2018 to 2019, certain things drive that such as a payroll increase of about 5.5% but the loss cost that were being charged during that period have come down quite a bit mainly driven by NCCI and other bureau rate filing. Carrier pricing hasn't really impacted it that much – its more of just the base loss costs that have been coming down. Overall, the change in premium has been relatively small – about a 1.3% drop. Looking at payroll growth, it was driven by two things: wages have been up about 3-4% pretty much across the board and then employment levels vary a little bit more by the different sectors but overall during that period employment was up 1.5% and now obviously we are going to see things go in the opposite direction going forward.

When looking at the long term approved changes in bureau premium level for NCCI states, for the latest two years there have been pretty much decreases. For 2019, there was an overall 10% decrease so there are a lot of filings involving double digit rate decreases. 2020 has moderated a bit so that the overall impact so far on 2020 was a negative 7%. For the last year's rate filing season, the data clearly backs up the negative 7% figure. During last year's rate filing seasons, there were no filed increases. The largest decrease filed was a negative 13.7%. There were not as many double digit decreases last year versus two years ago but you can see that the average was a decrease but not as big as negative 10% - it averages out to about negative 7%.

On the loss side, improvements continue to be driven by improvements in work comp lost-time claim frequency. 2019 saw another decrease in claim frequency of 4% which is pretty much consistent with the long term average of negative 3.8%. In 2018 there was a bit of a smaller decrease in -1.4% so some have questioned whether that was the year where frequency turns but so far it really did not turn out to be that and 2019 has continued on a long term pattern. There is one area that bucks the trend. Cumulative change in claim frequency from 2011 to 2018 shows a pretty large decrease during that time period – about 20%. One area that we've seen – probably the only area – claim frequency increase is in motor vehicle accidents. That is an area NCCI has been watching and has been posting studies on it during this period of time. From 2011 to 2018, smartphone ownership grew from 20% to 80% and NCCI has posited that the increase is really due to the increase in distracted driving so that is something that NCCI continues to look at. However, the data shows why NCCI has been filing decreases over this period of time.

Of course, on the loss side there is not just frequency but also severity which is the average cost of each claim. In 2019, the average indemnity claim cost or wage replacement increased by 4%; the year before that it increased by 3.4% - as we would expect since indemnity payments relate to wage levels. It has been pretty consistent over time as it is a long term 20 year history where it shows that the change in indemnity claim severity has pretty much tracked with the cumulative change in wage inflation during that time. There was a period between 1999 and 2008 where the indemnity claim severity was rising faster than wage replacement and we were seeing some larger claims during that period of time; but from 2008 to 2019 it has tracked more closely to wage inflation.

On the medical side, we see the medical claim severity is up 3% in 2019 versus 2.5% in 2018. It is a similar story although a little bit different when you compare medical claim severity to basically a medical cost index. The personal health care chain weighted price index is being used – it is not a medical CPI per se but that is pretty much a proxy for a medical cost index. Medical severity has risen much more than the medical cost index. However, between 1999 and 2008 it was very much out-pacing that cost index but from 2008 to 2018 it has been tracking much closer with the change in that cost index. What that really means for claim severity is that indemnity and medical claim severities have moderated so that they are pretty consistent with the wage and medical cost indexes. However, claim frequency continues to drop and that is really driving the improvement in the rates.

Going forward, it is difficult to project what will happen with several things but we can do our best. With employment, we continue to see large reductions in jobs in the leisure, hospitality and travel industries. Professional services may be staying the same as telecommuting helps to maintain current employment with a reduced risk of COVID-19 exposure. We have also seen an increase in jobs in the healthcare, grocery and direct delivery industries. There is definitely a very big downward pressure on premium and premium will be much lower going into the future. Unemployment is very high, people are working fewer hours and we don't know what is happening with wage adjustments yet. Even in 2020 there have been mid-term adjustments to premium because employment levels have changed so much just over this year and we are expecting negative audits meaning that payrolls are much lower than originally thought at the beginning of the policy being written. The only thing really holding things there is that some carriers have suspended or cancelled policies as well as penalties for late premium payments – due to laws being passed during the pandemic.

On the claims side, even in a normal year we would expect claim frequency to decrease but now maybe more so going forward due to a deferral in claim reporting or even a reduce in claim

frequency because fewer people are doing their more dangerous jobs. There has also been a decrease in work-related driving. There could also be some upward pressure here since there could be some coverage expansions for first responders, healthcare workers filing claims as well as for other essential workers or other occupations.

On claim severity, the use of telehealth could result in reduced medical costs. We know that telehealth has expanded during this time but we don't know yet exactly how much or if its resulted in savings. Things that could put upward pressure on claims severity are that things are taking longer and things may have been put on hold. Return to work and light duty programs may be used less often while these benefits continue. Those things could cause the current, open claims to be more expensive than they would have been if these things had not put a pause on the treatments that were occurring.

As we sit here today, the workers' compensation industry is strong and is in a very good position to handle any claims that would come out of this. However, there is uncertainty ahead as to what employment and premium will look like and what claims will look like in the future.

Rep. Matt Lehman (IN), NCOIL President, asked Mr. Eddinger from an NCCI standpoint as they have begun to see the compensatory mandatory compensation expansions how are those going to play into the rates and/or experience modifications. Mr. Eddinger stated that there has been a lot of activity in determining who is covered and there have been some expansions to the groups of workers with a presumption that they are covered. To the extent that those laws can clarify current state statutes, that can be a good thing as it could lead to claims being covered more quickly and denied less and less litigation. To the extent some of that legislation increases coverage over what it is today, those things need to be analyzed and it needs to be estimated what that means in terms of the change in system costs and California has attempted to do that. At this point in time, NCCI has not filed any COVID related changes to the rates as they feel they don't have enough information they don't know what the situation is going to look like in 2021 which is when rate filings that are currently being made now would be in effect.

As far as experience rating goes, NCCI did make a decision early on that COVID claims would be excluded from the experience rating calculation. The first thing to keep in mind is that the experience rating program is revenue neutral. That means that the program compares employer's experience and applies premium debits to some and credits to others overall not resulting in additional premium but applying those adjustments to employers and comparing them to see how safe they are. A pandemic is something that is a more rare event and not a very good predictor of how individual employers may be doing. The same decision was made when 9/11 happened – that terrorism would not be included because NCCI feels that even though you can argue that maybe some employers are doing things differently, there could be impacts on some employers for no fault of their own. It could simply be an area where there has been a COVID outbreak and a hospital sees many more patients. NCCI feels that COVID needs to be handled separately and not directly through the experience rating program.

## SCENARIOS FOR THE 2030S: THREATS AND OPPORTUNITIES FOR WORKERS' COMPENSATION SYSTEMS

Dr. Richard Victor, Sedgwick Fellow at The Sedgwick Institute, stated that he recently published a book titled "Scenarios for the 2030s: Threats and Opportunities for Workers' Compensation Systems" that focuses on existential threats to the continuation of state workers' compensation systems. It is not a very uplifting story as Dr. Victor stated that upon finishing it, his wife asked if it comes bundled with anti-depressants. The question asked is if state workers' compensation

systems were to disappear by 2030, what external forces might be the cause? Dr. Victor stated that by external he means outside the control of workers' compensation systems which makes it more difficult for the traditional workers' compensation reform processes to address successfully. The book identifies a number of disruptors that are likely to challenge the state systems by as early as 2030. Since publication of the book 10 months ago, several other disruptors are likely to emerge from the pandemic and increased attention to economic and racial disparities. Dr. Victor stated that he spent 35 years doing research on workers' compensation; first at the RAND corporation in Santa Monica, California and then by founding the Workers' Compensation Research Institute (WCRI) in Cambridge, Massachusetts and lead it for about three decades. Dr. Victor stated that he retired about three years ago and decided he wanted to write a book and The Sedgwick Institute was kind enough to sponsor it and make it possible.

As background, over the past 100 years the state workers' compensation systems have been remarkably resilient and have persisted through periods of great change – through wars, economic gyrations, major demographic changes in the workplace, medical innovation, cultural shifts, political change, and more. These comp systems have been reasonably successful in meeting goals and being adaptable but that is not necessarily true for the next 100 years nor for the next decade. Dr. Victor stated that he would like to discuss three external disruptors that he believes create existential challenges for these systems. The first is historically large increases in work comp costs ahead of us, and that is a reversal of the trends stated by Mr. Eddinger. That is driven by forces outside the work comp system that are likely to produce dramatic increases in what we call soft tissue medical conditions that get shifted to work comp from other health insurance plans. These are medical conditions like back pain, knee pain, shoulder pain and wrist pain.

The second disruptor is political and fiscal realignments happening driven by millennials and post-millennials. That creates historic pressure on public officials. To reduce expenditures and regulatory compliance costs. It is not really more of the same pressures public officials have seen in the past and shaped public debates – it is really a paradigm shift driven by millennials and their priorities. The third disruptor is declining public support for employer-based health insurance. The pandemic has exposed a downside to linking health insurance to the workplace as millions of people have or will abruptly lose their jobs and lose their employer-based health insurance. It is inevitable that some public support for employer-based health insurance is likely to weaken.

Starting with an increase in soft tissue medical conditions shifted to work comp from other health insurance, Dr. Victor stated that his estimates show that work comp soft tissue cases could triple over the next decade. The engine for that is the shifting of cases to work from other health insurance programs whether it is private employer-based insurance or the individual market or government health insurance programs. It really only takes a small shift in these cases to work comp in order to produce a shock in work comp costs. For example, if there was just an 8% shift in soft tissue cases currently paid by employer-based health insurance that would be a tripling of work comp soft tissue cases and about a 150% increase in work comp costs. Dr. Victor stated that he focuses on soft tissue cases because such cases are often inherently uncertain about what is the true cost whether it is work related or not. To adjudicate the cases, work comp systems typically indulge in rules of thumb or necessary legal fictions but often the true cause is medically unknowable so patients and providers have substantial discretion in what they attribute the cause to – work related or not work related.

Dr. Victor posed the scenario of how state legislators' constituents would respond to sustained annual double digit increases in work comp costs for employers while at the same time there is no real increase in benefits to injured workers. Employers would howl for legislative and regulatory changes to contain costs. Labor would resist what they term "takeaways" reminding that workers got no benefit increases. As the key players got more and more dissatisfied with the systems and if no timely and effective solutions came about, and remember the causes are external and substantially outside the control of the work comp reform process, the players will increasingly search for alternatives to state work comp systems as they get more and more frustrated. Dr. Victor posed the question of what could produce such a large increase in these soft tissue cases? Dr. Victor pointed out three forces. The first is workers shifting soft tissue cases to work comp from their health insurance as they face large and larger deductibles in their non-work comp health insurance - \$3,000/\$4,000/\$5,000 is now common. Studies are now beginning to show exactly this behavior. Fifteen years ago, the average family deductible in a family health insurance plan was \$1,000. Today, it is \$3,000 and \$5,000 in the high deductible health insurance plans. Fifteen years ago, only 4% of workers were in high deductible plans. Today, it's 30% and by 2030 it is likely to be the norm.

Dr. Victor stated that we have substantial evidence from decades of economists that patients respond to growing deductibles by forgoing care. Conservative consensus estimates of how much care that was forgone are that if a worker had a small deductible they would consume 25% more care than if they had a large deductible and remember, work comp has no deductible and no copays. So, for medical conditions where the true cause is inherently ambiguous, like these soft tissue cases, work comp becomes an increasingly attractive alternative for patients where work relatedness is ambiguous and workers have higher deductibles and they would but for the alternative of work comp forgo care for back or shoulder pain. This is not fraud but rather honest uncertainty about the true cause. What's changed is that the economic incentives to think outside the box about how I get reimbursed for care, not just my group health policy but maybe my work comp policy is an opportunity.

The second factor is healthcare providers shifting soft tissue to work comp from other health insurance plans as those plans abandon fee for service contracts with providers. Studies are also emerging that show this behavior. Traditionally, healthcare providers have been paid fee for service but today, health plans are moving away from fee for service and embracing provider contracts where providers bear some financial risk for meeting the financial targets for the insurer's patients. Common is an HMO where the provider is paid a fixed amount at the beginning of the policy year to provide all or most of care and doesn't get paid fee for service as they render care. So, if I go see a provider and I am covered by a capitated contract and my back pain is deemed not work related, the provider gets no payment for services for that care. But if the back pain is work related, the provider gets fee for services even though I am covered in my non-work comp healthcare under a capitated contract.

These capitated contracts are very common in some states and not common in others. In California, it is nearly half of enrollees in employer-based insurance. In other states like Michigan, North Dakota, Maryland, Nevada, Massachusetts it is 20%-30% of enrollees. And in a number of other states it is not very common – less than 10% in states like Texas, Minnesota, Kentucky, Ohio and Tennessee. But in those states the Medicaid populations are almost universally covered by capitated health plans and many of the Medicaid recipients are also workers and covered by work comp.

Another type of provider contract pays providers bonuses or levies penalties for providers hitting certain financial targets for the insurers group of patients. Currently, about 30% of employer

plan enrollees are in these types of contracts and that has been growing rapidly. Providers can avoid their penalties or preserve their bonuses by classifying soft tissue injuries as work related and new studies are showing that this is beginning to happen as well. The third force is the pandemic itself. The pandemic is likely to result in significant permanent increases in remote work – especially sales or office work. The more remote work – the more soft tissue cases. Sofas are not as ergonomically correct as office chairs and it is also harder for an employer to disprove whether back pain is work related when the worker has worked for the last two years at home. So, it is not hard to get to a tripling of work comp soft tissue cases which is 150% cost of work comp increases even if there is no real benefit increase to injured workers. The challenge to the work comp reform processes is that the causes are outside of work comp so the standard processes are not likely to be able to get the job done and then it is not hard to imagine growing interest by employers and regulators as they get more and more frustrated for alternatives to the state programs.

The second disruptor is that over the next decade we will see significant political and fiscal realignments in our public policy debates that have significant implications for the survival of state work comp systems. This is really a paradigm shift in the public policy debate driven by millennials and post-millennials voters who by 2030 will replace boomers as the largest group of voters and they will reframe the debate about government taxing and spending. Dr. Victor stated that about a decade ago his then teenage son bought him a book called Boomsday by Chris Buckley and the book has a scene that has stayed with him involving the Governor of Florida calling the National Guard to protect aging retired baby boomers on the golf courses in Florida who are being attacked by millennials because their taxes are so high because of all the spending and debt and unfunded liabilities that we have left them with. Since they will be the majority of voters, they will call the tune – not the Boomers. Their tune will be to cut spending big time and they will have an urgency that we haven't seen because we have run out of room to kick the can down the road. We have had a lot of room to kick the can down the road because we have had a labor force growing faster than the number of beneficiaries of the programs we have created but that has begun to turn around for Social Security, Medicare and public pensions in particular. It is also well known about the sorry state of our public infrastructure with lots of deferred payments that will come due.

So, if the debate is rational about cutting costs – and Dr. Victor stated that he firmly believes that it is not going to be the ideological small gov't vs. big gov't debate but rather a very pragmatic and immediate debate that really cuts across party lines and urban and rural lines and geography and socioeconomic status – the quest will be first about getting rid of unnecessary costs and the low lying fruit for unnecessary costs is found in program consolidation. Work comp is a prime candidate when you talk about program consolidation. So, what motivates the paradigm change and the urgency? Well, we boomers have left a fiscal mess for the millennials and post-millennials even before the pandemic and it has only gotten worse. With high government debt, massive unfunded liabilities, and substantial deferred maintenance on infrastructure, Dr. Victor stated that pre-pandemic he estimated that \$100 trillion dollars and it is an easy calculation when you think of that as a mortgage and what you would have to do to pay it off over the next 50 years. That requires a doubling of all federal, state and local taxes and fees and clearly that is not something that any tax payer would stand for. It is really putting millennials and post-millennials in an untenable position and they have already had their earnings disrupted by the great recession and pandemic. So, it is not surprising that their fondness for baby boomers has already grown thin.

So, as taxes rise and bridges and water lines begin to crumble and millennials say “enough” and as we run out of time to continue deferring the problem and problem solving, the debate will be

to cut costs and work comp is very vulnerable when you talk about program consolidation. It is an expensive way to deliver benefits with lots of overhead and there is an overlap with some safety net programs. The third disruptor is that the pandemic will weaken support for private health insurance. That will increase the odds of a public replacement. One of the arguments against Medicare for all is that we would lose our employer based health insurance and for those of us that have it that would add uncertainty to something that is very important and emotional with questions like whether to change doctors, whether we will have higher costs, whether we will have to wait longer for our care. Dr. Victor stated that he recently saw estimates that 10 million workers either have lost or will lose their employer-based health insurance because of the pandemic. Many of these workers and their families probably used to feel that their jobs and their health insurance were secure but they now feel that is no longer as secure as they thought. Many of their colleagues that retain their insurance and jobs, or neighbors or relatives, still feel less secure about their employer based health insurance so it wouldn't be surprising if a number of those folks were less persuaded by the argument that employer based health insurance is secure when the debate arises again. Whether that debate arises in February, 2021 or later in the decade, it is inevitable.

What does that mean for the survival of state work comp systems? The larger the role the federal gov't plays in health insurance, that is really a potential disruptor for state work comp systems. Along with the growth of the federal role will be pressure to subsume medical care for work injuries into this expanded system. The broader the expansion the more pressure on work comp. The greater the need for funding sources for the expansion the more pressure on work comp. The faster work comp costs are growing, the greater the pressure on employers to include work comp in other plans. The greater the pressure for program consolidation from the millennials to save overhead costs, the greater the pressure. So, lets say the payment for work comp medical care gets subsumed into a larger healthcare system. That leaves income benefits as the revenue base for work comp insurers and many of the administrative costs will remain the same but now amortized over a base that is only about half its former size. So, the question arises: is that an economically sustainable line of insurance? When you put those three disruptors together, they are all external to the work comp systems and the picture is one of several potential threats to the existence of state work comp programs over the next decade or so.

#### UPDATE ON STATE COVID-19 WORKERS' COMPENSATION PRESUMPTION EXECUTIVE ORDERS/STATUTES/REGULATIONS

Jason Marcus, Esq. Legislative Chair of the Legislative Committee for the California Applicants Attorneys Association (CAAA), stated that CAAA is primarily a group of work comp attorneys that does applicant work or represent injured workers. California Governor Gavin Newsome issued a shutdown order on March 19 which basically said everyone needs to stay home except for essential workers and shortly after that CAAA along with various labor groups started engaging in an effort to either legislatively or through the Governor create a presumption for COVID-19 work comp claims, specifically for those workers that had been deemed essential and had to physically report back to work. Governor Newsome issued an Executive Order creating a work comp presumption for all workers who were working at their employer's location as opposed to those working from home in early May. That presumption was retroactive to the shutdown order on March 19 and lasted for 60 days from the day of the Order expiring on July 5.

Mr. Marcus stated that it was an interesting move in that California work comp is generally considered to be the sole province of the legislature so there were some questions about

whether or not the Governor had the legal authority to issue the Executive Order. Nonetheless, he did and what CAAA found was that claims were being accepted under that presumption. CAAA continued to engage in efforts legislatively to both extend the presumption and expand it as necessary as probably was the case in legislatures across the country. It was anything but business as usual in California. The legislature was shut down for a number of months and even when it re-opened it was in a quite limited fashion so everything was being done via Zoom or phone calls. Those efforts continued right up until the end of California's legislative session on August 31 and it culminated in primarily two pieces of legislation that related to work comp and COVID.

First is SB 1159 by Senator Jerry Hill which Governor Newsome signed into law shortly after the end of the session. That bill: a.) codified the Governor's Executive Order into statute which was a smart move and effectively prevents any legal challenges to the Governor's Order as exceeding his constitutional authority; b.) created a regular presumption for specified workers such as firefighters, police and other peace officers and certain healthcare workers. If those workers are at work and they contract COVID it is presumed to be work related. All of these presumptions both in the Order and in statute are rebuttable presumptions meaning that the employer or carrier has the ability to obtain and produce evidence to try and rebut the presumption and prove that the worker contracted COVID other than on the job; c.) created a triggered/threshold presumption that applies to all other workers – it applies only to employers with five or more employees and requires that the employer's premises be subject to an outbreak when a worker tests positive for COVID.

The legislation tried its best to define outbreak. Ultimately, what it settled on was that if an employer has 100 or less employees, if four or more workers test positive within a rolling 14 day period that meets the definition of an outbreak; or if an employer has more than 100 employees at a specific location then you have to have 4% of the workforce test positive. Mr. Marcus stated that in his experience that is new when it comes to presumptions – having these kinds of triggers. CAAA is not a fan of that and pushed back on it but ultimately the objections weren't heard. One of the biggest objections CAAA had was how in the world is an employee supposed to prove that? How do you obtain data about other workers testing positive especially with HIPAA and healthcare privacy concerns. In order to address that there is a companion bill, AB 685 by Asw. Eloise Reyes which was also signed into law which creates additional enforcement standards and regulations for California Division of Occupational Safety and Health (CAOSHA) and requires employers to proactively report COVID infections so when an employee tests positive the employer is required to report that both to CAOSHA and to their work comp insurance carrier. It remains to be seen how that is going to work in practice as that law was only signed about less than 10 days ago. The presumption statutes did contain an urgency clause which in California means that rather than going into effect at the beginning of next year it goes into effect immediately so that is the state of the law in California but it remains to be seen how it will be applied in practice.

Mr. Marcus stated that in California one of the organizations that tracks data is the CA Work Comp Institute (CWCI). Mr. Marcus stated that he will post a link in the Zoom chat to their website which has put together an online tool where anyone can go and look at the overall claims in California and it is updated on a regular basis and is broken down into different data sets and is very helpful. Through September 21, there have been 42,544 COVID claims in California and the projections through the end of August were about 48,000 so California is slightly under those projections. Of those claims, just under 12,000 or about 28% have been denied and the remainder, just under 30,000, or about 71% either have been accepted or have not yet been denied. Mr. Marcus stated that in his own experience as a work comp attorney in

California that represents injured workers, he has a handful of COVID claims all of which are either healthcare workers or peace officers and all of those claims have been accepted so far. The CWCI website breaks it down by employee group and far and away the largest group in California of COVID claims are healthcare workers. Over 15,000 claims or 38% of claims filed are healthcare workers. The next largest group with about 6,000, about 15%, are public workers which would include public officers, highway patrol, correction officers.

Interestingly, in California there has been a level of uncertainty with the CA Work Comp Insurance Rating Bureau (WCIRB). They have said that there is a whole lot of uncertainty in what COVID means for claim frequency, claim rates, and experience modification. California has had almost a decade of rate decreases. The WCIRB has recommended a slight increase this past Summer for this first time in about ten years but there is a lot of uncertainty about what it going to happen and how to incorporate what we are seeing now into future rate filings.

Erin Collins, VP of State Affairs at the National Association of Mutual Insurance Companies (NAMIC), stated that she would like to start by saying that we are all cognizant of the impact of the virus and mostly everyone has been impacted in some way by someone who has contracted the virus. So, when we talk about COVID-19 in the context of work comp, it is not to say that individuals who have contracted the virus shouldn't have access to care in order to recover – they absolutely should. This is about saying that shifting the onus of that recovery from a healthcare or government solution to the work comp system, which isn't built or designed for that, is going to imperil that system from completing the purpose that it is built for.

Work comp is meant to create a remedy for conditions that are specific and peculiar to a specific job meaning that there has to be a causal connection to the job function and the condition or the injury. In the existing system, if there is a casual link between the condition and job function for things such as black lung or if your job were to directly handle a virus and develop a vaccine, the system is already built to contemplate those kinds of fact patterns and handle it accordingly in the claims process. In fact, in most states there are statutes that say that a covered condition cant be an ordinary disease of life and that is ordinary only in the sense that it isn't specific to a function of work. The system is built that way so that there is a system with the scope available for those conditions that are peculiar to a job.

Ms. Collins stated that if a presumption of coverage for COVID is in place like the rebuttable presumption that Mr. Marcus mentioned, it shifts the onus onto the insurer to prove that someone didn't get the condition or injury through work. You can see where in a widespread disease of life, you can get the virus going to the grocery store or gas station and it would be nearly impossible to meet that standard and that is going to stress the system. Ms. Collins stated that we know there needs to be government based or healthcare solutions to help all of the people that contract the virus, but if we move that solution to work comp, the system is not going to be able to bear that level of long term effect and it will jeopardize the ability for the comp system to exist for those conditions and injuries for people that were underwritten and contemplated by what the product is built for.

Frank O'Brien, VP of State Gov't Relations at the American Property Casualty Insurance Association (APCIA) stated that as he sits here today he is thinking about this issue in the backdrop of Dr. Victor's presentation – particularly the last two points. Looking at what happened in terms of COVID and the legislative response, for many legislators there was a great deal of pressure to not just sit there but do something. Legislators legislate and they responded and took a look at this particular issue in a number of states and frankly the states

are all over the place. Just look at the last two recent actions. In Virginia, the legislature just decided not to go with a presumption while in New Jersey they have.

One of the things that occurred here was that there was a presumption that the work comp system was somehow not dealing with these cases appropriately so there was a need to put the thumb on the scales in order to achieve a particular outcome. That has been and continues to be a growing trend in the work comp world whether it be various presumptions for public safety personnel, such as policemen and firefighters, certain conditions such as PTSD, and now with COVID-19 the legislature is making public policy decisions regarding who is going to be the winners and losers. That is obviously the legislature's purpose and it's prerogative. The problem here is, at the 10,000 foot level, where does this end? Where does the work comp system ultimately end up? Do we end up with a system that is folded into perhaps a single payer system or something like that? Going back to the initial presentation from NCCI, the one thing that you can take away from that is one word – uncertainty, particularly when it comes to COVID. As we look ahead to this and where we will end up, states are pursuing different solutions. Some are going the presumption route; some are going another route. We don't know what ultimate costs are going to be but at the end of the day we do know that there are going to be costs and there are going to be public policy debates and issues that are going to have to be considered by legislators across the country and which will ultimately end up at NCOIL.

Rep. Oliverson stated that with his experience as a healthcare worker and as an essential employee since March 15, and he believes most of his colleagues feel the same where he works, it is interesting that he has yet to come across anyone in his line of work that has contracted the virus at work. That prompted him to do some digging and he visited with two fairly large employers, MD Anderson Cancer Center which has about 16,500 employees, as well as the UT Health System in Houston which has about 11,000 employees and about 6,000 students in various training programs. Although they showed a prevalence in terms of people contracting the virus as with employees and students it was between 2% and 5%, their contact tracing showed that less than 1% of them actually acquired the disease at work. That brings up some very interesting questions when talking about presumptions in various essential employee roles.

First, the question is there are many occupational diseases for which there are occupational safety guidelines as far as personal protective equipment (PPE) and so to what extent with regard to presumptions does the role of PPE and employers taking reasonable precautions play into effect? Secondly, is it not the case that contact tracing and the presence of a medical director are almost becoming necessities in the age of COVID in terms of employers figuring out how to navigate this? It becomes important, especially if we are going to treat this as an accepted claim, that contact tracing becomes vital because several studies are showing now that people are less likely to contract the virus at work than they are at home because when they are at work their employer mandates that they take certain precautions and when they are going out to eat or going to a protest or going to the beach or going to the nightclub they are not following those precautions. Accordingly, the issue of presumptions needs to be more carefully examined. Rep. Oliverson further stated that we talk about COVID as being a disease of life and he understands that but also in the setting of mandated shutdowns and forced isolation, there are certain employee groups which are considered essential who are mandatorily required not to follow recommended guidelines as far as social isolation so is it really a disease of life for groups that are required to be exposed to virus as part of their employment?

Ms. Collins stated that with regard to Rep. Oliverson's second point, in situations where there is a situation or set of conditions that makes it directly tied to the function of that job then it is not in that sense an ordinary disease of life. In that scenario, if your job function is directly tied to COVID, the current work comp system is built to contemplate that fact pattern and handle it appropriately in the claims process. The presumption on top of that is really where the problems Rep. Oliverson mentioned in his first point arise. Accordingly, that fact pattern raised by Rep. Oliverson is already handled by the work comp system and doesn't need a presumption on top of it.

Mr. O'Brien stated that regarding the PPE and safety guidelines issues, he was very much involved in a presumption bill in Vermont that had this issue in spades. Ultimately, the legislature basically put in place a provision that stated that if the employer is able to show that they have been following all of the guidelines then the presumption shifts back to the employee and disappears in certain situations. So, there is a realization or expectation that there is a certain amount of rule following and responsibility on the part of the employer community and employee that has to be involved as well. But, that also runs headlong into an attitude and opinion that Mr. O'Brien and his colleagues have seen in a number of states that these poor people got sick and whether they are considered an essential employee or not favored with the title essential – somebody has to take care of these people and there was a feeling on the part of public policymakers that not everyone has health insurance so work comp steps into the fray. A lot of claims are going to be lost time claims of about two weeks and someone has to pay these people while they are out. At the 10,000 foot level, is that the appropriate role of a work comp system or is it what the work comp system has evolved to at this particular point in time? That is a public policy issue that all sides have to wrestle with – what is work comp going to look like down the road? Is it going to be a dystopian future similar to what Dr. Vitor described or is it going to be something else?

Mr. O'Brien stated that things have been relatively quiet in the work comp side of things over the last few years as the NCCI pointed out with double digit rate decreases. You can get away with a lot of things when rates are going down but we are getting to the point where rates are going to begin to climb because costs are climbing and we are not going to be able to get away with as much as we have with rates going up.

Mr. Marcus stated that everything that Mr. O'Brien just said was part of the conversations in California. In California, there were very strict lockdown orders in March that were lifted somewhat in May and June and then just now as California is starting to open up county by county. From the perspective of someone who represents claimants, Mr. Marcus stated that he wants to extend the coverage to as many people as he can but it really comes down to people getting sick and getting someone to pay. Either private health will pay, union healthcare plans will pay, or work comp – someone will have to pay and it is appropriate for the legislature to say that as a matter of public policy, especially for essential workers who are out working when other people don't have to be, those people should be covered.

One of the other things that was a big concern for the labor industry was paid time off. Most of these claims involve people that are off for a couple of weeks, they get a positive test so they have to quarantine and they are back at work in 14 to 30 days often with little to no long term health concerns which is fantastic. But, we don't have any type of universal paid sick leave so there is an issue of how to get people paid when they are missing that time. That was another big driving concern in all of this. Mr. Marcus acknowledged that he is biased as he represents injured workers but every day of the week he will say the employer or insurer should cover a

cost rather than the worker. Not everyone will agree with that perspective but he is unashamed in having that position.

Rep. Oliverson asked Mr. Marcus about the scenario of a person who is an essential employee and their kid has a friend over or a relative is invited over for a BBQ and they expose you and you are in quarantine for 14 days. Is that an employer's responsibility to cover that when clearly that was not a work-related exposure? Where should the line be drawn because part of the issue is that we are not just talking about sick employees – we are talking about people who have potentially been exposed with workplace safety guidelines and mandatory quarantines.

Mr. Marcus stated that if there is evidence that the exposure was not at work it is reasonable to conclude that is not something that should be covered by a work comp system. In California, as a general rule when someone files a claim the employer has 90 days to do an investigation and make a decision as to whether or not to accept the claim. Those rules have been changed slightly for COVID claims. The Governor's Executive Order shortened that to a 30 day period and the presumptions in statute now have a 30 day period for firefighters, peace officers and healthcare workers and a 45 day review period for all other workers. So, shorter than normal but still enough time to talk to the worker or have a contact tracer figure out where has someone possibly been exposed.

Mr. Marcus stated that, for him, if you cant tell where someone has been exposed and they have been going to work outside of their home, it is reasonable to conclude that work comp can handle the claim. But, if you have evidence such as what was given in Rep. Oliverson's example of where there was a party and someone came over and that person had or was known to be positive for COVID and you can show that is where the exposure is then that is reasonably not within the work comp coverage.

Rep. Lehman asked whether SB 1159 is strictly limited to COVID 19 or if it applies to future pandemics or illnesses. Mr. Marcus stated that it is strictly limited to COVID-19. There were discussions during negotiations about having the bill, especially for healthcare workers, be a broader presumption for other infectious diseases but that did not make it into the bill. Also, there are other existing presumptions in California for other bloodborne illnesses, MRSA for example, and Lyme Disease for park rangers. Rep. Lehman stated that is his main concern – going down a path of getting compensated for the 14 days I was off when I got COVID but I am not compensated for the days off I had when I got the flu and really the way I contracted that is going to be the same path in that nobody really knows. Healthcare workers are probably more exposed but the burden of proof on where that actually happened is going to be very difficult. Rep. Lehman stated that overall, he is concerned with presumptions in that they will lead to picking and choosing which diseases of ordinary life will be covered.

Mr. Marcus stated that in California, the basic premise before the presumption was that if someone contracted an ordinary disease of life the law required that person to show that they were at a higher level of exposure or higher risk of exposure than the general public. Ultimately, California made a public policy decision to put these claims in work comp. Obviously, not all states agree and that is a reasonable debate to have.

Rep. Oliverson stated that it is clear that people are far more reckless with this virus when they are at home than they are at work when their employer is requiring them to behave in a certain way and wear masks and then they go home and let their guard down. Rep. Oliverson stated that he read an article that stated you should wear a mask at home because that is where you are most likely to contact the virus – that is an unpopular view but true because we are much

more cavalier about this at home than we were when our employers are watching. That is an issue that warrants further discussion going forward.

Sen. Jim Seward (NY), stated that in New York it has been interesting that the healthcare workers were contracting COVID at a much lower rate than the general population which was a great selling point for the PPE and precautions that were being taken in hospitals.

#### ADJOURNMENT

Upon a Motion made by Rep. Lehman and seconded by Del. Steve Westfall (WV), the Committee adjourned at 11:30 a.m.