

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
WORKERS' COMPENSATION INSURANCE COMMITTEE
TAMPA, FLORIDA
DECEMBER 11, 2020
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Workers' Compensation Insurance Committee met at the Tampa Marriott Water Street Hotel on Friday, December 11, 2020 at 9:00 A.M. (EST)

Senator Paul Utke of Minnesota, Vice Chair of the Committee, presided.

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

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

Rep. Bart Rowland (KY)
Rep. Wendi Thomas (PA)*

Other legislators present were:

Sen. Mike Gaskill (IN)
Sen. Andy Zay (IN)
Rep. Kevin Coleman (MI)
Rep. Michael Webber (MI)

Sen. Shawn Vadaa (ND)
Asm. Kevin Cahill (NY)*
Sen. Bob Hackett (OH)*
Rep. Joe Schmick (WA)*

Also in attendance were:

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

QUORUM

Upon a motion made by Rep. Matt Lehman (IN), NCOIL President, and seconded by Rep. Bart Rowland (KY), the Committee waived the quorum requirement without objection by way of a voice vote.

MINUTES

Upon a motion made by Rep. Lehman and seconded by Asm. Ken Cooley (CA), NCOIL Vice President, the Committee voted without objection by way of a voice vote to approve the minutes from the Committee's September 25, 2020 meeting.

THE ABC'S ON EXPERIENCE RATING

Gerald Ordoyne, Director of Experience Rating at the National Council on Compensation Insurance (NCCI), stated that he has been with NCCI for almost 25 years and has been working with the experience rating department for the vast majority of that time. Mr. Ordoyne stated that he will discuss today NCCI's experience rating plan and how it works with the pricing of the work comp program – the specific plan may not apply to all states but the general concepts of

experience rating are pretty similar across different jurisdictions. Experience rating is designed to recognize the differences among individual employers with respect to safety and loss prevention. It does this by comparing the experience of individual insureds to the average insured in the same classification such as roofers to other roofers, clericals to other clericals, and retailers to other retailers. Those differences are reflected in the experience rating modification factor and is based on the employer's individual payroll and loss records. That mod factor could result in an increase, called a debit, which is anything over 1.0; a decrease, called a credit, which is anything under a 1.0; or potentially could calculate to be 1.0 which means there would be no change to the premium that the employer was paying for their work comp policy.

If the rating system went no further than simply manual loss rates or manual loss costs that the carrier was applying to the different exposures, then potentially insurance providers could potentially seek out those employers with better than average experience and avoid the employers with worse than expected experience. So, the experience rating mod is really designed as a part of the overall pricing of work comp.

Thirty-five states and D.C. are NCCI states which are the states that participate in NCCI's experience rating manual on both the intra-state and inter-state basis. The difference between intra-state and inter-state rating basis is that if an employer had a single location in lets say one state, Oklahoma, and that is where their operations were then they would be intra-state rated with just their Oklahoma rated experience. But if they had operations in two or more states and those states were NCCI states and Independent Bureau State— Interstate Participant (IP) states, then they would be interstate rated. The IP states have their own independent rating bureaus that handle the intra state rating portion for those employers but they do participate in the interstate rating plan. So, if there was an employer that had operations in both North Carolina and South Carolina, NCCI would calculate a single modification factor that would apply to the exposure/premium in both of those states. That would be true of any combination of the NCCI and IP states.

There are also states that have their own independent rating bureaus but not part of the interstate rating plan so they calculate an single state mod for all employers that do business in that state. There are also states that have a monopolistic state fund so they also don't participate in the interstate experience rating plan. If, for example, an employer had operations in California and Nevada, CA would be responsible for calculating a modification factor for the California experience and NCCI would calculate a modification factor for business operations in Nevada with just the Nevada experience.

Mr. Ordoyne stated that in 2019, NCCI calculated over 1.2 million experience rating modification factors which were calculated for about 740,000 different employers. Of those employers, about 620,000 were intrastate rated employers which means they simply had operations in a single state. Another 120,000 were the interstate rated employers which are those that have interstate operations among any of those 42 states referenced earlier that participate in the interstate rating plan. That is a lot of work and a lot of data the comes into NCCI. Over the years, NCCI has implemented some systems that do the calculations automatically and for the most part about 80% of the mods are calculated without any manual intervention. So, the insurance provider submits the unit data – the audited payroll and loss records – to NCCI and it goes to the upfront editing process and passes over to the experience rating department and flows through the calculation engine and then the mod factors are processed and distributed to the necessary stakeholders that need that information either from a carrier perspective to apply that

modification to the premium or in most states to the employer so they are aware of what the modification factor is going to be for that current year.

Additionally, NCCI also looks at ownership requests which are important because it is how NCCI makes sure it is using the right experience in the calculation of the modification factor. All the ownership information that flows through NCCI is reviewed manually so while there is some automation around the calculation of the mods, all of the ownership is reviewed manually. Mr. Ordoyne stated that with regard to calculating the mod, in the most simplified format, the experience modification factor is really a comparison of employer's actual losses to their expected losses. Their actual losses are those losses that represent both the paid and reserved amount of any claims that may have happened in the experience period. Expected losses are based on the exposure or in most cases the payroll of the employer. The expected losses are really driven by two factors – the amount of payroll the employer has and the type of business and operation that the employer has. Clearly you would think that a construction business is more likely to have claims than a business that only has workers who sit at their desks the majority of the day. The upfront rates are going to be higher for the construction company than they are for an insurance company but the expected losses are going to be higher as well. The expected losses are based on both a combination of overall payroll - the more payroll the more losses you would expect – as well as the type of exposure and the possibility of risks for that employer in that class code.

In the experience rating calculation NCCI typically looks at three years of experience that ends one year prior to the effective date of the mod being calculated. As an example, for those modification factors that have an effective date of 1/1/21, NCCI is going to use a three year window that ends 1/1/20 and will be looking at 2017, 2018 and 2019 policy periods. Not all employers qualify for experience rating. In NCCI jurisdictions, qualification is based on premium and that is the premium generated by the policies that are part of that three year window. It varies by state. The average premium eligibility across NCCI states is about \$9,500 in premium annually but it ranges from \$5,500 to \$13,000 so there are state differentials that come into play.

Starting in 2017, in most states, that premium eligibility is indexed so it has the possibility of increasing as time goes on. It is tied to the U.S. Bureau of Labor Statistics quarterly census of employment and wages. That is looked at on an annual basis and in some cases a state may see a rise in premium threshold and in other years they may not but it is done to keep pace with inflation and make sure those employers that are too small to qualify for experience rating aren't being included in the calculation and getting a mod because they probably don't have enough credibility to warrant getting an experience mod factor.

In the calculation of the mod, the actual losses are based on the actual paid and reserved claims that the employer incurred over that three-year window. Those claims that go into the calculation are broken into two pieces. At a point, which is as of 1/1/21, the split point is \$18,000 so all claim dollars up to \$18,000 are considered primary and they go into the experience modification calculation at 100%. Any claim dollars over \$18,000 are going to go into the calculation but at a reduced amount and that amount really depends on the size of the employer and how much payroll they have generated over the years. That amount can be as low as 4% or potentially as high as 80% depending on their size.

Often times when you talk about experiencing rating the terms frequency versus severity are used. That means primary versus excess portions of the claim. The primary portion represents the frequency and the excess portion represents the severity. Frequency plays a greater weight in the mod calculation than severity. The fact that the claim happened and that it existed is

more important than what the overall claim dollars are. That is not to say that the overall claim dollars are not important but they are not quite as important.

For example, if an employer has a \$50,000 claim, the first \$18,000 would go in at 100% and those dollars over \$18,000 would then go in at a reduced amount. Lets say based on their size the weighting factor was 10% so the \$32,000 is only going into the mod calculation at \$3,200 so the \$50,000 claim in the mod calculation is only going to look like \$21,200 – the \$18,000 primary and the \$3,200 excess. The split point, much like the premium eligibility threshold is also now indexed and can be indexed annually. This was some research that was done by NCCI's actuarial department in the early 2010s and went into effect in 2013. NCCI moved what had been a very static split point and indexed it over a couple of years to what the appropriate amount was which was around the \$15,000 mark and now it has been indexed based on inflation annually since then and as of 2021 in most states the split point value is going to be \$18,000.

Mr. Ordoyne stated that the claims are taken and split into primary and excess but there are also some other limitations that can occur to a claim. In most states, if the claim is medical only then the claim dollars are going to be reduced by 70%. For example, if an employer had a \$2,000 medical only claim and there was no loss time and the employee just had to get stitches and didn't miss any time that would be medical only and that \$2,000 claim would only go into the mod calculation as a \$600 claim, reduced by 70%. Every state has a state per claim accident limitation. In terms of frequency versus severity, it can get to a certain point where a claim can get be of such size that any dollars above a certain level aren't adding value to the mod calculation. That dollar amount is based on the state data that actuaries look at as part of the loss cost or rate filing and it can vary anywhere from \$150,000 to \$500,000 based on the state data. For 2020 it looks to be on average around \$275,000. So, if for example an employer had an unfortunate claim that was \$500,000, that claim with a \$275,000 state accident limit would be capped at \$275,000 so the \$225,000 above that cap are going to be excluded completely. So, \$18,000 of the claim is going into the mod calculation at full weight but the difference between \$275,000 and \$225,000 is going in at a reduced rate depending on the employer size and anything above the \$275,000 is going to be discarded and not used at all.

There is a secondary claim limitation and a state multiple claim limitation which is an added layer of protection for employers. If for example there is a single accident where multiple employees happened to get injured such as an explosion in a warehouse or a car accident, those claims grouped together would be limited to a value and that value is two times the state accident limitation. So, if a state has a \$275,000 individual claim accident limitation then the combination of all the claims in that single accident would be limited to \$550,000 in the mod calculation and that is important because it adds another layer of protection for the employer.

There has been a lot of talk in the work comp arena about the impact of COVID-19. From an experience rating perspective, a decision was made earlier this year and a filing was made which resulted in an exclusion of COVID-19 claims from the experience modification formula. It was felt that actuarially that information probably didn't add a lot of value because it wasn't going to be a great indicator for potential claim activity in the future. We expect COVID, hopefully, to be a once in a 100 year pandemic and it is not likely that the same type of claim activity is going to occur in three years for the same employer. So, the filing was made and for any claims reported with certain identifiers that were created to identify that claim as a COVID claim which have to do with the accident date (after December 1, 2019) and other things, it would result in that claim being excluded from the work comp experience rating mod calculation. Something similar was done many years ago following 9/11 and all claims associated with that

were excluded from experience rating for basically the same reasons as there just wasn't an expectation that it was going to be a good indicator of future claim activity in the near future.

Mr. Ordoyne stated that as a final layer of protection for the employer, there is a maximum debit modification that can be applied. This is a cap on the mod that would limit how high the mod can go for an employer and it is based on size but it is really a protection for smaller employers that maybe just qualified for experience rating and happened to have a couple of unfortunate claims during the experience period. The cap starts at 1.10 and grows based on the size of the employer. Regarding ownership, NCCI does collect ownership information on employers and it is up to the employer to submit that data to NCCI. It is important because experience rating uses the past experience of the business to calculate the mod factor so it is appropriate that NCCI uses all of the experience of that employer. Changes in ownership could impact the experience that is used in the mod calculation and for purpose of experience rating that past experience could be transferred or combined in the mod calculation. Ownership changes vary quite dramatically from a simple name change to sales or some large mergers as well as new entities being formed.

As an example, in each of three examples (three companies), owner A owns a majority of the business. Based on NCCI's experience rating plan manual rules, because that person (a person or entity) owns more than 50% of all three businesses, the experience of all businesses are going to be combined to calculate a single modification factor that would then apply to all of the businesses and that is true regardless of the business operations and how varied they might be. Another example can be used with a sale. If I own a company and sell that to someone else who wants to start operating that business, when that transaction takes place and the business is sold that experience that was generated while I was the owner also transfers to the new owner because the operations haven't changed and the new owner is just taking over the operations – they inherit the experience. So, the person buying the company is buying the experience as well. Also, let's say the person buying the company also owned another company, NCCI would then calculate a combined mod because that person now owns multiple different businesses.

Mr. Ordoyne stated that he would like to point out that this was a very high level of NCCI's experience rating program and NCCI has a lot of other information at NCCI.com. There is a lot of information and webinars that take you through different levels of detail in the calculation and worksheets. There is also a document called the ABC's of Experience Rating that has been popular over the years and goes into a lot of detail. In many cases, that document tends to answer a lot of questions that people may have on experience rating.

Rep. Matt Lehman (IN), NCOIL President, stated that he has always wondered how something that happened to one of his clients is handled by NCCI. His client was an auto company, and they were in a not at-fault accident in the course of employment and paid out about \$350,000. It was going to be fully subrogated and the carrier took on the obligation but in the meantime, because it was paid out under work comp, his experience rating took a hit and it cost him about \$25,000 per year. It was fully subrogated and they got their money back but they are now on the hook paying that mod. Accordingly, Rep. Lehman asked what research NCCI has done with subrogation and reserving because we also see in the market that there will be a claim setup and they will reserve it for \$250,000 and if that doesn't get adjudicated, it pays out at \$50,000 but that hits their mod at \$250,000.

Mr. Ordoyne stated that from a subrogation perspective, there are specific rules in the experience rating plan manual that state if a claim is subrogated, once the carrier is reimbursed

they should be submitting correction reports which then lower the claim value down to just whatever the difference was that wasn't subrogated. In Rep. Lehman's example, if all of that was reimbursed, they would submit correction reports back to the original reporting and then NCCI would then be able to go back and revise the mod. In most states, for any reason, the current mod that is in effect today is revised as well as the prior two year's mods. For subrogation, that time period actually expands for potentially up to five years so it would be the current mod and the four year's prior. In Rep. Lehman's example, once the subrogation was worked out and the carrier got the reimbursement they should then be reporting the correction report which would then trigger a revision at NCCI to revise the current mod and the prior year's mods.

Rep. Lehman asked who's obligation it is to report the subrogation and reimbursement. Mr. Ordoyne stated that once the carrier submits the correction report with the revised claim dollars that will automatically trigger it for that three year window. If it goes into the five year window there might be some communication needed by NCCI but the insured shouldn't have to do anything but if they are not seeing anything done they should raise it with their agent. Mr. Ordoyne stated that with regard to reserving, NCCI cannot respond to questions on carrier practices, especially when it comes to reserving.

Rep. Bart Rowland (KY) stated that with subrogation if NCCI adjusted the mod down for prior years would the carrier be obligated to adjust the premium and refund the customer based on the lower mod. Mr. Ordoyne replied yes as that is in NCCI's experiencing rating plan manual and rules. Because that mod was revised within the revision window as defined in the manual then the carrier would have to issue that refund.

Jeff Klein, Esq. at McIntyre & Lemon, PLLC, asked if occupational disease is treated the same way. Mr. Ordoyne stated that he did not get into occupational disease as there is a whole separate claim limitation for occupational disease that is a bit more complex and it is not really seen that much. Claims for occupational diseases would go into the mod calculation and there is a separate layer after that but it is not common.

DISCUSSION ON FLORIDA'S WORKERS' COMPENSATION INSURANCE MARKETPLACE RESPONSES TO COVID-19

Geoff Bichler, Esq., Founding Member & Managing Partner at Bichler & Longo, PLLC, stated that the starting point for these issues is always going to be the state work comp statute. The Florida statute relating to occupational disease and exposure is very stringent and prohibits claims for toxic exposure and injury or disease. The statute (440.02) states that "An injury or disease caused by exposure to a toxic substance, including, but not limited to, fungus or mold, is not an injury by accident arising out of the employment unless there is clear and convincing evidence establishing that exposure to the specific substance involved, at the levels to which the employee was exposed, can cause the injury or disease sustained by the employee."

That standard has been in place since 2003 reforms to the Florida work comp Act and have created a lot of problems for injured workers who have attempted to bring these types of claims so you don't see many of these cases brought. That may be why NCCI stated that this issue is not that common because most states have similar restrictive language relating to occupational disease and exposure claims. That is the starting point and has to inform any consideration of liability or immunity or additional legislation that may be looked at to try to limit claims related to COVID. Further, Florida law has a specific occupational provision which is in Florida statute

441.51 that has similar language to the statute just discussed. The bottom line is that there are very restrictive and difficult standards in Florida.

A recent Florida appellate case that was very anticipated as it related to COVID was released in November with re-hearing denied in January just before COVID cases began in Florida. The case involved an occupational exposure and a death claim. There was a concurring opinion from Judge Wolf who is a very prominent jurist in Florida and features regularly in constitutional decisions in Florida and said the case and *Gibson* “reject the use of overwhelming circumstantial evidence to prove the statutory requirements of clear and convincing evidence in toxic exposure cases. Direct proof of the level of exposure to the toxic substance is simply not available in a great number of toxic exposure cases. I am, therefore, not convinced that workers' compensation is a viable alternative to the tort system for workers that are injured by toxic exposure at the work place. Either the court system or the Legislature must deal with this problem.”

Mr. Bichler stated that as an advocate that represents injured workers and primarily first responders, this was a reversal of the trial judge that had found in favor of the widow of the worker who died following a very clear exposure to a toxic substance in the workplace and the evidence was overwhelming. From Florida's perspective, there is a very thin edge as to what may be constitutional and not in these types of circumstances.

When this issue first began and was looked at with COVID, it was clear that statutory protections would be needed. A lot of states have implemented presumptive legislation which is quite controversial but in Florida there is a history of presumptive legislation being passed to protect first responders. There was work done early in the process to try and get a presumption passed either through a Governor Executive Order or by statute. The Governor did not issue an Order but the CFO did in late March and it essentially advised state agencies and employers in Florida that they should recognize these claims as presumptively work related. That was not binding but something that a lot of Florida employers recognized and agreed that it essentially was the right thing to do for first responders.

At the same time, federal legislation was moving related to public safety officer benefits which provide for health benefits and some limited disability benefits for first responders who were injured or killed on the job. Congress did pass the legislation and it went into effect in August and recognized COVID as presumptively work related at least with respect to death claims. The language there was something thought to be beneficial for Florida police officers and firefighters. Mr. Bichler stated that separate legislation in Florida was also proposed. Florida has special protections for first responders in Chapter 112 and separate legislation was proposed for some union leaders and a template was created that they can use to try and go find sponsorship to pass legislation that would provide basic coverage for COVID cases with the ability to rebut the presumption in certain circumstances where you could demonstrate that the disease was contracted somewhere else.

Because of the timing of Florida's limited legislative sessions, the session was during the middle of the pandemic and the session ended and there was no opportunity to pass the legislation but there is interest in potentially doing it again this year and with the way things are going in Florida with COVID cases rising it appears this may be a good approach to the issue to make sure that first responders are getting covered under work comp for these types of conditions.

At the same time, there is a Task Force in Florida that is pushing primarily to restrict liability which is similar to what is being seen at the federal level where they want to immunize

employers from liability claims related to COVID. That is problematic from a civil liberties standpoint that you would not allow someone to bring a claim regardless of circumstances and that may be where the rub is at in Washington. There is a sense of the need to protect employers that may not be real. If you are looking at the legislation that exists in most states, it is restrictive and it is very difficult to prove these cases anyway. In speaking to others, once the previously discussed Florida appellate case was decided last year, most attorneys that represent injured workers pretty much gave up the idea that you could prove an occupational disease or exposure case as the standard is so difficult as the cases are essentially suicide missions as you are likely to lose the case and not meet the burden.

Mr. Bichler urged the Committee to look at the precise language in state statutes regarding exposure and occupational diseases and then make a determination as to how difficult the standard is and whether anything additional is needed to protect employers from liability. Mr. Bichler stated that he would suggest nothing further is needed as about half the claims in Florida are being accepted. That is shocking as given the legal standard, Mr. Bichler stated he doesn't think any employer would have to recognize COVID-19 as being work related. It is encouraging that roughly half of the cases are being acknowledged and it seems as though employers and carriers are attempting to do the right thing in various circumstances. Mr. Bichler stated that his sense is that this may not be the sort of pressing issue that it seems and individual states will have their own determinations as to the compensability of these types of conditions.

Ya'Sheaka Williams, Esq., Partner at Eraclides Gelman, stated that when she thinks about 2020 and COVID, this has definitely been a year of change and adaptability. We have been thrust into this new world of remote working and having to adapt to the change in the world. Work comp has adapted to the changes that COVID has presented as well. On March 9, 2020, Governor DeSantis issued a state of emergency and Executive Order 20-52 which essentially limited personal interactions outside of the home. At that time, many businesses closed or worked from home. Ms. Williams stated that all of her insurance defense clients are remote still today with the expectation that they will return to their offices at some time in 2021 on a graduated basis in order to ensure that they are able to socially distance and keep everyone safe.

Another thing that was big with the Executive Order was that it prevented elective surgery. In most instances, that may not make a big difference but when you are thinking about work comp and injured workers who are scheduled for an elective knee or back surgery that was stopped because the Governor wanted to make sure that surgeries could be done safely while not exposing patients and doctors to COVID and at the same time ensuring that if there was an issue as a result of COVID those facilities could quickly respond.

Eventually, that caused a ripple effect in work comp. If you have a person scheduled for surgery on March 15 the expectation is that they would be out of work for two weeks and the expectation is that you are paying them lost wages for that period of time and then you are able to get them back to work. If elective surgeries are delayed, the employer's exposure continues because the injured worker can't return to work and their out of work status is prolonged and quite possible their ability to recover from the surgery, although it's elective, could have a ripple effective from having them recover long term.

About two months later, some changes were made with another Executive Order being issued on May 4 (20-112). That Order stated that "Local jurisdictions shall ensure that groups of people greater than ten are not permitted to congregate in any public space that does not

readily allow for appropriate physical distancing.” Also, “Bars, pubs and nightclubs that derive more than 50 percent of gross revenue from the sale of alcoholic beverages shall continue to suspend the sale of alcoholic beverages for on-premises consumption.” If you represent a district or an employer that is largely a business they are drastically impacted by that Order. Not only are they losing revenue but you also have a diminished workforce because if you have a business that more than 50% of revenue is from alcohol and that is stopped, and if they don’t have sufficient menus to serve food then more than likely they are not going to be open or they are going to be open at such a reduced capacity that it’s going to cause significant loss. At that time, capacity at restaurants was limited to 25%.

On June 5, Executive Order 20-139 was issued which took a look at long term care facilities. The Order stated that those people working at such facilities must undergo routine testing. That is excellent because that means the spread of the virus can be prevented and people with the virus can be treated. Also, retail stores and fitness facilities were allowed to reopen as long as they could ensure social distancing and able to sanitize the facilities. Then, restaurants and businesses moved to 50% capacity and businesses really started to reopen. Then, in September the state moved to the right to work phase and that phase is where the Governor really got aggressive in trying to re-open businesses and getting the economy re-started after roughly six months of businesses being somewhat stagnant because of the precautions needed to help cease the spread of COVID.

All of this relates to work comp. In work comp, if you are an employee that is primarily paid in cash or in tips, their IRS filing is heavily relied on to calculate what the average weekly wage is which is used by the carrier and the claimant’s counsel to determine how much weekly cash benefits the workers would be entitled to if they are out of work based on their work restrictions. The tax deadline was delayed from April to July so there was no obligation for the worker to file before July so in that regard there were issues with trying to calculate what a person could be entitled to on a week to week basis.

Regarding unemployment compensation, during the initial state of emergency in phase one, many businesses were closed and operating at a significant reduced capacity. Ms. Williams stated that many of the employers she represents were furloughing their employees at least for the short term. For those employees, they were not fired but were furloughed and allowed to collect unemployment compensation and so the question is how does unemployment compensation directly impact work comp. Under Florida statute 440.15, it addresses a person’s entitlement to unemployment compensation benefits and the impact on work comp. First, if a person is on a no-work status but has been furloughed they would be entitled to unemployment compensation which would include the \$600 per week additional benefit provided by the CARES Act. If a person receives unemployment compensation at any time during which they are on a temporary total disability work status where their doctor has said you are so injured that you are unable to work at all, you cannot receive unemployment compensation and compensatory total disability benefits at the same time. Temporary total disability benefits are paid at two thirds of the claimant’s average earnings during he week. So, the claimant is unable to double dip. For the employer carrier, that reduced the exposure on that particular claim for as long as the person is receiving unemployment compensation.

For someone who is on duty or has work restrictions at the same time they were furloughed, they would also be entitled to unemployment compensation during that time but they would be able to receive the full 64% of their average weekly wage in conjunction with unemployment compensation. Unemployment compensation is primary so the employer carrier will receive a dollar for dollar offset of unemployment benefits received. As an example, if a person would

normally receive a temporary partial disability benefit of \$200 per week but with unemployment compensation in the CARES Act they were receiving \$700 per week – during that week of temporary partial disability they were receiving no money from work comp because they were fully compensated by unemployment compensation and receiving a benefit of the CARES Act. Ms. Williams stated that for her practice, the positive of the unemployment compensation CARES Act was that for injured employees they weren't able to receive unemployment compensation and work comp or the amount of unemployment compensation that they received was so high that they were entitled to receive unemployment compensation throughout temporary partial disability benefits which in turn reduced the file exposure on the claim.

Ms. Williams stated that another thing that had to be dealt with in phase one were doctor's office closures. At the beginning, it was almost a sense of ants scrambling around figuring what was safe and not safe. Many doctor's offices had to close to make sure they could rest and operate in a way that was safe for them and patients. One medical practice in the Tampa area contracted COVID and as a result the office and multiple offices in that practice group closed down for 3 weeks to make sure it was safe and everything was cleaned. That was a big deal because a lot of injured workers were being sent to that practice group.

Then, there was a concern of injured worker fear. For instance, many did not want to leave the house or go to the doctor's office over fear of contracting COVID. That results in delayed care. However, what has been very positive for work comp practice in Florida is that many doctors have become more innovative and there has been an uprising of Teladoc. When Teladoc was first introduced, Ms. Williams stated that she was skeptical, but this year it has become so prevalent and successfully operated for injured workers being treated. It has also resulted in doctors being more efficient and being able to treat more injured workers which has been a silver lining of COVID. Not every doctor agrees, but for those that do, it is a great way to keep cases moving forward and getting injured workers back to pre-accident status. Physical therapists are also providing therapy via Teladoc which is very innovative and a great way to get injured workers back to work. Ms. Williams stated that the only hiccup she has seen with Teladoc has been technology as it almost presupposes that the injured worker has the necessary technology to get the benefit of Teladoc. There are some vendors out there who provide the technology to injured workers to assist them for appointments. It is very important that those issues are addressed and COVID has highlighted the need to work together and use a more collaborative model in treating injured workers.

Going forward, Ms. Williams stated that enhancing cleaning and treatment protocols will be a priority. You are seeing changes in the amount of people that are allowed to come into the examining room which can be an issue if the injured worker needs a translator. Many times, now the translator attends the visits by phone because the doctor is limiting the amount of people in the room. Nurse case examiners who typically would attend an appointment to get information to give the employer carriers are now attending telephonically. Also, doctor's offices are now conducting temperature checks and waivers and questionnaires or requiring the worker to stay in their car prior to the appointment. Ms. Williams stated that she has noticed providers really adapting to COVID at a great rate as she really hasn't seen a significant decline in the treatment injured workers are receiving.

Ms. Williams stated that she had a case that went to trial earlier this year where the injured worker felt uncomfortable seeing a physician in-person and they were offered to provide transportation services. The worker was concerned with whether they would be the only person in the vehicle or whether they had time to disinfect the vehicle. In that case, the judge ordered that accommodations be made to find a doctor closer to the claimant's home because of his

concerns with transportation and COVID. Ms. Williams noted that treatment options have been very innovative and there has been a lot of flexibility in practice. Ms. Williams noted that since COVID, there has been less workers and less claims and that the cases she does have are more litigious because more focus is able to be on those cases. With a reduced workforce and businesses closing, there are less claims and the claims that are filed are related to people having pretty significant injuries and not your run-of-the-mill minor work comp claims and they are significant enough for the person to want to file a claim versus dealing with it and keep working.

Ms. Williams stated that one thing that has been key throughout this has been communication. COVID required these work comp cases to be handled on a more collaborative basis – more communication with claimant's counsel, doctor's offices, vendors who are helping move the cases to the system and getting the injured worker back to work. That is a positive, as has also been the case with the expanded use of telemedicine in the work comp system. Ms. Williams stated that this has been a year of change and adaptability for everyone and if everyone remains collaborative going forward, the results should be positive in the end.

David Langham, Deputy Chief Judge of Compensation Claims at the Florida Office of Judges of Compensation Claims, stated that he has been in this industry for over 30 years and he has never seen anything like COVID. Judge Langham stated that his main advice for anyone legislating or regulating in this system would be that the ancillary and tangential affects are going to be far broader than the direct affects and that is where minds need to be moving forward. The big peak for work comp claims in Florida was in July and since that time even though the state has opened since then the curve has flattened. A lot of folks thought that once the state was re-opened there would be a lot more work comp claims but that has not happened.

There are 22 million people living in Florida and there have been 23,452 loss time claims reported – the people who have claimed they have suffered a work injury. That is exceedingly low in the grand scheme of things and is important to note. The vast majority of those claims fall into a cost that is less than \$5,000 to the carrier; they have a mean average cost of \$703 each. Some of the blame for that can be put on the federal government as they stepped in and provided a greater unemployment compensation and some of the blame can be attributed to Mr. Bichler's comments about how hard it is to prove an occupational disease in Florida so some folks looked at things and saw how high the hill they had to climb was or they could just take the unemployment compensation which was a good benefit and a lot of those cases probably steered that way. Judge Langham noted that the vast minority of cases did get very expensive and the mean average of the 6 highest cases was almost \$800,000 each. Judge Langham stated that cost does not come from indemnity but rather medical care and the cost of medical care for COVID is very expensive and is something that needs to be monitored.

Miami-Dade is by far the most densely populated county in Florida and 31% of the claims are coming from there. Another 8% comes from Broward so almost 40% of the cases come from an area of the state that has almost 22% of the state's population. That supports the notion that population density is important but not critical as this meeting today is in Tampa that has 7% of the state's population and only 3% of the lost time claims which indicates that COVID can be controlled and better treated in urban areas. For some reasons it is not in some places.

Judge Langham stated that the 31% COVID lost time claim number compares to 8% of all lost time claims in Florida this year. That shows that COVID claims are really a big percentage but they are also only 8% of total expenditures, including the very expensive claims of about

\$800,000 each, so this is a very broad and very important segment of claims but the cost of them today is simply not where you would expect them to be. The word “today” is important because a lot of scientists are saying that there is such a thing as “long COVID” which refers to the fact that some people may have bad health outcomes years down the road due to exposure and we may be talking about some folks about lung transplants and cardiopulmonary disease of a variety of things. So, picking these things up as compensable today may create risks for insurance carriers 5-10 years down the road and that may be part of the cost not seen yet.

Of the almost 25,000 claims, only 45% have been denied. It turns out that a lot of those denials are based on negative test results – employees who have gone to their employer to report they have COVID at work and they say they have symptoms and then they get a test result back 10 days later that says they tested negative. That is going to be denied and rightly so. Part of the flattening of the curve might be that employees are not so quick to report in today’s environment because for the most part there is wide access to rapid test results.

There is a disparity in the way the money shakes out. Florida’s Division of Work Comp chose to categorize all the claims into categories: airline; healthcare; office workers; protective services (first responders); and service industry. The numbers are not in parity everywhere. The office numbers are closely tied: 10.6% of the claims and 10.7% of the cost. But, the protective services category is 32.5% versus 44.2% and the service industry category is 29.2% versus 10.2%. Part of that may be due to optimism bias and Judge Langham warned against that as first responders and doctors are trained professionals and they have convinced themselves that they are invincible and that is a psychological occurrence that we know occurs.

Judge Langham stated that the denials are not totaling \$0. For compensable claims the number is about \$40 million spent and that number is expected to rise but the denial claims total about \$500,000 spent. For cases that are denied and they are not moving forward in terms of expenditure it is important to remember that there are still costs associated with that and employers and carriers are paying those costs to get testing and quarantine time and those sorts of things. Judge Langham noted that of the total amount of lost time claims, Mr. Bichler believes that it is in large part to folks doing the right thing and Judge Langham stated that he does not doubt there is some of that but it also occurs to him that some employers are picking up the claims because by doing so they get a healthy dose of work comp immunity and that may be part of this. We do know that there are several cases pending in Circuit court where employees are trying to sue their employers and they are concurrently in the work comp system. So, all of that probably goes into an employer’s decision making process in all of this.

Sen. Bob Hackett (OH) stated that he appreciated Ms. Williams’ comments and hopes that the American Medical Association (AMA) was listening because with regard to telemedicine, providers are able to see more patients and it is cheaper most of the time to do telemedicine versus in person care.

ADJOURNMENT

Upon a Motion made by Rep. Lehman and seconded by Asm. Cooley, the Committee adjourned at 10:30 a.m.