REPORT OF THE

JOINT SUBCOMMITTEE STUDYING THE FEASIBILITY OF INSTITUTING A WAGE-LOSS CONCEPT AND A COMPETITIVE PRICING PLAN IN THE WORKMEN'S COMPENSATION SYSTEM IN VIRGINIA

TO

THE GOVERNOR

AND

THE GENERAL ASSEMBLY OF VIRGINIA

SENATE DOCUMENT NO. 9

COMMONWEALTH OF VIRGINIA
RICHMOND
1983

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Report of the
Joint Subcommittee Studying the Feasibility of
Instituting a Wage-Loss Concept and a Competitive
Pricing Plan in the Workmen's Compensation
System in Virginia
To
The Honorable Charles S. Robb, Governor
and
the General Assembly of Virginia
Richmond, Virginia
December, 1982

INTRODUCTION

The Joint Subcommittee Studying the Feasibility of Instituting a Wage-Loss Concept and a Competitive Pricing Plan in the Workmen's Compensation System in Virginia was established pursuant to Senate Joint Resolution No. 13 of the 1982 General Assembly.

SENATE JOINT RESOLUTION NO. 13

WHEREAS, there appears to be a trend among states in their workmen's compensation systems toward the reduction of system-wide costs of benefits associated with partially injured workers; and

WHEREAS, some states have enacted new legislation, called wage-loss laws, the intent of which is to increase benefits to the more seriously injured worker while cutting other system costs by decreasing excessive litigation and providing more efficient administration which would more than offset the increased benefits paid to those significantly injured workers; and

WHEREAS, under this new system there is no decrease in the benefits that injured workers receive during their healing periods, even though those with relatively minor injuries would no longer be eligible eligible to receive large awards under the permanent partial award provision and additional benefits after they are fully recovered from their injurties; and

WHEREAS, interest has been shown in the past by concerned citizens in Virginia over the rapidly escalating costs in the workmen's compensation sysem, and presently there is interest to study this new legislation and competitive pricing in an effort to do what is necessary to curb these rising costs; now, therefore, be it

RESOLVED by the Senate of Virginia, the House of Delegates concurring, That the Senate Committee on Commerce and Labor and the House of Delegates Committee on Labor and Commerce are requested to form a joint subcommittee to study the effect of the wage-loss experience and competitive pricing on the workmens compensation system in Virginia. The joint subcommittee, to be appointed as hereinafter provided, is also requested to study the new wage-loss and competitive pricing laws enacted in other states which remove the classification of benefits as permanent partial and provide new benefit classifications labeled wage-loss with no impairment benefit, wage-loss and impairment benefit, and impairment and no wage-loss benefit and also study competitive pricing systems. The joint subcommittee is requested to review how an injured worker qualifies to receive a wage-loss benefit and an impairment benefit. Finally, the joint subcommittee should study whether these types of law changes may be made to Virginia's system, since each state has statutory and administrative differences in its workmen's compensation laws, as well as having different economic, political and social conditions

The joint subcommittee shall consist of eight members; three members from the Senate Committee on Commerce and Labor to be appointed by the chairman of the Senate Privileges and Elections Committee, and five members from the House Committee on Labor and Commerce to be appointed by the Chairman of that Committee. The following three persons, two to be appointed by the Speaker of the House and one, to be appointed by the chairman of the Senate Privileges and Elections Committee, shall serve as non-voting members on the joint subcommittee and shall receive

compensation for their expenses only: a representative of the insurance companies writing workmen's compensation insurance in Virginia, a representative of labor and a representative of employers. All agencies of the Commonwealth are requested to assist the joint subcommittee in its study.

The joint subcommittee shall complete its work and submit its findings, conclusions and recommendations to the Governor and the General Assembly not later than December 1, 1982.

The cost of the study shall not exceed $5,000.

WORK OF THE SUBCOMMITTEE

In an effort to hear as much testimony as possible regarding the issue of instituting a wage-loss concept and a competitive pricing plan in the workmen's compensation system in Virginia, the Subcommittee scheduled three meetings to be held on July 27, August 17, and November 5 of 1982.

The Subcommittee heard a large amount of oral testimony at its meetings and also received position papers and other written materials from a number of organizations, including the Virginia AFL-CIO, the Virginia Manufacturers Association, the State Corporation Commission's Bureau of Insurance, the Virginia Compensation Bureau, the American Insurance Association, the Alliance of American Insurers, the Industrial Commission of Virginia, the Virginia Retail Merchants Association, the Florida Association of Insurance Agents, the Ohio Bureau of Workers Compensation, and the law firm of Ashcraft and Gerel of Alexandria, Virginia.

As a result of those representatives discussion of the advantages and disadvantages of instituting a wage-loss concept and competitive pricing plan in the workmen's compensation system in Virginia, the Subcommittee was able to decide early in its deliberations that the wage-loss concept deserved more attention than did the competitive pricing issue, and therefore the subcommittee decided to devote most of its attention to the wage-loss concept.

The Joint Subcommittee was aided in its study by having three citizen members as part of its membership. Mr. Lewis C. Spicer, Manager of the Workmen's Compensation Division of the Pittston Company Coal Group, was the citizen member representing employers. Mr. David H. Laws, Secretary-Treasurer of the Virginia State AFL-CIO, was the citizen member representing labor. Mr. Dwight Dillon, owner of Dillon Insurance Agency was the citizen member representing insurance companies writing workmen's compensation insurance in Virginia.

During the first, meeting held on July 27, 1982, the Subcommittee received testimony from the Bureau of Insurance and other interested parties regarding the elements of Florida's wage-loss law. A copy of the State Corporation Commission's prepared remarks on the subject of wage-loss is attached as Appendix 1 to this report.

At its first meeting, the Joint Subcommittee learned that the workmen's compensation system in Florida had reached a crisis stage by 1979. The administration of the workmen's compensation law in Florida was at best passive and out of touch with the claimants coming into the system. Prior to August 1, 1979, workers' compensation costs in Florida were extremely high, with insurance rates among the highest in the nation. These costs were especially high in view of the relatively low statutory benefits provision then in effect. The over-utilization of permanent benefits was largely responsible for the high cost. Contributing factors to the crisis were the relative ease in qualifying for permanent total disability benefits and the basing of permanent partial disability awards on disability or medical ratings which were generally subjective in nature. These ratings resulted in a high degree of attorney involvement and over-compensation of minor injuries.

Under Florida's the wage-loss law which went into effect on August 1, 1979, benefits are provided only to the extent that a worker's after- injury earnings are less than the worker's pre-injury earnings due to compensable injury. That is, disability benefits for workers with temporary injuries are terminated as soon as the worker has recovered medically from the injury. Workers with permanent injuries, once rehabilitated to the maximum extent possible, must return to the work force in their pre-injury job or in some other capacity. Benefits to these workers are based on frequent periodic comparisons of pre-injury and post-injury earnings. Only those workers completely

unable to undertake any continuous employment are eligible for permanent and total disability benefits.

Thus, the wage-loss system was designed to eliminate the over-compensation of minor injuries and to use the resulting savings to finance increased benefits for workers with serious injuries, as well as to provide savings to employers in the form of lower workers' compensation costs.

To qualify for wage-loss benefits, a worker must suffer permanent impairment which results in the loss of at least 15% of his pre-injury wages after the point of maximum medical improvement. In the case of permanent impairment due to amputation, loss of 80% or more vision (after correction), or serious facial or head disfigurement, the injured worker will receive a lump sum benefit determined by the percentage of permanent impairment which the worker suffers after he has reached the point of maximum medical improvement.

An injured worker with a loss in wages and no permanent impairment is a loss-wage only case. An injured worker who receives a lump sum award but has no loss in wages is an impairment only case. Finally, a claimant with a loss in wages and an impairment award is a wage-loss and impairment case. For all three categories, the injured worker also will receive temporary total benefits during his healing period, as well as full medical benefits.

During its first meeting, the Joint Subcommittee also learned that after wage-loss was instituted in Florida there was a total decrease of 54% in premiums for workmen's compensation insurance in Florida.

The Joint Subcommittee also heard testimony at this first meeting concerning Virginia's workmen's compensation system. The Joint Subcommittee found that the Virginia system does not have the same problems that Florida had, and there is nothing comparable in Virginia's system to the tales of abuse that were heard in Florida prior to the wage-loss system being instituted there. Testimony and information received by the Joint Subcommittee showed that benefits paid out in Virginia seemed to be reasonable to the premiums paid. Most persons involved understand the Virginia system and like it. Virginia is fourteenth best in the United States in terms of average earned rate, whereas Florida after wage-loss is 24th. In regards to incentives to return to work, rehabilitation in Virginia is a big part of the program and an employee must participate in a rehabilitative program, the same as in Florida. Testimony noted that Virginia is thought of as a conservative state in which rational decisions are made on the awarding of compensation benefits.

Speakers for the insurance industry pointed out that, given the fact that Virginia operates better than Florida does even with its wage-loss system, the institution of the wage-loss system in Virginia may or may not be advantageous and the savings, if any, may or may not be worthwhile. Any institution of wage-loss in Virginia would be a gamble in their opinion. They also observed that the institution of the wage-loss system on a workmen's compensation system in a state must necessarily entail the reorganization of the administration of that system. They also stated that in their opinion there were no serious administrative problems in Virginia.

In regards to the issue concerning competitive pricing of workmen's compensation insurance the, Joint Subcommittee heard from the State Corporation Commission, which delivered a prepared statement to the Joint Subcommittee. That statement is attached as Appendix 2 to this report.

The Joint Subcommittee found from the information submitted and the testimony elicited that the major concern with the competitive pricing of workmen's compensation insurance, is whether the integrity of the Virginia Compensation Rating Bureau's data base can be maintained while instituting a competitive pricing system in Virginia. Testimony suggested that the data base's integrity could be maintained by having a mandatory requirement that insurance companies file annually the necessary information with the Rating Bureau.

Several members of the Joint Subcommittee, having previously served on a study committee that concluded its study in November of 1980 regarding the root causes of recent substantial workmen's compensation rate increases within the State, were well aware that competitive pricing is an issue today because workmen's compensation rates are continuing to go up. They heard testimony which gave the following reasons for the continuing escalation in rates: (1) inflation, (2) benefit increases adopted by the General Assembly, especially in 1974 and 1975, (3) the addition of the heart-lung benefits, (4) increased expenses of the insurance carriers, (5) hospital costs, (6) increases in

physician's costs, and (7) increases in the number of claims reported.

The Joint Subcommittee also heard testimony concerning a study that had just been concluded in May of 1982 in which the Workers Compensation Competitive Rating Advisory Committee reported to the National Association of Insurance Commissioners on Competitive Rating. A questionnaire developed by the advisory committee during their study revealed that the smaller employer, those who are paying $5,000 or less in workmen's compensation insurance premiums per year, may, as a result of the institution of competitive pricing, find that their premiums will increase. The cause of such an increase would be the initial underlying expenses for underwriting the policies that are greater pro rata for the smaller insurance policies. It was noted that the smaller employees only account for 15% of all premiums written, but comprise 88% of the policies written.

In testifying before the Joint Subcommittee, the Virginia Compensation Rating Bureau suggested that in theory the General Assembly could open up the workmen's compensation system to competitive pricing and the State Corporation Commission could go a long way toward competitive rating without destroying the integrity of the Rating Bureau's data base. At one end of the spectrum of competitive rating, that a file and use system could be instituted which would provide for full advisory rates. In the middle of that spectrum, a pure premium system could be instituted wherein the insurer would add his own expenses to the base rate. At the other end of the spectrum, a rating system could be instituted wherein the Bureau would have no input into establishing rates, but in order to maintain the data base's integrity, law or regulation could mandate that the insurance companies submit annual reports to the Bureau.

Further testimony before the Joint Subcommittee set forth several aspects of the 64-year-old Virginia Compensation Rating Bureau. It was observed that the detailed data base system had been built over the years for the purpose of setting rates and that Virginia has a high quality system. The Joint Subcommittee learned that the Rating Bureau maintains a classification system which is an inherent part of rate making and that that system contains more than 600 classifications which are advantageous in keeping premium rates low and in maintaining equity among the classes of employers and carriers. For use in Virginia, the Bureau publishes rate rules and a basic rate manual which is basically the manual of the National Council of Compensation Insurance with paticular modifications for Virginia. It was pointed out that the advantage of rates and rules in a basic rate manual is that the rules and proceedings in Virginia are fairly applied to all carriers, agents, and employers. It was suggested that this may not be true in a truly competitive rating environment. It was further pointed out that the Rating Bureau, being the central location for workmen's compenstion rates and rules in Virginia, works with other jurisdictions in the Commonwealth and with other states in order to provide unity of premium rates. The idea was advanced that the Rating Bureau maintains the underpennings of the Virginia Workmen's Compensation Rating System, and if the General Assembly were to back away from a central system it would be more difficult to accurately answer questions concerning the cost of certain changes in the system. These questions are commonly asked by study committees and by the Legislature in order to introduce new legislation. Further testimony pointed out that the Rating Bureau also handles complaints concerning the workmen's compensation system, performs test audits on carriers, regularly performs classifications inspections, administers the assigned risk plan and answers employer questions.

In testimony received from the insurance industry, the Joint Subcommittee heard that the insurance industry was in favor of maintaining the present system. Their apprehension in going toward competitive rating was directed towards the potential harm that could come to the data base. They maintained that the data base and the 600 classification system were working well presently. They stated that they saw no advantage in going to a competitive pricing system. They reiterated the thought that a more competitive rating system could actually hurt a smaller employer by increasing his premium rates. They observed that during the 1982 session of the General Assembly a bill was passed that provided for downward deviation filings and that that was a form of competitive pricing. They also observed that the Subcommittee may want to see how this system works before considering competitive pricing. It was suggested that the 1983 General Assembly may want to amend the section of the Code allowing for downward deviation filings by providing that a carrier may go back to a manual rate if the deviated rate proves to be uneconomical thereby, eliminating the necessity of the insurer's having to go through the prior approval method as is presently required.

In addition to hearing testimony describing the erosion of the industry wide data base relied on

by regulators and carriers, the impact on small insurance carriers of placing heavy actuarial demands on them, effects of losing an essential rate making authority to whom the legislature could pose probable cost questions concerning new proposed benefit changes, and the facts that the current system is working well and that ample competition is already present, the Joint Subcommittee heard further arguments against competitive pricing. It was observed that the administered pricing system of rate regulation has fostered a tremendous amount of activity in competition in the loss prevention and rehabilitation fields. Largely because of the administered pricing system, the competitive emphasis has been concentrated on areas other than price competition alone, and this has caused extensive service competition, most of which has focused on a reduction in losses and the creation of a safer work environment for the benefit of both the buyer and the labor force. Testimony revealed that in observing the activities in the so-called residual market and the voluntarily insured market, little doubt is left that the worker's compensation market has largely escaped the availability problems which have plagued some markets such as the personal automobile insurance market, characterized by an up-front pricing variability. The workmen's compensation market generally has not experienced major market supply interruptions or withdrawals and has experienced relatively small residual market populations.

The purpose of the September 17th meeting was for the various interest groups to present expert witnesses to testify before the Joint Subcommittee. At this meeting the Joint Subcommittee heard testimony exclusively concerned with the issue of wage-loss.

Ms. Mary Ann Stiles, General Counsel for Associated Industries of Florida, and Frederick Karl, General Counsel of the Florida Association of Insurance Agents, both of whom were instrumental in instituting the wage-loss concept in Florida, informed the Joint Subcommittee of the development and enactment of the wage-loss law in Florida. They stated that they were advocates of wage-loss reform in Florida, but that it may not be necessary in Virginia. They stated that in Florida in 1979 there was total reform by the revision of the relevant laws of Florida and that the total revision had a cumulative effect. The said that it was not just adding the wage-loss concept that improved Florida's situation, but also the revamping of the administrative and insurance code provisions. They opined that it was important for this subcommittee to look at Florida and what happened there in order to determine whether such a reform would be good for Virginia.

Ms. Stiles and Mr. Karl informed the Joint Subcommittee that in 1977 Florida's workmen's compensation laws were in bad shape. Generally, employees were unhappy because Florida was 37th in benefit levels; employers were not happy because Florida was 5th or 6th in premium levels; insurance companies were unhappy because they had lost $207,000,000 in a very short time; insurance agents were unhappy because they were losing business and there were fewer insurers with whom to place workmen's compensation insurance; and everyone involved was unhappy because there was an 8% surcharge in the pooling charges for assigned risk employers. Prior to wage-loss 2% of the injuries compensable under workmen's compensation in Florida were in the permanent partial category, but this category was responsible for 60% of the benefits paid out. Prior to wage-loss, 76% of the permanent partial injuries were settled, many of which were summarily approved by the Deputy Commissioners in the Industrial Commission in Florida with little or no thought. Ms. Stiles and Mr. Karl presented to the Joint Subcommittee copies of a book called The Circle Solution , which is an account of the birth of wage-loss in Florida prepared by the Florida Association of Insurance Agents. An article extracted from that book entitled "How Wage-Loss Works" is attached as Appendix 3 to this report.

They stated that since the institution of wage-loss in Florida, benefit levels for injured workers have increased from 60% to 66 2/3% of his average weekly wage. Injured workers receive full medical and rehabilitation benefits during their healing period. They stated that the maximum weekly benefit has been raised to 100% of the Florida average weekly wage, which in dollars represents a raise from $132.00 to $253.00. Death benefits have doubled. Impairment benefits, which are awarded in cases of permanent impairment due to amputation, loss of 80% or more of vision after correction, or serious facial or head disfigurement, have increased by 600% since the institution of wage-loss. They concluded that benefits are paid if wages are lost, that there are no more windfalls, and that the actual economic loss resulting to the employee from an injury received on the job is compensated. In addition, they pointed out that there has been over a 50% reduction in rates of workmen's compensation insurance premiums. They added that 102 companies in Florida have deviated downward from manual rates, which is in addition to the rate reductions. Generally, they stated, there is a situation of intense competition among the workmen's compensation insurers in Florida. The Joint Subcommittee also learned that there has been recently a 10% increase in

workmen's compensation premium rates because of the increase in benefit levels, benefits for funeral expenses, benefits for permanent impairments, and inflation. Finally, they stated that the numbers of employers in the assigned risk pool has decreased by 15%, the premiums in that pool have been reduced by 46%, and 18% fewer cases are being litigated per month.

Representatives of the insurance industry stated that although they were in favor of the concept of wage-loss, it was their opinion that the present conditions in Virginia do not warrant the institution of the wage-loss concept of the workmen's compensation system. They noted that in Florida by 1979, the workmen's compensation system was at a crisis stage. All of the representatives of the industry observed that it was wise of the Virginia Legislature to look at wage-loss and the provisions of the Florida system now, while the Virginia system is still in good shape. The whole concept of wage-loss in the workmen's compensation system is wage replacement and rehabilitation where needed. They added that wage-loss provides full cost of medical benefits and compensates the injured employee for his economical loss through fundamental wage replacement. Testimony revealed that there are presently in the Virginia system the proper incentives requiring the employer to provide rehabilitation for the injured worker. Testimony also revealed that 99.82% of the cases in the workmen's compensation system in Virginia involve no rehabilitation. Further testimony convinced the Subcommittee that the employer is the best person to have in the position of initiating rehabilitation for the employee because he needs that person back at work.

Commissioner Charles James, Chairman of the Industrial Commission of Virginia, stated unequivocally to the Joint Subcommittee that the Industrial Commission in Virginia does not have the same problems that Florida had before wage-loss. He pointed out to the Study Committee that testimony received at the first meeting and at the September 27th meeting indicates that other persons also believe that the administration of the workmen's compensation system in Virginia is above average. It was noted that usually in a Virginia workmen's compensation case the treating physicians, the examining physicians, and the parties can agree as to the extent of the impairment and the injury rating without the necessity of a hearing. Commissioner James stated that he believes that Virginia is up front and active with the employees in the system and is aggressive in handling the claims filed. It was observed that should Virginia go to a wage-loss system it may be necessary to increase personnel within the Industrial Commission in order to administer the new system. It was also noted that any increase in the budget of the Industrial Commission would decrease the probability of realizing any savings by instituting the wage-loss concept.

The Virginia State AFL-CIO asserted at this meeting, as it did at the previous meeting, that it was in total opposition to the wage-loss concept in workmen's compensation. They stated that behind all the rhetoric and statistics, the intent of this scheme is clear: to save money for employers by cutting the benefits of injured workers. They observed that under the wage-loss plan adopted in Florida, thousands of worker have been eliminated from receiving workmen's compensation benefits and those that are still receiving benefits are receiving them only after substantial delays and burdensome paper work. They pointed out that there are two philosophical defects in the wage-loss concept. The concept fails to acknowledge the fact that a worker who loses an arm or leg is likely to suffer a lack of earning capacity in the future, even if there is no immediate wage-loss. These workers will lose opportunities for advancement and promotion. The second essential defect in the wage-loss scheme, they pointed out, is that it ignores the fact that workers with permanent impairments must live with these handicaps for the rest of their lives. Everyday lives are affected, not just their work lives. (See Appendix 4). The AFL-CIO had a private practicing attorney from the Northern Virginia law firm of Ashcraft and Gerel testify at this meeting. He submitted a memorandum comparing the Virginia system with the Florida system which states that "the conclusion is inescapable that the wage-loss concept should be rejected by the Virginia Legislature after it weighs the proposed minimal benefits of a wage-loss system in Virginia against the tremendous loss to the injured employee." That memo is attached as Appendix 5 to this report.

A private practicing attorney from the Commonwealth of Massachusetts and the editor of a publication called Worker's Compensation Monthly stated to the Joint Subcommittee that he had studied the Florida Act and that things are worse in Florida now than before wage-loss was instituted. He observed that it is costing Florida $6,000,000 more to administer the new act, yet claims have dropped to less than one-third of what they were before the institution of wage-loss. He stated that injured workers are having difficulty filing claims because of the new procedures of the system. He stated that benefits have dropped $30,000,000 because the new statute is too restrictive and people are having difficulty receiving benefits from the system. He told the Joint Subcommittee that the courts are backed up with workmen's compensation cases, and yet the total number of

judges handling those cases has increased from 7 to 12. He stated that in his opinion Virginia has a good system and he sees no reason why Virginia would want to duplicate any portion of the wage-loss system.

The Virginia State AFL-CIO offered, as an alternative to the enactment of the wage-loss system, the development and establishment of an exclusive state insurance fund for workmen's compensation protection. They pointed out that the escalating cost of coverage of workmen's compensation insurance is the motivation for employers to embrace the wage-loss concept, however that concept cuts benefits to workers with permanent impairments. They stated that they have long supported the idea of the establishment of a state insurance fund as the best way of providing the most extensive workmen's compensation coverage for the least cost. They pointed out that costs to employers are much higher in states where private insurance companies handle coverage for workmen's compensation than in states with exclusive state funds. They observed that since private insurance companies are prohibited from selling workmen's compensation policies to employers in these states, investment income is retained by the fund to pay benefits and reduce employer cost. Overhead expenses and profit margins are unnecessary. See Appendix 6 to this report, which is the Florida AFL-CIO Executive Council's comments to the enactment of the wage-loss concept in Florida.

The Virginia AFL-CIO had one of the three Ohio Industrial Commissioners speak to the Joint Subcommittee concerning the alternative of a state insurance fund. The Joint Subcommittee learned that Ohio has had this concept for 70 years. They learned that Ohio has been able to award full benefits to the severely injured worker and to the marginally injured worker. All employers pay into the fund, and the amount of payment is determined by their experience factor. The Joint Subcommittee was told that the Ohio system of workmen's compensation was so secure that a few years ago when insurers tried to get an insurance backed concept into Ohio, it was defeated 4 to 1 at the election polls. Testimony revealed that the Ohio insurance fund generated investment income amounting to $197,000,000 in 1979, $200,000,000 in 1980 and $230,000,000 in 1981. It was pointed out that this investment income helped to reduce the employers' premiums.

Although the Joint Subcommittee during its September 17th meeting selected November 5th as its next meeting date, the November 5th meeting was canceled. During the time between September 17 and November 5th, a polling was made of all the members of the Joint Subcommittee to determine whether they thought it was necessary for the Joint Subcommittee to meet again. The members of the Joint Subcommittee unanimously decided that there was no need for the study committee to meet since all of the testimony that had been brought forward to the Subcommittee suggested that because the Virginia system was already working well, there was no large clamor to change. It was their belief that Virginia was not in the same posture that Florida was, and there was no need to institute a wage-loss concept in Virginia's workmens compensation system. It was also the Subcommittee's belief that the present workmen's compensation insurance pricing system was working satisfactorily and that there was a competitive atmosphere in Virginia.

RECOMMENDATIONS

The Joint Subcommittee finds that the present workmen's compensation system, the rating of workmen's compensation insurance, and the administration of both are working satisfactorily, and therefore, the Joint Subcommittee recommends that no change be made to the workmen's compensation system, the rate regulation, or the administration of either. The Joint Subcommittee finds that its recommendation is based on the fact that the present system is working well and that there appears to be no support to go to the wage-loss concept or to the competitive rating for workmen's compensation insurance.

CONCLUSION

The Subcommittee expresses its appreciation to all those parties who participated in its study.

The study group would note that its recommendation has been offered only after thoroughly reviewing the evidence presented during the meetings. The Subcommittee believes its recommendation is in the best interest of the Commonwealth, and it encourages the General

Assembly to adopt that recommendation.

Respectfully submitted,

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Elliot S. Schewel, Chairman

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William T. Wilson, Vice-Chairman

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Clive L. DuVal, 2d

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Elmon T. Gray

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Claude W. Anderson

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Statement of Robert T. C. Cone
Presented To: Joint Study Commission on
Wage Loss and Competitive Rating
July 27, 1982

The Bureau of Insurance appreciates this opportunity to address the Study Commission on the wage loss concept of workers compensation insurance. The purpose of my presentation is to provide background information on this concept. Comparisons between Virginia's benefit system and Florida's wage loss benefit system will be used to provide clarification.

In general, there are five objectives of workmen's compensation coverage.

These are:

1) Income replacement.

2) Medical and vocational rehabilitation.

3) Occupational accident prevention and reduction - such that positive incentives should be provided to reduce risk.

4) Proper cost allocation - costs should be allocated to those responsible for the loss.

5) The achievement of these objectives should be done in the most efficient manner possible. This can be difficult as some of the objectives are conflicting.

Workmen's compensation statutes are designed to achieve these objectives by incorporating the following four components.

1) Impose limited liability on employers for injuries incurred by employees in the course of employment.

2) Establish predetermined benefits which are to be paid promptly.

3) Provide for appropriate medical care.

and finally

4) Provide an administrative body to implement the law.

The past decade has witnessed a rapid increase in the dollar amount of benefits paid. The following conditions were instrumental in this growth.

1) Benefits in the 1970's rose rapidly to keep pace with inflation induced wage increases.

2) Diseases bearing distant relationship to employment have found their way into the compensation system.

3) Rapid inflation in the health care area.

and finally as a result

4) Insurers have had to rapidly increase premiums to offset these costs and when price increases were not possible, insurance availability became a problem.

In 1978 the Florida Legislature established a Joint House Senate Committee to study the Flordia Workmen's Compensation Act. Five major problem areas were defined.

These are:

1) High cost of coverage.

2) Minimal use of rehabilitation facilities.

3) High cost and volume of permanent partial disability claims.

4) The inequity in income compensation among workers with permanent partial disabilities and claims.

and

5) The high degree of attorney involvement.

Florida has had a very high level of attorney involvement in the settlement of permanent partial cases. Florida, Alabama and Wisconsin, the three states evaluated in an NCCI study, had respectively 70.7%, 30.0% and 17.5% attorney involvement in the permanent partial cases. In essence, we will see that the design of the Florida System promoted high levels of attorney involvement.

Importantly, the wage loss concept embraces the objective of income replacement. In the case of a permanent partial disability, the wage earner is compensated for any reduction in income resulting from an injury. As an example in Florida, an individual is awarded a benefit of $130 a week for 30 weeks. If the injured worker is back on the job in 10 weeks earning his normal wage, he is still eligible for 20 more weeks of $130 weekly payments - something far in excess of income replacement. However, if the individual had not recovered sufficiently to return to work by the end of the 30th week, he is out of luck and benefits are terminated.

Virginia's system is similar. When a worker returns to his place of employment he continues to receive benefits for the designated period. However, in Virginia, if his recovery is delayed beyond this period, the Industrial Commission can extend the payment period to a total of 500 weeks.

In Florida, prior to the introduction of wage loss benefits, an unscheduled injury resulting in a permanent partial disability generated a strong motivation to present the impairment in its worse case. Once the injured worker achieved maximum medical improvement, he became eligible for a series of payments or benefits. However, the number of payments depended upon the amount of disability. The categories of payment duration were as follows: 175 weeks for 1% to 10% disability, 350 weeks for (twice as long) 11% to 50% disability and 525 weeks for greater than 50% disability.

The difference in disability classification can be significant. As an example, an individual eligible for a benefit of $130 can receive payments for 17½ weeks if he has a disability rating of 10%. However, if this rating is increased to 11%, his benefits will be paid over a period of 38½ weeks. This amounts to benefits of $5,005 rather than $2,275. This increase of $2,730 or 120% is sufficient to provide a strong incentive to hire attorneys and medical expertise for testimony designed to increase the disability rating from 10 to 11 percent.

For unscheduled injuries in Virginia, a type of wage loss system is already in effect. An injured worker receives payments equal to 2/3 of the difference between the preinjury wage and post injury wage subject to a current limit of $253 a week. The degree of disability determines the duration of payments. As an example, a rating of 10% results in payments for 20 weeks while a rating of 11% results in 22 weekly payments. The Virginia benefit system certainly does not have the tremendous discontinuity associated with the older Florida System.

The current Florida wage loss system, frequently called the 85/95 formula, compensates a worker for wage loss when he shows, retrospectively, that he is actually loosing money as a result of the injury. The wage loss benefits are computed as 95% of the difference between 85% of the pre-injury wage and the post injury wage. Benefits can be paid for a maximum of 525 weeks. The worker is required to assume the first 15% of the wage loss.

As an example of the Florida wage loss system, suppose a worker's pre-injury wage was $300 and post-injury wage is $200. The benefits under the Florida law are $52.25. The worker is eligible for these benefits for a period of 525 weeks. However, any increase in the post injury wage will reduce the benefits.

The current Virginia benefits allow for a maximum of $253 a week. This is equivalent to a before tax weekly income of $361 if the individual has total taxe rate of 30 percent. An individual having an average weekly salary greater than $361 (less than $19,000 annually) will not be completely compensated for the loss in income. Florida establishes no cap on its wage loss structure.

The Florida's law applies the wage loss formula to all injuries. However, certain injuries can still result in an impairment payment, in addition to the wage loss benefit. Therefore, in the event of an injury such as the loss of an eye or limb, the injured worker receives an impairment payment for this loss. It is not related to a loss in

earnings, but reflects other than economic costs of the injury. The impairment benefit is related to the degree of disability. A worker is awarded an impairment benefit of $50 for each percent of disability up to 50% and $100 for each percent above 50%.

The Bureau of Insurance is neutral regarding the use of wage loss for altering the current benefit system. This study represents not only an educational opportunity for the Joint Study Commission, but also for the staff of the Bureau of Insurance. Wage loss certainly offers an opportunity to eliminate some of the unconsistencies that might be associated with the current system. However, an evaluation must be made of the possible disincentives to return to work that may be associated with wage loss benefits. Commissioner Thomson and the Bureau staff look forward to working with you on these as well as other relevant issues regarding the use of a wage loss concept.

Presentation of: Stephen J. Kaufmann
Open Competition
Discussion of Issues

Introduction

Beginning with Wisconsin in 1911, many states enacted workmen's compensation laws replacing the old common law employers' liability system which had proven inadequate for an industrial society.

Prior to workmen's compensation an employee injured while working was required to show that the employer was negligent in order to recover. This was a difficult if not impossible task for the injured worker. This condition was rectified by the state enacting basically a mandatory compensation law which specified benefits to an injured worker. By accepting this compensation system an injured workers' benefits were established by law. The employer was able to trade off the uncertainty of cost associated with legal actions for known insurance premiums. Likewise, an injured worker was able to more easily acquire stated benefits to offset the damage and cost of injury.

Workmen's compensation benefits are specified by statute in every jurisdiction in the United States. Since its inception as the nation's first widespread social insurance program, workmen's compensation insurance generally has been subject to thorough state regulation. Regulatory responsibility has been shared in that industrial commissioners focus on delivery of benefits to claimants and insurance regulators focus on rate regulation.

In the beginning there was no historical loss data from which to determine the rates for this new social insurance program. As competition intensified, many insurance commissioners and other authorities became alarmed over potential insurer insolvencies. And many states moved quickly to establish controls. Rate-making bureaus were formed to accumulate and analyze data and to promulgate rates.

Workmen's compensation insurance today remains a highly regulated system. As a rule, in the administered pricing system, rating organizations are permitted to require their members to adhere to manual rates, rules, classification plans and policy forms.

In almost all states workmen's compensation insurance rates have been made by a single rating organization, filed with the state insurance department pursuant to a prior approval rating law, and used by insurers under mandatory adherence rules.

Insurers must base their premium charges on prescribed, front-end rates developed by the bureaus, although the rates can be modified for given policyholders based on loss experience. Insurance companies contribute to the rate-making process by providing premium and loss information to the bureaus according to a mandatory plan.

Workmen's compensation is considered a somewhat unique form of insurance. Jobs are risk classified into more than 600 categories, each of which is supposed to represent a homogeneous risk class. An insurance price based on payroll is developed for this class by evaluating the loss history of the class and adding to this loss value appropriate expenses and an adequate profit margin.

For the year ending 1980 in Virginia, 187 workmen's compensation insurers had in excess of $300 million dollars of written premium. With its growing size and cost, the system has also become a subject of attention from regulators and legislators. The focus of their attention has been the rate-making mechanism. With increasing frequency, they are expressing the view that competition rather than regulation ought to determine the market price for workers' compensation insurance much the same way that prices are set in most of the rest of the economy and particular in most other areas of insurance.

Many insurance buyers are looking to open rating as a means of reducing their workers' compensation insurance costs. On the other hand, many compensation underwriters are fearful that they won't be able to "see" or project future experience without their rating manuals and that open rating therefore places a system that is now working well in jeopardy.

Any consideration of possible movement toward competitive rating requires several major issues to be addressed.

1. What are the pros and cons of competitive rating?
2. Should competitive rating be achieved in one complete step or a series of limited steps which ultimately lead to open rating?
3. What should the role of a rating bureaus be under this new system?
4. What type of regulatory review and control should exist - prior approval, file and use, use and file, or no filing at all?
5. How will the legislature in the future be able to assess the effectiveness of competitive rating, if such a system is adopted.

I think it would be helpful to briefly give you an overview of some of these issues to put the study into perspective.

There are strong arguments both for and against competitive rating with respect to workmen's compensation.

First the Advantages of Competitive Rating

1. Many feel that employers today are trapped in an unfair system of cartel pricing that deprives them of the fundamental economic opportunity of shopping around and comparing prices and thus hopefully lower the cost of their insurance, and that insurance companies also should be free to compete on the basis of price.

2. That the elimination of prior approval of rate filings would allow insurers the flexibility to react more rapidly to changing market conditions thereby increasing the availability of coverage in the market. They would no longer be required to assume the risk of a perceived slow regulatory process which could force them to write nonprofitable insurance while waiting for rate relief. This also reduces the insurance provider's need to add an additional amount to the premium to cover the cost of the regulatory lag risk.

3. Availability of insurance has been a long standing regulatory objective. At times, desired insurance coverage has been unavailable because insurers have perceived the line of business to have inadequate profits. Because workmen's compensation coverage is mandatory, an involuntary procedure has been established to assure coverage. In essence, the uninsurable risk is charged the same rates required in the voluntary market, but the resultant losses (or profits) are allocated on the basis of premium volume among all insurers writing workmen's compensation insurance.

Two interesting conclusions can be reached regarding this involuntary market. First it provides a barrier to any new firm considering writing compensation insurance as they are forced to participate immediately in the losses associated with the residual market. Second, those who are recognized as being inferior risk, either relatively high expenses associated with the policy or abnormally high losses, are charged the same premium as the "normal" risk. In essence, the "normal" risk is required to subsidize the "inferior" risk.

4. Competitive rating could slow the movement of employers to self-insurance and could encourage others now self-insuring to buy conventional insurance, if lower prices result. If lower prices and greater availability of coverage result from competitive rating, these factors could make the purchase of private insurance a more attractive alternative.

5. That the insurance industry should detach itself from what many call the "hypocracy" of the current system, which presents an image of uniformity and coherence, but ultimately forces insurers to compete in indirect ways. Workmen's Compensation Insurance is in fact a very competitive industry. Under prior approval today, manual rates for similarly classified employers are the same for each insurer, except where deviations have been approved. However competition in fact causes the actual cost to an employer to be less because insurers offer various dividend plans, retrospective rating plans, cash flow plans and other cost reducing options. In addition, account pricing is utilized where the insurer makes price concessions on other than workmens compensation lines of business where price is not regulated. The main problem with these dividend plans and similar plans is that they are priced at the "back end" as opposed to up front and that the employer has no way of adequately determining the ultimate cost for the insurance in advance to compare different quotes.

Those arguing against changing the current administered pricing system - or against competitive rating point out the following:

1. Workers' compensation insurance is unique because it is a mandated form of social insurance, providing unlimited protection to employees as a result of an injury. It cannot be compared to other lines which are subject to market, not regulatory, forces. Open competition would destroy the data

base legislators rely on to set benefit levels. This financial data base, among other things, included earned premiums, incurred losses and statistical data for each insurance policy (payroll, rates, premiums, losses for each employer classification).

2. Open competition would either eliminate entirely or reduce the contribution of rating bureaus, whose data base is essential to the integrity of rates.

3. Open competition might favor the larger employer and raise rates for the medium or small employer because they are less attractive risks.

4. It might ultimately harm the worker because insurers, to remain competitive, might cut their support for loss control, work place safety, and rehabilitation.

5. Only a few companies (the largest ones), without an effective rating bureau would have the expertise or statistics to develop credible rates for the several hundred vocational classifications in existence today. Not only would it be very expensive for each company to maintain additional staffing and computer capability to develop credible statistics for rate-making, it would redundant.

6. Without experience rating under the present system, an employer might lose his motivation to provide a safe work place.

7. Under extreme conditions raise concerns of financial adequacy with respect to drastic rate cutting under cash flow underwriting.

8. In addition to the above reasons many people feel the current system is working well enough so why change it. Injured employees receive their benefits on a timely basis and employers have a positive incentive in providing a safe place to work thus reducing insured losses.

Alternatives To The Administered Pricing System

The administered pricing system for workmen's compensation insurance can be replaced by one of a variety of alternative pricing systems.

While many combinations for change can be made, two general alternatives represent the range of options. They can be referred to as limited competitive rating and full competitive rating. Both require a change in the prior approval form of rating to at least file and use. This would mean that the regulator is no longer required to judge the excessiveness of rates so long as a competitive market exists.

Very briefly, limited competitive rating can be achieved in a gradual step-by-step manner, allowing employers, insurers and regulators a transition period to get used to each step before progressing further towards full open competition. Virginia already has achieved the first step. Insurers many now deviate from bureau made rates on a uniform percentage basis. To date, ten companies have filed for downward deviations and eight have been approved. The downward deviations have average 15 percent. Additional steps towards deregulation within the framework would be to allow non-uniform deviations, both up and down, from the prior approval rate. After that the next step could be to recognize that while manual rates or pure premiums would be produced by rating organizations, a law would be passed, similar to that in affect for other insurance lines, prohibiting agreements by insurers to adhere to such rates. Insurers would be free to establish their own final rates.

Full competitive rating would extend, in one sweeping change the prohibition on agreements to adhere to other elements on addition to manual rates such as classifications, expense provisions, experience rating, and other rating plans just to name a few.

The role of the rating bureau must be considered in evaluating open competition. The rating bureaus traditional role has encompassed a variety of tasks, among which

are to determine employee risk classification categories, collect relevant data for each classification, develop experience rating plans and present statewide rates for each classification. Possible deregulation schemes could range from allowing the rating bureau to develop full rates as recommendations to the insurers to disallowing the participation of the rating bureau. Either extreme could cause concern. To allow a rating bureau to provide recommended prices opens the path once again to cartel pricing. The opposite extreme could result in the elimination of a large data base which includes loss data. This data base is used to project loss and expense data for each classification. Some feel that if the data base is lost, the preciseness of forecasting losses will drop significantly. As a consequence, higher prices and insurance availability problems may result.

To counter the data base problems, it may be desirable to either permit or require participation by and with the rating bureau. The absolute minimum participation would be to require insurers to file relevant loss and expense data with the Rating Bureau. However, to be usuable, the data must be classified on a universally acceptable basis. This requires the Rating Bureau to establish employee risk classification categories. If the insurance companies are not required to use these classification, data must be transformed to meet the standard classiciations. Errors at this stage of development could render the data and any subsequent analysis useless. Once the data is collected, it could be made available to the insurance companies or the Rating Bureau could analyze the data. This analysis could cover a variety of items, such as trending losses, developing expense factors, determining pure risk premiums for each classification and finally providing a full rate.

We have assembled reading material for you which thoroughly discusses the complete range of legislative options that you may consider, including extensive material on the role of the rating bureau in a future system of competitive rating,

clearly one of the most important and controversial aspects that this study will consider.

Commissioner Thomson and the staff at the Bureau of Insurance stands ready to assist you fully as you pursue this study to provide you with any information you may need to answer question you may here. Should you choose to adopt a form of competitive rating, please be assured that we will thoroughly monitor the competitive marketplace with respect to insurance solvency and profitability, availability and affordability, as we have been doing for the past 8 years for other lines of insurance.

APPENDIX 3

How Wage-Loss Works

by Frederick B. Karl, General Counsel of FAIA

In January, 1979, there began, in earnest, the process of selling Wage-Loss. Workers' Compensation is a complex subject and most people — including most attorneys — did not know the details of how benefit awards were made. It was felt that Wage-Loss could not be fully understood, nor its potential appreciated, unless it was measured against the then existing law with all its known flaws.

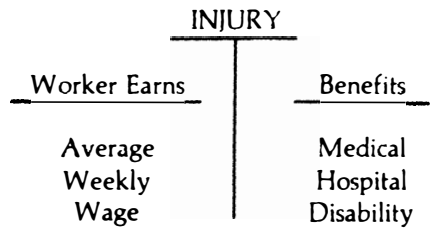
So, beginning with the Wage-Loss conference in the chambers of the House of Representatives and continuing through every mini-conference and editorial board meeting in all major cities of Florida, Fred Karl explained how Wage-Loss works in that way.

What follows is the text of the presentations made in that process. It was decided to include it here for two reasons. First, it is an explanation of what existed in Florida, pre-Wage-Loss, and what the Last Manifesto was proposing. Secondly, it documents what was said in the winter of 1979 in support of the bill.

Readers are reminded that the Wage-Loss proposal which is described below was modified in the legislative process. The principal change was in the benefit formula — which was substantially liberalized. Moreover, when the "present law" is mentioned, reference is to the pre-1979 statute.

Rather than just talking to you about our concept, let me be sure we're thinking together about the law as it exists today. Then we can show you our proposal in contrast with what actually happens today.

A person in the work force in Florida does his daily work and earns his weekly wage. For Workmen's Compensation, the overall average of thirteen weeks' wages becomes the worker's average weekly wage (A.W.W.). If it's a part-time worker, there is a formula for computing. All is well until an employee has an injury that arises out of and in the course of his employment. When that happens, his life changes. The Workmen's Compensation law comes into effect. Think of that point — the point of injury — as the beginning point in all this discussion.



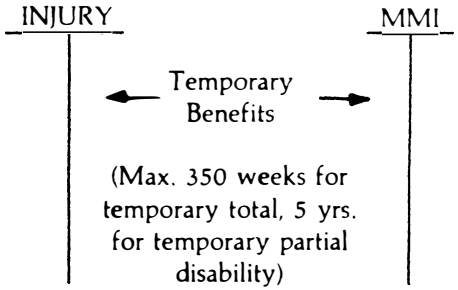
Under the present law, the worker is entitled to all reasonable and necessary medical expenses immediately following his injury, no matter whose fault the injury was (as long as it was a compensable injury). If the worker needs to go to the hospital, he is taken to the hospital. If he needs a doctor's attention, he gets it. If he needs specialized care, he is entitled to it. If it's surgery, he gets it; medication, he gets it. Whatever he needs medically, he is entitled to. The law even protects him against those who would try to make him go to second rate facilities or take less than proper medical care. He must get quality medical care based on community standards. The treating physicians and hospitals are entitled to their normal charges according to a schedule adopted by the Bureau of Workmen's Compensation.

Lost Time Cases

Now what if that worker loses time from his job? If, for instance, he goes to the hospital, or if his injuries are totally disabling, he doesn't get back any lost pay for the first seven days. Then, beginning on the eighth day, he becomes entitled to 60% of his average weekly wage. If he is totally disabled for fourteen days or more, he recovers his lost time back to day one. From the date of the injury, he will be reimbursed for 60% of his average weekly wage as long as he is temporarily totally disabled. No income tax is deducted from his 60% benefit award. If his temporary total disabilities become partial in character and he can go back to work, he gets 60% of the difference between what he now makes and his average weekly wage pre-injury. (Present law provides a maximum weekly benefit of $130.)

There are extra benefits in this time frame for those with certain serious injuries. The compensation can be as much as 80% of A.W.W. with a $400 maximum weekly benefit.

That situation continues — with the worker getting all of the benefits without regard to fault and without any need for litigation — until a point is reached which is known as maximum medical improvement, abbreviated as MMI (or for maximum statutory period if MMI is not achieved). Maximum medical improvement occurs when the treating physician says he has gone as far as he can go in healing the worker. That is the point at which it can be determined whether the worker has no disability or is permanently but partially disabled, or is totally disabled. The worker may need some kind of treatment in the future to make him more comfortable or to alleviate lingering symptoms. But, in terms of improvement or regression, a plateau has been reached.

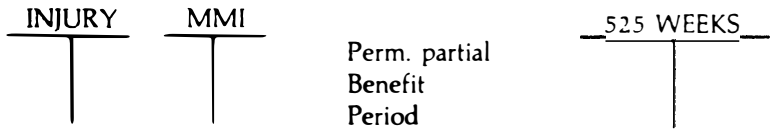


Obviously, MMI involves a subjective judgment by the doctor. That's the first area of potential contention. It is often in the worker's financial interest to postpone MMI.

Permanent Total

If it is determined at MMI that the worker is totally and permanently disabled (he is so disabled that there just isn't any hope of his working again), the worker then is entitled to benefits that are 60% of his average weekly wage for as long as the disability continues. That may be a long time. The average age of the injured worker in Florida is 36 and these benefits could go on for the rest of his life. Of course, medical expenses also are paid as needed for as long as the disability continues. There is an escalation provision so what is paid relates to the inflation rate. The average weekly wage is adjusted to inflation. Not too many workers fall in the category of totally and permanently disabled.

If at MMI the doctor says the worker does not have any permanent disability, he is out of the system with no further benefits. Between the extremes of permanent total disability and no disability are the permanent partial disabilities. These are the cases which absorb so much of the system's money. Under our present law, from MMI there is a period of 525 weeks within which permanent partial benefits may be paid. That's the maximum. Now how do you determine how many of the 525 weeks are to be used in the payment of these benefits? This is where the guessing game really begins.



The law says, first of all, that there are certain scheduled injuries (for example, the loss of an arm, or a leg, or an eye). Such injuries are easily determined and fairly common.

For those injuries mentioned in the Statute, there is a specified number of weeks of compensation allowable. For example, if the worker loses an arm or a leg, he is entitled to a maximum of 200 weeks of compensation counting from MMI. That means for 200 weeks the worker gets 60% of his average weekly wage whether he needs it or not! If within that 200 weeks the worker goes back to work making his average weekly wage, or even more, he still receives compensation. If he comes to the end of 200 weeks and the disability is such that he can't go back to work, that's tough. He doesn't get any more.

If he loses an eye, it is 175 weeks; if he loses his hearing, 150 weeks; if he loses his big toe, he gets 30 weeks of compensation — whether he needs it or not. As a lawyer, if I lose my big toe, I get all medical expenses. If I can't work, I get 60% of my average weekly wage up to the maximum of $130. When I get to the point where the doctor says, "OK, Fred, you're healed. You've learned to walk without your big toe," and I say, "Yep, and I'm going back to work," I will make the same salary or more than I did before the injury, but for 30 weeks I will get $130 a week just because I was injured. That's one of the problems we have. It just isn't fair. There are people who are being reimbursed for injuries when they're really not suffering a loss of wages. Conversely, there are people who cannot return to work at the end of the statutory benefit period but receive nothing more. We overcompensate some and undercompensate others.

Unscheduled Injury Problem

But that's not the only problem. The most difficult problem is with the unscheduled injuries, such as soft tissue damage and injuries affecting the back or the neck. Let me show you how that works. You have to understand this to appreciate fully what we're proposing.

The law says that when the worker reaches MMI, the doctor appraises his injuries and assigns a percentage of physical disability to the worker. In other words, he quantifies the impact of the worker's injury on his body's effectiveness. If the doctor says the percentage of disability resulting from physical impairment is 0-10%, multiply the percentage of disability by 175 weeks and you get the number of weeks he will receive disability payments.

The law goes on to say that if the disability rating is from 11-50%, multiply the percentage rating by 350 weeks. For the few most severely injured, with ratings from 51-100%, multiply the rating by 525 weeks.

INJURY	MMI		175 WEEKS	350 WEEKS	525 WEEKS
Temp. Benefits		1% to 10%	11% to 50%	51% to 100%	

Now just consider the game — and I don't mean to be facetious when I call it a game — and think about how it works. The worker reaches MMI and his doctor says, "Yes, you have a permanent injury that's going to last you the rest of your life. It is going to diminish your effectiveness by 10%." (So his rating is 10%.)

The worker will get 17½ weeks of disability (10% of 175 weeks) unless he can get the doctor to raise the percentage or get another doctor with a different point of view. An 11% rating would garner a percentage of 350 weeks. If he can really raise the rating, it would be a percentage of 525 weeks. I'm going to show you that the dollars are worth the fight.

The Rating Game

Under the present law, this rating game is subjective. Rating varies from community to community and from doctor to doctor.

In all fairness, say you are a lawyer practicing in the Workmen's Compensation field, and an injured worker comes to you saying, "I have an 8% or a 10% injury disability rating that the doctor has assigned. Is that the best I can do?" If you understand the system at all, you've got to say: "Maybe not. Maybe we ought to have another doctor look at you, perhaps a specialist, and see if he agrees with that general practitioner." So even if you're acting totally in good faith, the incentive is there to probe because the law says if your doctor's disability rating is in these categories, that's what you get.

Let me show you a couple of examples of what that means in dollars. Assume the worker is making enough money to be entitled to the maximum weekly compensation of $130. If the doctor assigns a 10% disability rating (recall that you multiply that by 175 weeks), the worker is entitled to 17½ weeks of payments. At $130 per week, the worker receives $2,275 for his 10% disability. If the doctor would go to 20%, then compensation would be 20% of 350 weeks. That yields 70 weeks (instead of 17½ weeks) at $130 for a total of $9,100, instead of $2,275. Is that worth the fight? You bet it is!

Let me tell you of a change in the law made in 1978 that has had an unintended impact. As I told you, a 10% disability is applied to the 175 weeks and results in $2,275. If the claimant could get just one percentage point added to that rating, either by convincing his doctor to raise it one percent, or finding some other doctor who will, then you multiply that 11% by 350 weeks for $5,005, plus

attorney's fees, of course. Just one percentage point! That's so subjective that I virtually guarantee that's going to happen in any case where the intial rating is close to 10%.

10% × 175 weeks @ $130 = $2,275
11% × 350 weeks @ $130 = $5,005

That difference also invites litigation and extra medical expenses. If you'll recall the charts comparing medical payments in Florida to Alabama's and Wisconsin's, you begin to see the problem.

Wage Earning Capacity

But now there is something else you need to understand before we discuss wage-loss. Our law properly recognized that a given injury does not affect all people the same way. The example most commonly used involves a lawyer who loses a finger but loses no wages compared to a concert pianist for whom that loss of a finger would be devastating. The law recognizes this distinction between people based on what they do, their lifestyle and all of that. To consider these differences, the Florida system includes a provision that at or after MMI, the worker may demonstrate to the Judge of Industrial Claims that his injury diminished this wage earning capacity for the rest of his life. Now that doesn't mean that worker necessarily is going to make less. It means, instead, that the injury has had such an effect on the worker that it probably will diminish his earning capacity. That may mean that the worker can't offer himself for as many jobs, or it may mean that he can't do certain kinds of jobs others can. It doesn't necessarily apply only to the worker's present job.

Determining Diminution

How does this provision work? The claimant comes in, and based on age, education, type of work and other similar circumstances (not necessarily medical circumstances), he demonstrates to the judge that, in addition to the physical disability, his future wage earning capacity has been diminished. The law requires the Judge of Industrial Claims somehow to interpret that evidence and to assign a second percentage of disability. Now there is one physical disability and one diminution of wage earning capacity rating. The law says the larger of the two will be used in making the compensation award.

So the worker with a 10% rating based on physical disability, who would get a $2,275 award, can use a 30% rating for diminution to get $13,650 (multiply 30% by 350 weeks for 105 weeks at $130 a week). That's $11,375 at stake. That's worth the fight. It's worth a try. This process is not uncommon because a 10% disability very easily could result in a 30% diminution of wage earning capacity.

Claimant Attorney's Fee

As a guideline to the Judges of Industrial Claims, present law sets up a schedule for attorney's fees and sets percentages of fees on awards like this. The Statute goes on to say that the judge doesn't have to follow that schedule precisely. The judge may vary it up or down depending on circumstances. Just taking that schedule, however, the attorney's fees for proving that the 10% physical disability really resulted in 30% dimunition of wage earning capacity would be about $2,500. As of 1978, the law also provides that the claimant is obliged to pay 25% of the attorney's fees. If the provision is enforced, the worker would pay roughly $615 and the $1,885 balance would be paid by the carrier/employer **in addition to the award.**

The Statute providing that the worker contribute 25% to attorney's fees, written by well-meaning people, also provides that, if the employer or the company acts arbitrarily or negligently, that company or employer pays it all. As you might guess, in most cases where the carrier/employer offers one percentage or amount and the worker gets more, the allegation is made that the worker was treated unfairly. I would be surprised if in most cases you couldn't demonstrate some negligence in appraising a claim or some arbitrary action which would cause the full $2,500 to be added to the amount of the award.

If you analyze the system and think it through, even if you haven't been through one of these cases, you can see it's just fraught with subjectivity, and is full of inducements to litigate. In good faith, a claimant has got to ask if he's getting all he's entitled to when the first offer is made. Most times the answer is no. As we have seen, 70% of permanently but partially injured people involve an attorney in their attempts to secure their lawful benefits. The wonder is that anyone accepts what is offered or proceeds without legal assistance.

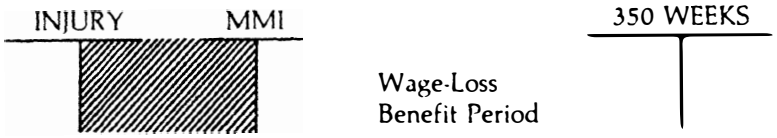
So what do we do about that? What do we change in the system to solve the problem? Obviously, reducing benefit levels such as the $130 maximum to $120 or $125 isn't going to solve the problem.

We looked at the 1972 report of the National Commission on State Workmen's Compensation Laws prepared by outstanding people. We did our own study. We concluded there is a better way – or at least one that holds the hope of getting better. (1) Reduce the importance of the physical impairment rating the doctor gives so it doesn't emphasize time at 60%, and doesn't produce the kind of benefits per percentage point that our current system does. (2) Require that those ratings be given in accordance with some acceptable standard – and there are standards

available such as the American Medical Association guide to impairment benefits! Orthopedists have a similar guide. (3) Eliminate the wage earning capacity concept which requires someone to guess what will happen to the worker for the rest of his life. That is really nothing more than the old pain and suffering proposition.

Wage-Loss Concept

Instead, continue to provide the worker his medical expenses and 60% of his average weekly wage until maximum medical improvement. Thereafter, reimburse him for a portion of what he **actually** loses. That's what wage-loss is all about. The chart below is a breakdown of these time periods. The shaded portion of the chart shows from the date of injury to MMI and the unshaded part is the period under our proposal in which the worker can get wage-loss benefits for a maximum of 350 weeks. Our proposition, reduced to its simplest form, says that at MMI the worker is entitled to be reimbursed, month by month, for a portion of the wages that he actually loses. In our proposal, he is entitled to 80% of the difference between 80% of his average weekly wage pre-injury and his post-injury earnings.



The 80/80 Formula

Now, I know that sounds confusing going in, so let me illustrate how that proposal works. The first 20% — (from 100% leaves 80% difference) — is a deliberate shortfall. It is calculated to bring the worker short of what he was making prior to the injury. That is an inducement to go back to work. Obviously, if the system pays 100%, there is no incentive to go back to work. But with a shortfall, there is a strong incentive to get up out of bed and get back to work.

The second 20% is the income tax factor. Whatever is received through Workmen's Compensation is income tax free.

The 80/80 formula works like this. Suppose a worker was making $200 a week at the time of his injury (the statewide average weekly wage is now a little over $200). From the date of the injury to the date of MMI, if he is totally but temporarily disabled, he gets 60% of his average weekly wage, as I've said, or $120 per week. We don't propose to change that. Following MMI, let's say the worker still is unable to earn anything. In terms of earnings, he is making zero. He is entitled to 64% of his $200 average weekly wage, or $128. (Step 1: 80% of $200 = $160; Step 2: $160 − 0 = $160; and Step 3: 80% of $160 = $128.)

	MMI
A.W.W. $200	A.W.W. $200
60% = $120	80% = $160
	80% of $160 = $128

The first question that should come to your mind if you are watching these numbers is, "Why did the benefit total jump from $120 (under temporary total) to $128 (under wage-loss) when the worker passed MMI?" Well, there are at least two reasons. First of all, we want to preserve the temporary total system exactly as we have it today. We also want to encourage the worker to cross the MMI line. Under the present system, there is a tendency to push MMI out, or delay it, so those scheduled and unscheduled benefit time periods don't begin to run. The worker says: "Gee, Doc, I don't really feel that good. I don't think I've reached MMI." We want to discourage the delay in MMI under the proposed system.

The $200-A-Week Example

Let's say our $200-a-week worker goes back to work making half of what he was making prior to the injury. His wage-loss benefits will be $48. Half of his pre-injury salary would be, of course, $100. Remember our formula: 80% of the difference between 80% of his average weekly wage pre-injury and his post-injury weekly earnings. 80% of $200 is $160. Subtract his $100 current earnings to arrive at the difference: $60. Multiply $60 by 80% to arrive at $48 in wage-loss benefits. (The $48 is tax-free.) Always work to the $160 figure, which is 80% of his average weekly wage in this case. Thus, when our worker comes to the point where he consistently makes $160, his wage-loss benefits terminate.

$200 × 80%	= $160
Earnings	= 100
Difference	= 60
80% × $60	= $ 48

It doesn't necessarily follow that sequence, I'm sure you understand. In the case of the lawyer who goes back to work making as much as he did before (or at least

80% of what he made before), he **never** gets wage-loss benefits. To reiterate, there is a 20% deliberate shortfall as an incentive to return to work. A second 20% portion is deducted to represent the average income tax hike that isn't deducted from compensation benefits.

That's the heart of the wage-loss proposition. There are a couple of other things that go with it which I would like to get to before the question and answer period. First, we didn't completely do away with the physical impairment rating in our proposal. We recognize that any kind of injury resulting in a permanent disability of any degree has some effect on the life of the injured person. Even the lawyer who loses a finger is going to suffer somewhat; he might not play tennis, rake his yard, or do many other things as well as before. A limitation of motion in the neck or a pain in the arm is going to have some effect. We recognize that effect in our proposal. We also recognize that it may help wage-loss pass if we have a physical impairment rating in it.

Impairment Retained

We think there is some value to that kind of rating (even though it is a little bit outside of the pure intent of Workmen's Compensation), but we didn't put very much value on it. What we said was that for each percentage point of physical disability through 50%, the worker should be paid $50. For each point 51% and above, he should get $100. A 10% disability would provide $500. There isn't much advantage to litigation in such a plan. It would be unlikely a lawyer would think it was worthwhile to force a change from 9% to 13%, for instance. But we also propose — and this is a bone of contention, and will be in the Legislature — that the injured worker not be paid these special awards at MMI. Instead, they would be paid at the time the worker permanently goes out of the system. That could be when the worker has exhausted his statutory benefits or earlier. We think that provision will add some additional incentive for the worker to get back on the job. (The worker must draw wage-loss benefits for three consecutive months within two years to remain eligible for future benefit payments. Otherwise, he's out of the system.) It also will be possible for a worker **to wash out the case** when it is apparent there isn't going to be any loss of wages because the disability is insignificant.

Safeguards

We have some safeguards for certain anticipated problems. I'm sure you're saying to yourself, "What about the second worker?" For example: the woman with children who has a job and pays a sitter or maid to care for the children. If she's injured and she doesn't want to go back to work, or if she comes out better sitting at home collecting benefits, what happens? Under our proposal, if the worker is able to go to work but refuses the offer of a job, she or he would be deemed to have accepted the job and there would be a forfeiture of wage-loss benefits. Easier said than done, I grant you.

A second safeguard is an anti-fraud provision. The present law already has anti-fraud provisions. Our proposal beefs it up. A lawyer can lose his license for suggesting that someone cheat the system. So can a doctor. They both can go to jail. along with the claimant, the insurance adjustor, or anybody else who defrauds or attempts to defraud the system.

Another strong safeguard is the built-in incentive for the employer to get the worker back to work. As you can see, if an injured worker goes back to work making 80% of what he was making before, wage-loss benefits stop. Even if an employer is not on a rating or dividend plan of some kind that relates his losses to his premiums, he should have an interest in the cost of the system. If we can get workers back to work quicker than under the present system, overall costs will be reduced.

Rehabilitation

In addition to the built-in financial incentives for workers to return to work and for employers to help them, there is a strong rehabilitation section written into our proposal. We have said our goal is to **restore** the worker — rehabilitate him. We know for every dollar spent for rehabilitation, we can save up to ten dollars in other costs that would be spent without rehabilitation. We know this is the humane thing to do. It also is part of the concept of wage-loss to get injured workers back to work making as much or nearly as much as they were making before. Our proposal puts the burden primarily on the employer and the insurance carrier. We must create a system that moves the injured worker into the best available facilities, if needed, so that he need not settle for a menial job if he can learn new skills, improve his position, and work himself out of the wage-loss system.

Current Impasse

We have come to an impasse under the present system. It simply isn't working; premiums continue to escalate; and it is not fair that some people get benefits they don't really need in terms of the intent of the act, while some who need go without. We aren't proposing any statutory benefit reduction, as others suggest. We are recommending that payouts be redistributed, taking from those who are

getting unnecessary awards, providing more to those who really do need. In the process, we expect to hold down the total cost.

We have concluded that wage-loss is the fair and equitable way to achieve the above goals. It says that for up to 350 weeks, an injured worker will be paid part of what he loses in wages as a result of the injury. That is logical — just compare reimbursing for wages actually lost with the guessing game I described in the beginning.

Savings Projected

And, best of all in the eyes of many, the National Council says if the Legislature will enact our precise proposal, loss costs in Florida will be reduced by 18.8% That is a fairly objective analysis which does not price the savings from the anticipated reduction of litigation or some of the other improvements. A big piece of the $40 million a year presently going to attorneys no longer will be paid. What happens if this rehabilitation thing really does work and we save the money that rehabilitation experts believe will be saved? That 18.8% estimate doesn't price the effects of streamlining administration, incentives to get workers back to work. or the anti-fraud measure. So we say we'll accept the 18.8% figure as the **minimum** savings that can be expected from our proposal. We know it's substantially more than that. Experience will show it to be more, if it is enacted.

Add to that savings our desire to see the system survive, not to be bled to death. Add to that expectation the fact the market will improve for our members. There'll be places to insure people under voluntary Workmen's Compensation, which will be an additional 8% savings for those who will be taken out of the pool. For all of those reasons, FAIA wholeheartedly supports the wage-loss concept.

STATEMENT OF JULIAN F. CARPER, PRESIDENT VIRGINIA STATE AFL-CIO ON WAGE LOSS SYSTEM OF WORKERS' COMPENSATION (Joint Resolution 13)

We want to go on record, at the outset of this study, in total and fervent opposition to the wage-loss concept in workers' compensation.

Behind all the rhetoric and statistics, the intent of this scheme is clear: to save money for employers, by cutting the benefits of injured workers.

Under the wage-loss plan as adopted in Florida, thousands of workers with permanent impairments are receiving little or no compensation. Those few workers who do get benefits get a small fraction of what they would have received under a permanent partial disability schedule — and then only after substantial delays and burdensome paperwork.

It is unconscionable that a worker who loses an arm, a leg, an eye, who is crippled, or who is severely disfigured by burns, would receive little or no benefits. Where is the justice in a scheme which would allow a worker who loses the use of his or her legs to be totally uncompensated?

It is easy for employers under this scheme to avoid paying wage-loss benefits altogether. They can simply retain the worker on the payroll for two years, and then let them go after the time limit for filing wage loss claims has expired.

Even if an injured worker suffers an immediate loss of wages it is extremely difficult to draw wage loss benefits under the Florida law. The worker must be earning less than 85% of the pre-injury wage, and also must file a claim every month proving that it would not be possible to earn more money because of the injury. The resultsof this system in Florida are noted by Jack Inman in the article given to this committee: "Wage loss cases are infinitessimal in number...It appears that the complexities of the filing procedures, and the fact that each month stands on its own, may be at least a part of the reason...Or, it may be the fact that there is now an obvious incentive for the employer to hire the employee back at the same or greater wages..." That is, until the statute of limitations runs out.

There are at least two essential philosophical defects in the wage-loss concept. First, the concept fails to acknowledge the fact that a worker who loses an arm or leg or eye is likely to suffer a loss of earning capacity <u>in the future</u>, even if there is no <u>immediate</u> wage loss. These workers will lose opportunities for advancement and promotion. And although a young worker may be able to continue working at his or her former wages for a few years, what happens to that person when he or she must look for work later in life?

The second essential defect in the wage-loss scheme is that it ignores the fact that workers with permanent impairments must live with these handicaps for the rest of their lives. Their everyday lives are affected, not just their work-lives. They can no longer participate fully in the activities of their families and communities which are so important to the quality of life.

The AFL-CIO holds firmly to the belief that a worker has a basic human right to be compensated for the loss of a body member, or the loss of use of a body member, even if a loss of wages has not resulted. The workers' compensation system takes away the worker's right to sue the employer for negligence. Workers therefore are denied the right to be compensated for pain and suffering, and the right to punitive damages if an employer is grossly negligent. It is an outrage to consider also denying workers the right a just compensation when they lose a part of the body in an industrial accident.

The present system in Virginia, with a schedule of permanent partial disability payments, is a rational way to compensate workersfor loss of future earning capacity. To eliminate this would distort the social and remedial intent of workers' compensation legislation.

If the legislature is interested in finding ways to save money on workers' compensation payments, we would suggest the development of an exclusive state fund, as a means of providing the most extensive protection for the least cost. This would cut out profits and interest on premiums which insurance companies are earning — rather than cutting the benefits of disabled workers.

We would like to develop our position in more detail at future committee meetings by presenting several expert witnesses who will elaborate on the injustice of the wage-loss system.

Statement by
Julian F. Carper, President
Virginia State AFL-CIO
S. J. R. 13
September 17, 1982

At the first meeting of this Study Committee, I presented our position, which is total and fervent opposition to the Wage Loss concept, as merely a thinly disguised means of cutting benefits to workers with permanent impairments. I will not repeat myself here, but I would like to add that the fact that Florida has recently amended its law, and that there has been need to make frequent major changes in the law, is just one more indication that the Virginia legislature should not want to model itself on what is going on in Florida.

We have two expert witnesses today. Mr. Steven Babitsky, who will discuss the Florida plan and what is wrong with the wage-loss concept. Then we have asked Mr. Leonard Lancaster to speak and to point out that there are other ways to reduce workers' compensation costs other than cutting the benefits of disabled workers. One way is to establish an exclusive state fund for workers' compensation. This would allow fair treatment to claimants while reducing costs to manufacturers, at the expense of no one but the insurance companies, who can seek their profits from sources other than the injured workers.

Another alternative is to factor into the rate-setting process the large profits insurance companies realize from premium investments. This would allow a reduction in premiums if the profits from investments were considered.

/csj
OPEIU 334, AFL-CIO

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September 9, 1982

Delegate William T. Wilson
228 N. Maple Avenue
Covington, Virginia 24426

Dear Delegate Wilson:

As you know, Senate Joint Resolution No. 13 calls for a study concerning the effect of the wage-loss experience on the workmen's compensation system in Virginia.

Enclosed please find a brief examination of this issue, offered to facilitate your deliberation on this important topic. If I can be of any assistance to you, or if you have any questions, please do not hesitate to call me.

Very truly yours,

Michael W. Heaviside

Michael W. Heaviside

MWH/blg

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A CONSIDERATION OF SENATE JOINT RESOLUTION NO. 13

The stated mandate of Senate Joint Resolution No. 13 is to study the current workmen's compensation system in Virginia in light of the recent "wage loss" experiment, particularly in the State of Florida. Any reasoned evaluation of this issue requires a basic understanding of the current Virginia system and the system operating in Florida before the wage loss concept was implemented.

The Florida workmen's compensation system in 1979 was, simply stated, in a crisis situation and on the verge of collapse. Premium rates (decimal fractions applied to payroll to calculate premiums due) in Florida in 1979 were the fifth highest in the nation according to NCCI data. In that same year, total premiums paid by Florida employers ranked it seventh highest in the United States according to figures from the National Association of Insurance Commission "Florida Association of Insurance Agents, Workmen's Compensation Wage-Loss Reform Conference", January 16, thru February 9, 1979; pg. 10.

The structure of the Florida system itself perpetuated an unstable state of affairs. The pre-1979 Florida system provided benefits for "scheduled" and "unscheduled" permanent disability benefits. A brief examination of the system will compel the conclusion that the Florida system fostered increased litigation and added expense.

In the case of an "unscheduled" permanent injury, for example, a physician would assign a percentage disability rating. The percentage was then multiplied first be a specified number of weeks (175 for 1% - 10% rating, 350 for 11% - 5% rating, and 525 for 51% - 100% rating) and then by 60% of the pre-injury average weekly wage. If we assume a maximum weekly benefit of $130.00 and the permanent disability rating was 10%, the benefits would be calculated as follows:

10% x 175 weeks at $130/wk = $2,275.00

If, however, the disability rating was raised thru litigation by 1% from 10% to 11% then the benefits would be calculated as follows:

11% x 350 weeks at $130/wk = $5,005.00

Obviously, the system encouraged litigation. It should also be noted that until 1978, all attorney fees generated in workmen's compensation cases were paid by the employer and its insurer. In 1978 the Florida legislature required the injured worker to pay 25% of the attorney fees with certain exceptions. According to testimony presented to the "Wage-Loss Study Subcommittee" of the Virginia Legislature on July 27, 1982, the annual attorney fees paid by the employer or its carrier to the claimants' attorneys amounted to nearly $20 million.

The Florida pre-wage loss system also provided for payment of permanent disability benefits on the basis of diminished wage earning capacity. As such, benefits were fixed on the basis of highly speculative forecasts of the workmen's earning capacity.

The Florida system was obviously unstable and unpredictable; the system itself encouraged speculation and increased litigation. The Florida wage loss legislation in 1979 was, therefore, a specific remedy fashioned to cure a specific malady.

The Virginia Workmen's Compensation Act, on the other hand, provides for payment of permanent disability benefits by creating a "schedule of losses" which is embodied in Virginia Code §65.1-56. This schedule, unlike the Florida system, provides a finite, and therefore predictable, exposure to the payment of permanent disability benefits. Under the Virginia system, the claimant must pay his own attorney fees, which are subject to the approval of the Industrial Commission (Virginia Code §65.1-102). More importantly, however, the Virginia Act creates a mechanism whereby disabilities are being rated fairly and disputes are resolved expeditiously thru the Industrial Commission of Virginia. Further, the following information, published by the U.S. Chamber of Commerce, indicates clearly that the benefits payable in Virginia for scheduled losses cannot be characterized as excessive.

INCOME BENEFITS FOR SCHEDULED INJURIES

Jurisdiction	Arm at Shoulder	Hand	Leg at Hip	Foot
				January 1, 1981
D.C.	$142,347	$111,323	$131,397	$95,529
N. Carolina	50,400	42,000	42,000	30,240
S. Carolina	47,520	35,640	42,120	30,240
Virginia	42,600	31,950	37,275	26,625
				January 1, 1982
D.C.	123,795	96,814	116,653	81,340
N. Carolina	54,720	45,600	45,600	32,832
S. Carolina	51,700	38,775	45,825	32,900
Virginia	46,200	34,650	40,425	28,875

(Figures assume maximum weekly rate).

It should be clear from the preceding discussion that the crisis with which the Florida Legislature was presented and which prompted the implementation of "wage loss" legislation simply does not exist in Virginia.

The Virginia Workmen's Compensation Act was first enacted by the General Assembly on March 21, 1918. Although the Act has been amended from time to time since the original enactment, the purpose has remained unchanged. The Act was designed to protect employees. The objective of the General Assembly was to insure the workman, to a limited extent, against loss from accidents in his employment, to give him an expeditious remedy for his injury, and to place upon industry the burden of losses incident to its conduct. As the Virginia Supreme Court has made clear, the damage resulting from an accident is to be treated as part of the expense of the business and to be borne as such, much like the expense of repairing a piece of machinery which has broken down.[1]

While the Workmen's Compensation Act was enacted for the protection of the employee, it offers certain advantages to the employer and insurance carrier. The employee is forced to surrender his right to bring an action at law against his employer for extensive damages. He accepts compensation benefits in a sum fixed by statute. The employer is, therefore, relieved from liability to the employee for which, in an ordinary negligence case, he might otherwise be required to pay. Although an employee's injury may clearly be the result of negligence on the part of an employer or fellow employee, the injured workman will receive no payment of damages for pain, suffering, mental anguish and anxiety, loss of future opportunity or earning capacity, or many of the elements which make up the damages awarded in the typical negligence case. An employee may be injured due to what is clearly a willful or intentional act by another; no punitive damages will be awarded. These immunity provisions similarly apply to workmen's compensation insurance carriers, as they are required to pay benefits only as outlined in the statute. The employee has therefore yielded a significant share of what would otherwise be his remedy in exchange for the expeditious reimbursement of a portion of his loss.

The Virginia Workmen's Compensation Act presently provides for the payment of the following benefits:

1) Payment of all medical expenses incurred as a result of the work injury, for so long as necessary.

2) Payment of temporary total disability benefits, in the amount of two-thirds of the employee's average weekly wage, up to the amount of $253.00 per week, for so long as the employee remains unable to return to the work in which he was employed at the time of his injury.

3) Payment of temporary partial disability benefits in the event the employee is able to return to some work (though not the work in

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[1] Humphries v. Boxley Bros. Co., 146 Va. 91, 135 SE 890 (1926).

which engaged at the time of injury) and is earning less than the wage earned at the time of injury.

4) For certain types of injury, those sustained to specified parts of the body, the workman may be entitled to payment of permanent partial disability benefits to compensate for loss of use of a body limb or organ. The payment is made for a certain number of weeks, according to statute, at the worker's basic compensation rate.

The workman receives less in workmen's compensation benefits than that to which he would be otherwise entitled to in a negligence action. For instance, a young worker injured while in a training stage of his career will be forever locked into a benefits schedule based on earnings received at time of injury. No provision is made for calculation of the worker's expected increase in earnings, except for periodic cost of living payment available to all claimants which are not paid while receiving permanent disability benefits. Nevertheless, the Workmen's Compensation Act has been accepted as a just compromise between the employer and employee, affording fixed and certain relief at a time when most needed.

The Virginia law is now being compared to the Florida Wage Loss statute, with the latter being hailed as a scheme designed to provide greater payments to the workers who sustain serious injuries and to assist those with minor or temporary injuries in returning to work. While the latter purpose is accomplished with no greater efficiency in Florida than in Virginia, the Florida law offers little or no recompense to workers who have sustained permanent impairment or limbs or organs.

The current Florida statute differs little from the Virginia statute with regard to payment of medical bills, temporary total disability benefits and temporary partial disability benefits. The major divergence in the two statutory schemes appears in the treatment of benefit entitlement for permanent injuries. The Virginia scheme is founded on the theory that an employee may suffer more than a pecuniary loss in an industrial accident. A permanent injury results in loss of use or physical capacity in addition to mere loss of income. The employee should be compensated for the functional impairment of his arms, legs, eyes or ears. The loss of use itself will affect all aspects of his life, and the present law reflects the attempt of the Virginia legislature to recognize all losses which are not strictly pecuniary in nature. The Act provides for payment of additional benefits to those persons sustaining permanent injuuries to the following: thumb, fingers, toes, hand, foot, arm, legs, vision and hearing. A workman may also be compensated for severely marked disfigurement of the body which results from an injury. Most states have an active law similar to the Virginia statute providing for payment of permanent disability benefits. Only a few states have schemes which differ markedly from the Virginia law: Nevada, Kentucky and Florida.

The proponents of the Florida Wage Loss Law argue that under their plan, those who have the more serious injuries are better protected than under the current Virginia statute. Even a cursory comparison of the two statutes will reveal the falsity of these arguments. The Florida plan provides that permanent disability benefits will be paid only to those employees with injuries resulting in amputation, loss of 80% or more of vision after correction, or serious head or facial disfigurement.

The benefits allowable are calculated as follows:

a) Fifty dollars for each per cent of permanent impairment of the body as a whole from 1% thru 50%; and

b) One hundred dollars for each per cent of permanent impairment of the body as a whole for that portion in excess of 50%.

No payment is permitted when the worker sustains permanent loss of use of a limb without amputation (even total loss of use) or when a worker sustains permanent loss of hearing. The plan calls for payment of temporary total disability benefits throughout the period that a worker is unable to return to work. (As previously described, the current Virginia law provides this same coverage.) The two statutes are more easily illustrated by a few examples:

Case A

Worker, injured after July 1, 1982, earning an average weekly wage of $400.00 per week at the time of injury, sustains a 70% permanent loss of use of his arm, and is able to return to his previous employment. Virginia - The worker is entitled to temporary total disability benefits of $253.00 per week (excluding cost of living benefits) until he reaches maximum medical improvement or returns to work. He then receives permanent partial disability benefits of $253.00 per week for 140 weeks as compensation for the 70% permanent loss of use of his arm. Florida - The worker is entitled to temporary total disability benefits of $253.00 per week during the period of disabibity. The worker receives no payment of benefits for the 70% permanent loss of use of his arm.

Case B

Worker, injured after July 1, 1982, earning an average weekly wage of $400.00 per week, has a total loss of vision of one eye, but is able to return to his previous employment. (Under the American Mutual Association Guidelines to the Evaluation of Permanent Impairments, the total loss of vision of one eye is 25% impairment of the visual system, but results in no impairment to the body as a whole.) Virginia - The worker receives permanent partial disability benefits of $253.00 per week for 100 weeks as compensation for the total loss of vision of his eye. Florida - If the worker's disability extends past seven days, the worker receives $253.00 per week during the continuance of his disability. The worker receives no payment for the permanent loss of vision in his eye.

Case C

A worker, injured after July 1, 1982, is earning $400.00 per week, has an amputation of the left leg at the hip and is unable to return to his regular employment (the amputation of a leg at the hip is evaluated by the AMA Guidelines as 40% impairment ot the body as a whole). Virginia - The worker receives permanent partial disability benefits of $253.00 per week for 175 weeks as payment for the loss of his leg. If he has not returned to work at the end of that time, he receives $253.00

per week until employment is found. He may be entitled to further temporary partial disability benefits. Florida - The worker receives temporary total disability benefits of $320.00 per week (80% of his average weekly wage) until he has completed training in the use of an artificial leg and/or training in a rehabilitation program - not to exceed six months. The worker also receives permanent partial disability benefits of $2,000.00 ($50.00 for each degree of permanent impairment of the body as a whole). If, after six months the worker has not returned to work, he receives $253.00 per week until employment is found. He may then be entitled to additional temporary partial disability benefits.

Case D

A worker, injured after July 1, 1982, earning $400.00 per week, sustains facial or head disfigurement. (Under the AMA Guidelines, no rating can be assigned to permanent disfigurement unless the injury is accompanied by psychological damage.) Virginia - The worker's disfigurement will be viewed by members of the Industrial Commission who will then assign to the injury an appropriate compensation award, not to exceed payment of 60 weeks of the worker's basic compensation rate. Florida - The worker will receive no permanent partial disability benefits for the disfigurement unless he can prove psychological damage pursuant to the AMA Guidelines.

These illustrations reveal that the most severely injured workers are those who have most to lose under the Florida plan. They are compensated for loss of earnings, as are Virginia employees, but receive little or nothing for the host of inflictions which can accompany a permanent injury. In Florida, the amputation of a leg is valued at $2,000.00. A workman may lose his leg solely thru the negligence of his employer or a fellow employee, and will receive only $2,000.00 for his misfortune. If the workman sustains total loss of use of his leg, but does not have an amputation, he receives nothing. His injury is not covered by the Florida law as a permanent impairment. It should also be noted that Florida wage loss benefits terminate at age 65.

Given the intended and actual effect of the Florida law, it is difficult to understand the claims of its proponents. If it were to be adopted in Virginia, those with minor and temporary injuries would be compensated in essentially the same manner as they are now. But those persons who suffer the greatest physical disabilities would be further harmed by the diminution of their rights. The proposed changes would remove from industry the burden of losses incident to its conduct, and would place that burden squarely on the shoulders of the workman himself.

Since the injured worker has nothing to gain and everything to lose if the wage-loss concept is embraced by the Virginia Legislature it is difficult to conceive of any benefits to this Commonwealth or its citizens which would result from the adoption of a wage loss system. Its proponents would argue that a reduction in benefits paid to injured workers must also serve to substantially reduce insurance premiums. Although this concept has some rhetorical appeal, it is without merit. Testimony by representatives of the Virginia Compensation Rating Bureau at the first meeting of the Wage-Loss Study Committee on July 27, 1982

indicated that even after implementation of the wage loss system in Florida and a rate reduction (of which 15% was mandated by the Florida legislature) Florida workmen's compensation insurance premiums are still higher than those prevailing in Virginia. Further, Virginia premium rates are the 14th lowest in the United States. The testimony also indicated that even if the wage loss system was implemented in Virginia, the rate reduction would only be 6% or 7% which could be completely offset by the vast administrative costs required to implement the system.

Rather than attempting a rate reduction at the expense of the injured employee, close scrutiny should be directed toward reducing rates by factoring investment income into the rate-making process. Currently, insurance rate submissions list a profit figure of 2.5% of gross premiums (underwriting profit) without taking into account investment income earned on the reserves associated with those premiums. Part of every premium dollar is placed by insurers into "unearned premium reserves" and "loss reserves". As of December 31, 1979, property/casualty insurers in the United States held $81 billion in loss and loss expense reserves and $34 billion in unearned premium reserves (Best's Aggregates and Averages, pg. 2, 1980) which generate $10 billion a year.

A recent study commissioned by the U.S. Department of Labor concludes that workmen's compensation insurance rates could be reduced by 18% - 20% if investment income was factored into the rate-making process. (Raymond Hill and Robert Hunter, Worker's Compensation Insurance Ratemaking: Regulation of Profit Margins and Investment Income, 1981.)

Weighing the proposed minimal benefits of a wage loss system in Virginia against the tremendous loss to the injured employee the conclusion is inescapable that the wage loss concept should be rejected by the Virginia legislature.

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Statement by the AFL-CIO Executive Council

on

Workers' Compensation

February 18, 1982
Bal Harbour, Fla.

All American workers should be entitled to adequate and equitable workers' compensation protection against all injury or disease arising in the workplace. An effective and sound workers' compensation system is vital to the economic welfare of every worker. The system needs improvement, but instead efforts are underway to weaken existing workers' compensation statutes.

Of particular concern is the so-called "wage loss" compensation system for permanent partial disabilities. Such a system has been enacted in Florida and is being viewed as a model for other states. This approach violates the principles of adequacy and fairness that are essential for a sound workers' compensation system.

Under the wage loss concept eligibility for permanent partial disability benefits is limited to those workers whose disability results in lost wages. Thus, injuries that result in permanent impairment would not be compensated except in those cases in which there is a loss of wages.

The wage loss system fails to consider the total impact of permanent partial disabilities on the lives of workers and their families. While there may be no immediate wage loss, these impaired workers often lose the ability to engage in their normal everyday non-work activities and more often experience a reduction in their ability to earn wages in the future. They must therefore be compensated.

The escalating cost of coverage is the motivation for employers to embrace the wage loss concept. In order to lower employer premium costs, millions of workers with permanent impairments would be deprived of workers' compensation benefits to which they are entitled. The wage loss system would force these workers to bear the cost of their injury.

As an alternative to enactment of punitive systems harmful to workers, the development of exclusive state funds has long been supported by the AFL-CIO as the best way of providing the most extensive workers' compensation protection for the least cost. Costs to employers are much higher in states where private insurance companies handle coverage for workers' compensation than in states with exclusive state funds. Since private insurance companies are prohibited from selling workers' compensation policies to employers in these states, investment income is retained by the fund to pay benefits and reduce employer costs. Overhead expenses and profit margins are unnecessary.

We therefore urge state legislatures to adopt exclusive state funds and our affiliates to oppose further efforts to institute wage loss systems.

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