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LONGSHORE HARBOR WORKERS' COMPENSATION ACT: TIME FOR REFORM?

HEARING

OF THE

SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

EXAMINING PROPOSED REFORM OF LONGSHORE HARBOR WORKERS' COMPENSATION ACT

MAY 9, 2006

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LONGSHORE HARBOR WORKERS' COMPENSATION ACT: TIME FOR REFORM?

TUESDAY, MAY 9, 2006

U.S. SENATE,
SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room SD–430, Dirksen Senate Office Building, Hon. Johnny Isakson, chairman of the subcommittee, presiding.

Present: Senators Isakson and Murray.

OPENING STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. We will convene the hearing. I appreciate everybody's patience. Senator Murray is on her way, so I thought I would open the hearing and make my statement. By the time I am finished, she will be here to make her statement, or we will interrupt testimony and let her make a statement when she gets here. We will proceed with the hearing.

Today, we address the Longshore and Harbor Workers' Compensation Act. Before we delve into the details of this program, we should state from the start that workers covered under this program, from shipbuilders to stevedores, play a key role in national security and our global system of free trade. Americans rely on the ships and boats they build as well as the myriad of products they bring onto our shores.

Longshore and harbor workers labor on the piers of Portland, Maine, in the dead of winter, just as they toil in the hot Southern sun in my home State of Georgia. Their work is undoubtedly difficult, and often dangerous. Given the industry's complexity and uniqueness, OSHA has maintained a special office for the maritime industry for decades. However, despite intense Federal regulation and consistent effort to improve safety throughout the maritime and shipbuilding industry, workers do get injured or even killed at a U.S. port and shipyard every day.

These workers deserve a fair and effective workers' compensation program. Since 1927, longshore and harbor workers have had a unique program of their own. Congress enacted the act in response to *Southern Pacific Company* v. *Jensen*, a ruling by the U.S. Supreme Court in 1917. The Court held that the Maritime Clause of the Constitution forbids States from covering shore-based maritime workers who may become injured while working on vessels anchored in navigable waters. Now, nearly 90 years later, not only

are private stevedoring companies covered by the act, but so are virtually all who work in construction projects on navigable waterways, builders and repairers of U.S. Naval and Coast Guard vessels, Federal contractors with overseas employees, oil rig workers, and even civilian employees at *PXes* on U.S. military installations.

As I learned in the Georgia legislature and as our panelists are well aware, States nationwide regularly amend their programs to incorporate the modern and best workers' compensation practices. Since the act was last addressed by Congress in 1984, States from California to Rhode Island have found numerous methods of improving their workers' compensation programs, saving taxpayer dollars and eliminating waste, fraud, and abuse, while never leaving workers without appropriate medical care. However, unlike those responsible State legislatures, Congress has not addressed the Longshore Act in over 2 decades.

Meanwhile, technology, events, and even Congressional interventions have dramatically changed our Nation's seaports and shipyards. Indeed, in 2002, per Congress's instruction, U.S. Customs and Border Protection began locating the so-called VACIS machines in U.S. terminals nationwide. These machines are enormous truck-mounted gamma ray imaging systems that produce radiographic images of the contents inside containers and other cargo to determine the possible presence of many types of contraband. Eventually, every port in the country will have these machines on site. Will maritime workers be exposed to radiation? If so, will they file claims against their employers when these machines are owned and operated by the Federal Government?

In sum, the act is long overdue for attention from Congress and I am eager to hear from our witnesses as they testify on how the Longshore program falls short of the most recent innovations in workers' compensation practices and their suggestions on how this committee can improve the system for our Nation's longshore workers, for the taxpayers, and for our economy as a whole.

I personally want to welcome the witnesses, whom I will introduce in a moment after we hear the opening statement from the distinguished ranking member, Senator Murray.

OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Mr. Chairman, thank you very much for calling this hearing this morning so that we can examine the important role the Longshore and Harbor Workers' Compensation Act plays in providing uniform protection and health care for eligible maritime workers.

I am very fortunate to have a close connection to the maritime industry because my home State of Washington, through its ports and navigable waters, is the most trade-dependent State in the country, and I know from talking to longshoremen and harbor workers and those who build and repair ships and boats in Washington State that this act has helped countless injured workers and their families pay their bills, put food on their tables, and maintain their dignity.

For workers, this act provides medical benefits, compensation for lost wages, and rehabilitative services if they are injured on the job or contract an occupational disease. But according to a random sur-

vey of claimants conducted by the U.S. Department of Labor, claimants are not always being advised by their employers at the time of their injuries that they have free choice of physicians. In addition, some claimants also complain that the initial payment of compensation is not being made in a timely manner by their self-insured employer insurance carriers. And I know from reviewing the testimony of our witnesses this morning that they have their own ideas on how to reform this act.

However, before this subcommittee moves forward on any of the longshore reform ideas suggested by our witnesses today, I believe that all of us in Congress would benefit from a comprehensive review of how well this program is working. This was last done when the Government Accountability Office reviewed this program back in 1990 to analyze the effects of the 1984 amendments to the act.

In 1990, the GAO found that for occupational diseases claims, employers seldom accept claims and provide benefits voluntarily. They routinely dispute issues such as the cause and extent of injuries. There are frequent controversies regarding who is the liable employer when employees have worked for more than one employer. And only about 1 percent of employers voluntarily provided compensation without contesting them.

GAO also found that the 1984 congressional amendments to the Longshore Act helped to clarify issues like the length of the statute of limitations, wage determinations for retirees, eligibility for survivors' benefits, and coverage for retirees.

Since 1984, the act has functioned well, providing a reasonable level of wage replacement for maritime injuries while protecting the employers from the full cost of the injury. No one gets rich from receiving longshore benefits. The worker always gets less than the wages he is losing from the injury.

The current system, while not perfect, is a reasonable compromise, generally fair, predictable, and easy to administer. Our Federal system for longshore compensation is far and way superior to our State system, which had been found to be inadequate, often failing to provide a basic floor to protect workers and their families from increased poverty, foreclosure, and a substantial decline in their quality of life.

I hope the chairman will take a measured approach as he considers changes to the Longshore Act. Hundreds of thousands of workers do this dirty and back-breaking work each and every day, helping our economy by moving goods and products through our ports. We owe these workers a fair system of compensation when they are injured on the job. I look forward to working with the chairman in a bipartisan way to fairly measure the long-term benefits of the Longshore Act for workers and employers and to explore the need for any necessary reforms. Thank you, Mr. Chairman.

Senator ISAKSON. Thank you, Senator Murray.

I will introduce all of our panel at once and then let them testify in the order in which we recognized them.

First is Robert White, General Counsel of Manson Construction Company of Los Angeles, California. Manson is one of the Nation's largest marine construction firms, building massive waterfront and waterborne structures across the country. Mr. White has a law degree from the University of Manitoba.

Next is Dr. Richard Victor, who has been Executive Director of Workers' Compensation Research Institute since its inception in 1983. The Institute, located in Cambridge, Massachusetts, is an independent research organization providing objective information from workers' compensation systems. Dr. Victor received his J.D. and Ph.D. at the University of Michigan.

Stephen Embry is a partner in Embry and Neusner in Groton, Connecticut. The practice is focused on personal injury, workers' compensation, the Longshore Act, and product liability. He is a graduate of the American University School of International Service in 1971 and the University of Connecticut School of Law in 1995. Mr. Embry is the past Chairman of the American Trial Lawyers Association Section on Workers' Compensation.

Finally is Larry Postol, a partner at Seyfarth Shaw here in Washington. Mr. Postol has been practicing law since 1976, upon receiving his J.D. degree from Cornell University. Concentrating in the labor and employment area, Mr. Postal has extensive experience in workers' compensation defense generally and the Longshore Act specifically. Mr. Postol has tried over 200 cases under the act and has won over a dozen Longshore Act cases before the Court of Appeals as well as two cases before the U.S. Supreme Court.

I want to welcome all of you. I will tell you how our system works here. There is a little box in front of you that has a red, a green, and a yellow light. The red means stop, yellow means you have got a minute to go, and green means you have got 4 minutes, so it is a total of 5 minutes. If you go over a little bit, that is okay. If you go over a lot, we won't do anything initially, but we will get you later, so try your best to stay somewhat within the time. Following the testimony, we will have a round of questions.

We really appreciate all of you being here. We will start with Mr. White.

STATEMENTS OF ROBERT M. WHITE, VICE PRESIDENT, MANSON CONSTRUCTION, AND NATIONAL CHAIRMAN, ASSOCIATED GENERAL CONTRACTORS MARINE CONTRACTOR COMMITTEE, SAN PEDRO, CALIFORNIA; RICHARD A. VICTOR, EXECUTIVE DIRECTOR, WORKERS' COMPENSATION RESEARCH INSTITUTE, CAMBRIDGE, MASSACHUSETTS; STEPHEN EMBRY, EMBRY AND NEUSNER, GROTON, CONNECTICUT; AND LAWRENCE P. POSTOL, SEYFARTH SHAW LLP, WASHINGTON, DC.

Mr. WHITE. Good morning, Senator Isakson, Senator Murray. I appreciate the opportunity to be here today. Again, my name is Robert White and I am here as National Chairman of the Associated General Contractors Marine Contractor Committee. I am here speaking for marine contractors from around the country.

The Longshore Act was promulgated in 1927. It was sorely needed at the time. It was to serve a class of workers that didn't have compensation. We recognized that. We recognize the need for the Longshore Act. We are not here today to tell you that the Longshore Act needs to go. I need to make that clear.

The legislative history from 1927, I think was somewhat revealing. I am going to quote.

> "The original intent of all workmen's compensation laws was to transfer from society and from the courts the expense of taking care of those injured in industry and transfer it to the industry itself. Incidentally, it gave the worker a square deal and eliminated the ambulance chaser."

The term "square deal" originated with Teddy Roosevelt when he offered the following admonishment. When we go in for reform, all sides should be remembered and justice should be extracted equally from each side, in other words, a square deal.

Well, I can tell you today that the Longshore Act does not offer a square deal. Although it is a no-fault system, we have gotten rid of a number of lawsuits, the ambulance chasing has not been eliminated. In fact, the ambulance chasing has been emboldened and encouraged by the current provisions of the act.

The legal machinations and the failure of the act to recognize changes in the compensation system over the last generation in State plans that have resulted in a more efficient allocation of health resources is something that needs to be recognized by this act. If that is not done, we are going to see a continued squandering of health care resources, less money for labor in wages and benefits, less money for safety training, and a lessening of morale within the workforce and the company.

There are three areas I would like to address. I mean, there are numerous areas, but three areas in particular that I would like to address. The first area has to do with claims.

Generally speaking, there are two types of claims that we see out there, or that a marine contractor sees. One is a trauma claim that is for a specific incident—broken toe, sprained ankle, foreign body in the eye. That is from a specific incident on the job. The other type of claim that we typically see is what I call continuing non-trauma-type claim. It is for injuries that are sustained not because of a specific incident, but that are sustained as a result of one's living, the aging process, and often the repetitive nature of one's work, a combination of all three.

It is the latter cumulative non-trauma claim, that I am going to refer to as a CNT claim for brevity—that is the particular claim that gives us particular trouble. Critically, a working man does not file a CNT claim. A working man will file a claim for an injury sustained on the job, again, the broken toe, the foreign body in the eye. He receives his health care compensation. He receives benefits as necessary during the healing process and he returns to work.

However, during that process, if he sees an attorney, quite often, we will see as a result of that a CNT claim, and that is a claim where an attorney makes broad allegations that are unrelated to that particular trauma, but are broad allegations that this person might have back problems, shoulder problems, knee problems, elbow problems. There has been no percipitating incident on the job that gives rise to those. Rather, it is the nature of one's work. It is something that occurs over time. The employer is faced with that, and how do you combat something like that? It is very difficult.

One can argue that the attorney has a good sense when the employee comes in to see him to ask those kinds of questions and determine really what type of claims he should have. You have got a less-educated person than the attorney. He is telling that individual, this may be the appropriate medical care you need and so

forth. But we think that the reporting of a trauma accident or a specific incident on the job is truly reflective of what has occurred on the job or what the injury is.

When we see a CNT claim, it typically involves the same attorneys, the same doctors time and again, and there is always the allegation or the diagnosis that there is going to be some sort of permanent disability. The reason that you see a permanent disability is because it is very valuable. A trauma claim without a permanent disability is not that valuable. But once you allege the permanent disability, the employer is put in a position where they are going to have to either fight the claim, because they don't think it is based on fact, or the objective medical findings are not—or, pardon me, the subjective medical findings are not supported by objective medical findings, so the employer has choices to make.

Typically, what we see with CNT claims is a situation where we are either going to take the thing to trial with an ALJ and we are looking at long-term costs to the company and resources going out to this particular situation when, in fact, at the end of the day, the employee is taking a lump-sum settlement, and I think taking the lump-sum settlement is very indicative of where the whole process is meant to go, and that is you take the lump-sum settlement, you settle the claim, you go back to work. A lump-sum settlement is final, binding, and you can return to work. If you take a permanent disability claim where you are getting lifetime benefits, those benefits can be set aside when you return to work.

So what we routinely see are CNT claims alleging permanent disabilities, then taking the lump-sum settlement and going back to work. Well, they are inconsistent. If you have got permanent disability, you don't return to work, but that is not what we see. I think as a result of that, we see a squandering of health care resources and a lessening of morale amongst our workforce and folks within our company.

We can appreciate that there are times where there are legitimate CNT claims. We understand that and we have no problem with taking care of those, whether it is resolved by lump-sum settlement or lifetime benefits. But I think that some things that we can do to assist us in overcoming some of these issues are to develop some mechanisms within the Longshore Act, and I will quote these four.

Determine the likelihood of where and when an injury occurred. Provide for a health care panel to determine the medical treatment an employee requires. Base treatment on nationally recognized standards. And provide for a correlation between objective and subjective medical findings. We believe that these mechanisms would allocate health care resources where they are most needed, to workers that cannot return to the workplace as a result of workplace injuries.

The second area I would like to address is the last responsible employer rule. In a nutshell, you can have a marine contractor with an employee working for you for a day or 6 years. He leaves your employ and goes to work for a non-longshore employer, and at some point during the life of that employment with the non-longshore employer, whether it is for a day or 6 years down the road, that individual can sustain an injury on the job and allege

that that injury was an aggravation of a pre-existing injury sustained working for a longshore employer 6 years ago. There may be absolutely no report of any injury 6 years ago to that marine employee despite the fact that they have prompt requirements for reporting all accidents so that we can get the necessary health care to someone as it is needed, promptly.

So as a result of this, we again face either a CNT claim, but this way it is back-doored in, to the marine contractor, who has, again, not experienced this claim, has not seen an individual injured 6 years back, but now they have to deal with a claim that really should belong on the doorstep of the employer where the individual is working.

Senator ISAKSON. Let me ask you to sum up, if you will.

Mr. WHITE. OK. I am sorry. The last area I would like to address is the allocation of risk between longshore employers. Marine contractors sometimes own vessels. Marine contractors are longshore employers. They will call for a subcontractor to come out and perform services to the vessel that is also a longshore employer. If the employee of that subcontractor providing services is injured on the job, while on that vessel, the subcontractor is required to pay longshore benefits to that individual, but that subcontractor can turn around and assert a lien against the vessel owner for the full amount that they paid, and this is despite the fact that there can be a finding that the subcontractor is 99 percent at fault and the vessel owner 1 percent at fault. That needs to be changed.

I would just say that, and I will conclude right now, I think that squaring the deal is not for the sole benefit for the marine construction contractor. It is for the benefit of employees, as well. Employers understand, as do their employees—and I was once one of those employees, I worked in the marine construction trades and I work for a marine contractor now—that incidents occur that call for payment of benefits. We don't have a problem with that. We will pay those benefits. We believe in taking care of our people. The flip side of that is we need to look at the gaming of the system, of those on occasion between attorneys and claimants that relates to permanent disabilities and lump sum settlements. Thank you.

Senator ISAKSON. Thank you, Mr. White.

[The prepared statement of Mr. White follows:]

PREPARED STATEMENT OF ROBERT M. WHITE

Good morning Mr. Chairman and committee members. My name is Mitch White and I am grateful for this opportunity to speak to you. As National Chairman of the Associated General Contractors' Marine Contractor Committee, I offer the following testimony.

The Longshore Act was established in 1927 to provide worker's compensation insurance to a class of workers that had no coverage. There is no denying that such coverage was sorely needed and the Federal Government wisely stepped in and provided it by enacting the Longshore Act. By the way, I am a former marine construction worker and know the importance of having a compensation system for the working man.

Legislative history from March 1927 shows that, and I am quoting,

> "the original intent of all workmen's compensation laws was to transfer from society and from the courts the expense of taking care of those injured in industry and transfer it to the industry itself. Incidentally, it gave the worker a square deal and eliminated the ambulance chaser."

The term square deal originated with Teddy Roosevelt when he offered the following admonishment: "whenever we go in for reform each side must be remem-

bered and justice should be extracted equally from each side"—in other words, a "square deal" must be sought. Well, I can tell you that today's Longshore Act does not provide a square deal. Although the need to file suit is eliminated through a no fault system, the ambulance chaser has not been eliminated, but rather encouraged and emboldened by the provisions of the current Longshore Act. Legal machinations and the failure of the act to recognize lessons learned over the last generation at the State level for delivering quality health care to injured workers have led to a costly and burdensome compensation system. As a result both the worker and the company sustain a loss of morale, there is less money for worker wages and benefits and less money for safety training. How can we square the deal?

Although there are many areas of the act that require change, I want to address three areas in particular.

The first area I wish to discuss involves cumulative non-trauma (CNT) claims:

Contractors generally see two types of claims. A trauma claim that is for any specific injury sustained on the job (it is most prevalent) and a cumulative non-trauma (CNT) claim that is for a variety of injuries for which there is no percipitating incident. Rather, it is a claim for injuries sustained over time as the result of the repetitive nature of one's work and the general aging process. Some Longshore attorneys have learned to game the system through the overuse of CNT claims resulting in a waste of health care resources.

Critically, a working man typically doesn't file a CNT claim until he has seen an attorney. Rather, our experience shows that an employee files a claim for a specific injury sustained on the job, in other words a traumatic claim, and the employer provides medical care and weekly compensation during the healing process. Although we do not deny that CNT claims may be legitimate, they typically arise when the same attorney, usually working with the same doctor time and again, files a claim on behalf of the employee following the employee's consultation on a traumatic injury. One can argue that the attorney has the good sense to ask medical questions that a less educated worker does not know to ask and thus the employee only gets appropriate medical care once an attorney becomes involved. However, we believe it far more likely that the initial traumatic injury claim by an employee is truly reflective of any injury sustained on the job (and our experience bears this out).

Why is it that we usually see a CNT claim after the attorney becomes involved? The attorney realizes that the CNT claim is far more valuable at the end of the day, particularly to the attorney as the employer pays his fees. The CNT claim arises when the attorney makes broad allegations of various unscheduled injuries (typically to the knees, shoulders, back, etc.). A doctor inevitably opines that the CNT claims are work-related, although there is no specific incident giving rise to them, and the employee will be permanently partially or totally disabled even though more often than not the worker's subjective complaints do not coincide with the objective medical findings. An unscheduled permanent total or permanent partial disability claim is very valuable given that the employer must pay lifetime benefits to a worker for the term of the disability. It is telling, however, that the employee generally opts for a lump sum settlement rather than settling for lifetime benefits.

We believe opting for settlement often belies the fact that the worker intends to work again and that he and his attorney are gaming the system. How so?

By alleging permanent disabilities the worker enhances the value of any lump sum settlement because permanent disabilities call for lifetime benefits vastly increasing the value of a claim if it goes to trial. Moreover, it is to the worker's economic advantage to accept a lump sum settlement if he intends to work again because lifetime disability benefits may be set aside, in whole or in part, if the worker finds employment during the disability. A lump sum settlement cannot be modified. It is final and binding. In short, alleging permanent disabilities is at times simply a negotiating ploy to raise the lump sum settlement value.

Again, we can appreciate that sometimes an employee has a legitimate CNT claim. However, we believe that this legislative body should provide a means to realistically assess a claim when this is not the case. Specifically, we believe that the Longshore Act should provide mechanisms that (1) determine the likelihood that an injury occurred and where; (2) provide for a health care panel to determine the medical treatment an employee requires; (3) base treatment on nationally recognized standards; and (4) provide for a correlation between objective and subjective medical findings.

Where these mechanisms substantiate a CNT claim, we would be assured that the employee is receiving prompt medical care, compensation during the healing process and the period of disability, and that health care resources are not being wasted.

The second area I wish to address is the last responsible employer rule. In a nutshell, the rule works as follows: an employee works for a construction contractor not subject to the Longshore Act. His previous employer was a marine contractor subject

to the Longshore Act. The employee sustains an injury working for the latter contractor. No matter how minor that injury, the employee can file a Longshore claim against his prior employer if the employee can show that the injury aggravates or accelerates or combines with a prior injury, occuring during employment with that marine contractor.

The claim against the former marine contractor must be made within 30 days of the employee having become aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between an injury and the prior employment.

It is particularly troubling that a claim can be asserted against the marine contractor after the employee left the contractor's employ and performed construction work for an extended period for the non-Longshore contractor. All the employee need to show is that a single day's work for the non-Longshore contractor aggravated a previous condition, caused a minor but permanent increase in the extent of disability and/or caused even a marginal increase in the need for surgery and the former employer is on the hook.

Because Longshore benefits are much richer than non-Longshore Act benefits, the former employee and his attorney have an incentive to assert a Longshore claim against the marine contractor, even where there is no percipitating incident while in the marine contractor's employ. The marine contractor will be found fully responsible for Longshore benefits, assuming timely notice by the former employee. Longshore attorneys are adept at finding a Longshore employer where possible and they are adept at finding a doctor who will find that the injuries occurred while in the previous marine contractor's employ.

We believe that this rule results in an unreasonable waste of health care resources, where:

- the employee reported no accident while in the marine contractor's employ despite policies that call for prompt reporting of all incidents no matter how minor;
- the employee is injured in his latter non-Longshore job and decides to assert an aggravation of an unreported injury with his former marine contractor employer;
- the employee sustains an injury, disabling or otherwise, while working for the non-Longshore employer and decides to assert a concurrent CNT claim or traumatic claim against his former employer.

To avoid this waste of health care resources, we believe that the appropriate solution is to make the last responsible employer rule inapplicable to the prior Longshore employer where the employee is exposed to workplace conditions that may give rise to an injury during subsequent employment not subject to the Longshore Act.

The last area I wish to address is the allocation of risks between Longshore employers.

Quite often marine contractors own their own vessels and they hire Longshore employers as subcontractors to provide services to the vessel. When a subcontractor employee is injured on a vessel, the subcontractor is obligated to pay Longshore benefits to that injured employee. That subcontractor then has a lien against the vessel owner for the full amount of the compensation benefits and fees paid to the employee's attorney, even if the vessel owner is 1 percent at fault and the subcontractor is 99 percent at fault for the employee's injuries. In addition, the subcontractor can sue the vessel to recover its payments associated with compensation or the injured employee can sue the marine contractor's vessel. We certainly don't have a quarrel with the injured worker suing the vessel and being fully compensated for his losses. However, to the extent that the subcontractor's lien is not diminished by its concurrent negligence we think results in an unfair result. The marine contractors would like to see a compensation lien reduced in proportion to a subcontractor's fault, as is found in the Outer Continental Shelf Lands Act.

CONCLUSION

We believe that the square deal we seek will maximize the utilization of health care resources and it will properly allocate risks between employers. Again, we need mechanisms that will:

(1) determine the likelihood that an injury occurred and where; (2) provide for a health care panel to determine the medical treatment an employee requires; (3) base treatment on nationally recognized standards; and (4) provide for a correlation between objective and subjective medical findings.

One may think that squaring the deal is for the sole benefit of the marine construction contractor. However, employees of the contractors stand to gain as well. We understand, as do our employees, (and I was once one of those employees) that

incidents occur that call for compensation benefits. We have no quarrel with paying benefits. Indeed, it is the right thing to do.

The honest working man understands and expects a company to be responsible and fair. When he is hurt in the workplace, the company is obligated to provide him prompt and appropriate medical care and return him to work as quickly as possible. In return, the worker will be fair and responsible to the company. When a company fails in its obligations to the worker or the worker games the compensation system, both the company and the worker suffer. There is a loss of morale, less money for the company to provide in wages and benefits to labor, and less money for safety training.

The reforms we would like to see will benefit both marine contractors and their employees. Thank you.

A COMMON REAL LIFE SCENARIO

A marine contractor hired a 48-year-old long-term construction worker, rodeo participant and livestock hauler. Many of you have seen cowboys that walk a bit bent over, that look like they have worked hard all their life. That is this man. He was hired to operate heavy construction equipment, weld and provide other work as needed. The first day on the job the employee complained that he had carpal tunnel syndrome and he had trouble holding a welding stinger while welding. The employer eliminated that task from the employee's duties and assigned him to operating heavy equipment so that he could avoid repetitive work with the right wrist. After 19 months on the job the employee injured the tendons in his right wrist. Although he declined recommended surgery, he was medically allowed to continue work. He worked an additional year before he was laid off. He then underwent three surgeries one for work-related tendonitis in the right wrist, and two for pre-existing non-work-related carpal tunnel syndrome and tendonitis in the right index and middle fingers. The latter two surgeries were admitted to have pre-existed his employment and were paid for by his union insurance. His doctor then released him to full duty with no restrictions other than he was not permitted to engage in very heavy lifting (90 lbs) with the upper right extremity. The employee then retired from the union after 25 years in the trades. During the retirement process, the employee obtained social security benefits, a union pension and retained a Longshore attorney who filed a cumulative non-trauma claim against the employer—the nature of the injuries alleged were to "both shoulders, both arms, both wrists, both hands, back; bilateral carpal tunnel syndrome and trigger finger on index and middle fingers on right hand." The attorney for the worker threw a number of claims against the wall hoping that some would stick, including the two non-industrial injuries alleging that the employer's work aggravated the carpal tunnel syndrome and tendonitis in the right middle and index fingers. Up to this time, the employer was unaware of any work-related injuries other than the tendonitis in the right wrist. Although there were no objective medical findings supporting the ct claims to the back and shoulders and the carpal tunnel syndrome and trigger finger were pre-existing and surgically repaired, the worker's new doctor (routinely associated with the attorney) recommended a three disk fusion in the upper back, and surgery to the wrists and shoulders. The worker stated that he wanted the back surgery and the worker's doctor diagnosed a permanent disability—a very valuable claim.

Rather than incur the risk of having to pay lifetime benefits (a seven figure sum) for a suspect claim, the employer opted to settle for $300,000 to the claimant and $50,000 to the attorney. Settlement was in spite of the facts that there was no incident or incidents percipitating the CNT claim, that the objective medical findings did not substantiate the retired employee's subjective complaints and the treating physician found that the employee was fit for full duty. Moreover, the former employee has not had surgery and continues working in the livestock trade. Was the system gamed? We believe so.

Senator ISAKSON. Dr. Victor.

Mr. VICTOR. Thank you. My name is Richard Victor. I serve as Executive Director of the Workers' Compensation Research Institute in Cambridge, MA. I have conducted research on workers' compensation systems for the past 27 years, first at the Rand Corporation in Santa Monica, CA, then at WCRI.

My expertise is on State workers' compensation systems, not on the longshore system. In fact, I know very little about the longshore system. Then why am I here? Well, the State systems

seek to meet many of the same goals that the longshore system does for workers and for employers. It may be that there are lessons that may be useful from the State systems in thinking about the longshore system.

This morning, I would like to leave you with three lessons from our studies about State workers' compensation systems as they struggle with how to deliver quality care to injured workers in their time of need at affordable cost to employers.

Lesson No. 1, we find that there is tremendous variation in the kind of care that is given to injured workers for a given injury, from State to State, from area to area within a State. It is unlikely that, given the diversity of these medical practices, that all of them are consistent with quality care, and it is even more unlikely that even if they were consistent with quality care, that they would all be cost effective. Hence, the care for intervention by policymakers at the State level to help ensure that injured workers are getting necessary and appropriate care and that employers are not paying for unnecessary care.

Let me give you just one example, one of many examples from our study. Think about a group of workers who have back pain—very common—and who have neurological symptoms—radiating pain down their legs, numbness in their hands. What are the odds that this worker, this group of workers, will get surgery? Well, if you are in Texas or California or Illinois, 30 to 40 percent of those workers will get surgery. If you are in Tennessee or North Carolina, 65 or 70 percent of those workers will get surgery. It is unlikely that all of that surgery is necessary in those States with high surgery rates. It is unlikely that both approaches are correct.

That brings us to lesson No. 2. One of the most complicated things that State officials deal with in workers' compensation is trying to figure out how to get quality care to injured workers at an affordable cost to employers. States use a number of common public policy tools. First, fee schedules that set maximum reimbursement rates. Increasingly in workers' compensation, this is tied to the Medicare rates in the State.

Second, legislation that encourages groups of providers and a payor to contract with what are called network arrangements, mutually agreeable terms for reimbursement rates, for service expectations for the injured worker, and for treatment guidelines to try and standardize some of the treatment that we have described as all over the map.

Third, legislation that authorizes the payor to conduct utilization review to compare the care being proposed or care offered with some standards of what is appropriate care.

Fourth, an emerging trend in workers' compensation, legislation to permit or even require that the standards that are used to evaluate appropriateness of care are evidence-based. Recent legislation in California and in Texas mandated that evidence-based standard be used, when available.

And fifth, restrictions on either the payor's ability or the worker's ability to choose the provider, which brings us to lesson No. 3.

Public policy debates in workers' compensation about who selects the medical provider are some of the most intense, some of the most emotional debates that I have seen. You know the arguments.

Worker advocates argue that the worker has the best information about who is the right doctor for me. Worker advocates also argue that employers may select the company doctor, a doctor that will be inexpensive, not necessarily quality care, and rush the worker back to work. Employer advocates argue that payors have much better information about who are the good providers and that they can help get the worker access to those providers where the worker independently may not. The employer or payor advocates also argue that workers and their attorneys sometimes game the system by choosing doctors that maximize the settlement value, delay return to work, and I am sure that both sides are right to some extent. The question is, to what extent?

We conducted a study that was published in December that looked at this question and what we found is that the simple black or white public policy debate, the worker gets to choose or the payor gets to choose, misses a really important point and maybe a win-win. We found when workers choose their family doctors, those who treated them prior to their injury for some unrelated condition, our study finds that the costs are not very different from when the employer chooses the provider and most worker outcomes are pretty similar. But when workers select providers who they have never seen before, the costs are higher and worker outcomes are either similar or poorer than when the employer chooses the provider.

The key, it seems to us, is who has the best information about who is a good quality doctor. Well, the payor, because the payor is a repeat player, has better information than the worker who occasionally seeks medical care. So it is not a surprise that when the worker sees their own doctor, their family doctor, they have pretty good information about the quality. But when the worker has to go out and look in the yellow pages or get there through some informal networks of referrals, sometimes the worker will make bad choices. So, on average, the worker would be better off, shows our research, if the employer makes those decisions.

The WCRI studies are publicly available. My colleagues have been resources for public officials in many, many States. We would be pleased to provide any additional information to the committee on these or other issues, if necessary. Thank you.

Senator ISAKSON. Thank you, Dr. Victor.

[The prepared statement of Mr. Victor follows:]

PREPARED STATEMENT OF RICHARD A. VICTOR, J.D., PH.D.

My name is Richard Victor and I serve as the executive director of the Workers Compensation Research Institute (WCRI) in Cambridge, Massachusetts. I have conducted research on the performance of workers' compensation systems for 27 years, first at the Rand Corporation in Santa Monica, California, and subsequently at WCRI. This written testimony is based on studies that my colleagues and I have conducted, and I would be happy to answer any questions now or at some later date. My expertise pertains to State workers' compensation systems, not on the Longshore and Harbor Workers' Compensation Program. The experience of those State systems may be instructive for the Longshore system. Each State has a workers' compensation system that seeks to meet many of the objectives of the Federal Longshore workers' compensation system. My comments will focus on the efforts of State policymakers to control medical costs paid by employers while ensuring the delivery of quality care to injured workers in their time of need.

There are three lessons that I would like to bring to your attention:

1. Although regulating medical costs is one of the most complex things that State policymakers do in workers' compensation, State policymakers do use a number of significant policy tools.

2. There is wide variation in the practice of medicine to treat injured workers. It is unlikely that all of these practices are high quality and cost-effective.

3. The policy debate about a key leverage point for cost containment and the quality of medical care—who should select the treating provider—often misses a very important point.

THE CONTEXT

The rapid growth of workers' compensation medical expenditures in the early 1990s led many State legislatures to enact new workers' compensation medical cost containment laws and regulations, most between 1992 and 1997. Many of these changes were focused on regulating medical prices. Some States also enacted or authorized tools to help payors to better manage utilization. In the first half of this decade, two important States (Texas and California) made major changes to their health care financing and delivery systems for workers' compensation. Prior to making these changes, based on studies by WCRI and others, policymakers in the two States had learned that (1) employers in both States paid much higher medical costs per case than typical; (2) workers in both States received more medical services than typical; and (3) workers in both States reported similar or poorer outcomes than typical. Since medical prices in both States were already lower than average, the legislation focused on how to reduce unnecessary care while improving patient outcomes.

COMMON POLICY INSTRUMENTS

The legislation of the 1990s employed what I would call "first generation policy instruments."

- Fee schedules that set maximum provider fees, often tied to the State's Medicare rates. An analysis of these fee schedules can be found in Eccleston, et al., *Benchmarks for Designing Workers' Compensation Medical Fee Schedules: 2001–2002*.
- Legislation to encourage contracting arrangements between payors and providers to establish mutually agreeable fee levels, service expectations, and treatment protocols. An important focus of most of these contracts was provider prices that were established below the State fee schedule or the usual and customary fee paid to the provider. Studies by WCRI and others have found that such contracting arrangements (often called "networks") significantly reduce medical costs without adversely affecting patient outcomes—although patients report higher satisfaction with non-network care.[1]
- Legislation to authorize the use of utilization review—whereby proposed or rendered treatments are reviewed for medical necessity and appropriateness.
- Legislation to adopt or permit payors to use treatment guidelines that articulate standards for reimbursement of appropriate care. However, the 1990s versions were often based on a negotiated consensus-process involving medical providers, stakeholders, and public officials—not on a transparent and disciplined process for assessing the strength of the scientific evidence about different types of medical care.

Descriptions of these tools and a State by State summary are found in Tanabe and Murray, *Managed Care and Medical Cost Containment in Workers' Compensation: A National Inventory, 2001–2002*.

In many States that enacted some or all of these tools, medical costs—especially medical prices—were lower than they would otherwise have been. However, after a few years, the rate of growth often re-accelerated—driven by growing utilization. Little information exists about the impact of these enactments on patient outcomes.

The recent legislative enactments in California and Texas have the potential to define the "second generation policy instruments." I say "potential" because both States are in the early stages of implementation of the legislation and supporting regulations. It is premature to assess their impacts on payors' costs and patients' outcomes.

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[1] R. Victor, D. Wang, and P. Borba, *Provider Choice Laws, Network Involvement, and Medical Costs* (Cambridge, MA: Workers Compensation Research Institute, 2002); S. Fox, R. Victor, X. Zhao, and I. Polevoy, *The Impact of Initial Treatment by Network Providers on Workers' Compensation Medical Costs and Disability Payments* (Cambridge, MA: Workers Compensation Research Institute, 2001); and W. Johnson, M. Baldwin, and S. Marcus, *The Impact of Workers' Compensation Networks on Medical and Disability Payments* (Cambridge, MA: Workers Compensation Research Institute, 1999).

What characterizes this second generation of policy instruments? There are a variety of elements from the first generation that were preserved or improved—like provider fee schedules that were lower than the typical State and were made much more comprehensive in coverage than their predecessors. The principal new elements were:

1. A policy decision that ensured prompt access to care at the outset of the case. Sometimes workers were unable to obtain care (or providers risked nonpayment) until the payor accepted liability for the claim—that is, that the worker truly suffered a work-related injury or disease. This could take weeks or months after the injury occurred, and especially a consideration for repetitive trauma conditions, like back pain or carpal tunnel syndrome. In California, the new law requires that the payor is responsible for medical care rendered from the time the claim is filed until the time when a case is either accepted or denied, subject to a maximum liability of $10,000. Texas recently enacted a similar provision with a maximum liability of $7,000.

2. A policy decision that defined quality medical care based on nationally recognized evidence-based treatment guidelines. In California, such guidelines can only be rebutted by scientific medical evidence. The State began by adopting the guidelines issued by the American College of Occupational and Environmental Medicine—as an interim measure while the State agency was developing a broader set of guidelines. In Texas, payors may adopt their own treatment guidelines as long as they meet minimum statutory requirements, especially that they are evidence-based, scientifically valid, and outcome-focused.

3. A policy decision that workers could select providers who were part of a network of providers, where the providers in the network were designated by the payor. One important exception was that a worker could see a non-network provider if the worker pre-specified a provider with whom he or she had a preexisting relationship. The California legislature adopted this approach to substitute from the prior rule whereby the payor controlled the choice of provider for the first 30 days after injury, and the worker controlled the choice of provider thereafter. The Texas legislature adopted a similar system to replace the prior system whereby the worker controlled the choice of provider.

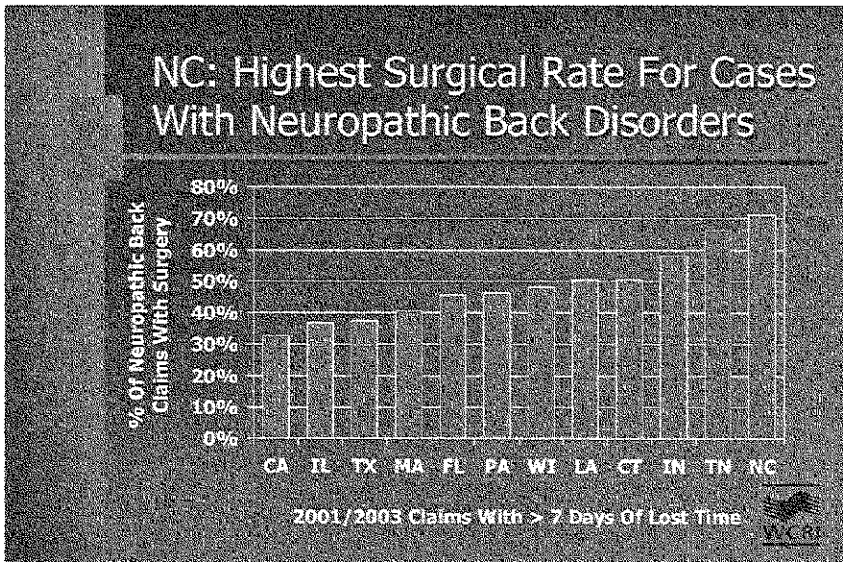
No. 3 above is probably one of the most important strategic changes in both States.

WIDE VARIATION IN MEDICAL PRACTICE FROM AREA TO AREA

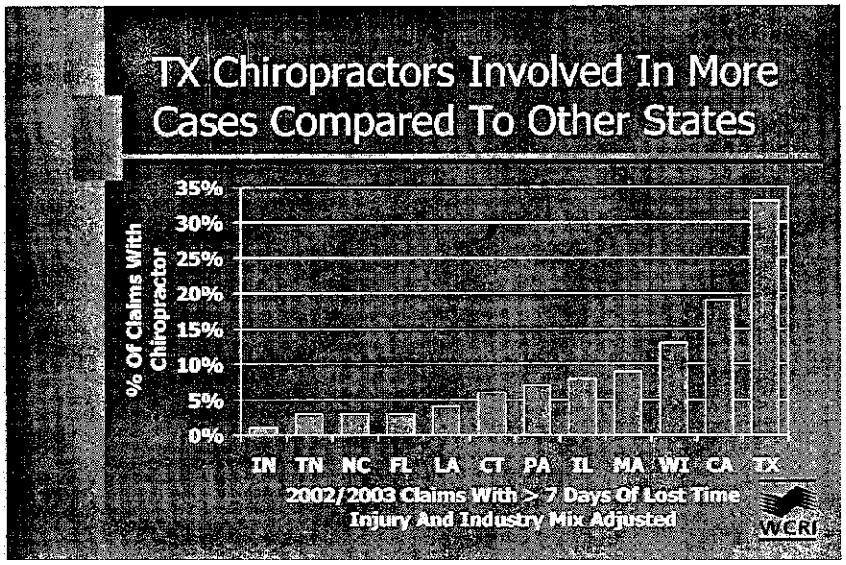
There is wide variation in the medical practice patterns to treat injured workers. It is unlikely that all the disparate practices are high quality and cost-effective.

Below we cite two of many examples contained in Eccleston and Zhao, *The Anatomy of Workers' Compensation Medical Costs and Utilization.*[2] Surgery rates vary widely from State to State. For example, for workers who have back pain with nerve involvement, fewer than 40 percent have surgery in California, Illinois, and Texas, while more than two-thirds have surgery in Tennessee and North Carolina. We cannot determine for certain whether there were unnecessary surgeries performed in North Carolina and Tennessee, but these statistics raise that possibility.

[2] See, for example, S. Eccleston and X. Zhao, *The Anatomy of Workers' Compensation Medical Costs and Utilization in North Carolina, 5th Edition* (Cambridge, MA: Workers Compensation Research Institute, 2005).



A second example shows that about one-third of injured workers in Texas saw a chiropractor. But in a typical State, 5–10 percent saw a chiropractor. In Texas, workers who saw chiropractors averaged nearly 40 visits per case, while in most States, chiropractors treated with about 20 visits. And in some States, chiropractors were rarely involved in providing care. Although we cannot tell for certain if there is excessive chiropractic care in Texas, or inadequate access to chiropractic care in States like Indiana, this slide raises those possibilities.



IMPACT OF PROVIDER CHOICE

The health care provider plays many critical roles in the outcome of a workers' compensation case. Those roles bear directly on most aspects of a worker's claim for

medical and income benefits, and include diagnosing the condition and assessing its cause, which can affect the compensability of the claim; prescribing and providing a course of treatment and disability management practices, which can influence whether the worker returns to work and how quickly; assessing whether the worker's condition has reached maximum medical improvement, whether the worker is left with a permanent impairment or disability, and the extent of the impairment; and judging whether a preexisting condition contributed to the degree of impairment. From the perspective of either the employer or the worker, any of these decisions by the health care provider can be sufficiently important to warrant being able to control the selection decision. Thus, the selection of that provider is an important matter for all parties of interest.

Worker advocates argue that the choice of the treating provider should be left to the worker. At a minimum, they argue that workers should be treated by those whom they trust and whose interests align with the workers'—interests that encourage prompt return to work, but only as medically indicated, and the fullest restoration possible of physical capacity. In contrast, employer advocates believe the choice of provider should be made by the employer, arguing that employer choice ensures that incentives exist for keeping the costs of care reasonable and appropriate, employer choice helps avoid excessive services and treatments, and providers familiar with the employer's workplace can use that knowledge to expedite return to work.

A recent study published by WCRI found that a critical consideration was missing from the arguments of both groups of advocates.[3] That is, on average, workers appear to have poorer information about the quality of providers when they select providers who they have never seen before. Compared to when the employer selects the provider, a worker selecting an unfamiliar provider can be expected to have poorer outcomes and the employer can be expected to pay higher costs for the care. However, when workers select providers with whom they have a prior treating relationship (e.g., their family doctors), it appears that the costs are not significantly higher than when the employer selects the doctor, and most patient outcomes are also similar. Among the most important findings of this study are:

- Compared with cases in which the employer selected the provider, cases in which the worker selected a provider who had treated the worker previously for an unrelated condition (a "prior provider") had costs that were similar. And patient outcomes did not appear to be very different between cases with employee-selected prior providers and those with employer-selected providers, except that satisfaction with overall care was higher when the worker saw a prior provider.
- Compared with cases in which the employer selected the provider, cases in which the worker selected a provider who had not treated him or her previously (a "new provider") had much higher costs and poorer return-to-work outcomes, generally no differences in physical recovery, and higher levels of satisfaction with overall care.

Senator ISAKSON. Mr. Embry.

Mr. EMBRY. Modern workers' compensation was born in the ashes of the Triangle Shirtwaist fire in New York, which in 1913 killed several hundred young women who recently had just returned from a strike where they had been arguing for safer working conditions. What they found when they lost that strike was that they returned to places where the doors were locked and they could not escape the fires and they burned to death and had to jump to their death to escape the flames. Out of those flames and those ashes arose the workers' compensation system, which was designed to compensate people partially for their wage loss and to try to give them medical care that they needed when they were hurt.

It became enshrined in our temple of law, where we could get at least a partial measure of justice until in 1972 the National Commission on Workers' Compensation Laws looked at it and found that the State workers' compensation systems were totally inadequate and didn't provide adequate coverage. Those who practiced workers' compensation at that time hoped that that would mean

[3] R. Victor, P. Barth, and D. Neumark, *The Impact of Provider Choice on Workers' Compensation Costs and Outcomes* (Cambridge, MA: Workers Compensation Research Institute, 2005).

that we would have reforms that would improve workers' compensation.

Unfortunately, through the 1980s and 1990s, there was a movement which swept the country, slashing workers' benefits and cutting health care. Workers in New York today can receive a maximum of $400 a week for an injury which renders them totally unable to work, not enough to pay for an apartment or to feed their families. In California, workers can no longer choose their own doctors. In Texas and Florida, doctors refuse to treat workers who have suffered work-related injuries because they are not paid enough money. Some workers have limited workers' compensation benefits for widows to 2 years. Death goes on forever, but benefits stop in 2 years. The result has been foreclosure, hunger, and many uneducated children.

It is these failures that we should be looking at at this time. Why is it that our State systems have so miserably failed our workers and why is it that workers who are injured who do what we ask them to do, go out and go to work for a living, are not being treated fairly?

The workers' compensation system is designed to be a social safety net to catch those injured workers when they fall. Instead, that net has been eroded and we have a hole in the ground that has been dug which is far too often called the grave, but it is deep enough so that when people fall into the hole, they can never bounce out.

The Longshore and Harbor Workers' Compensation Act, on the other hand, is a reasonably fair act. It is generally fair, but not generous. Workers do not get paid to not work. They get compensated because they cannot work. This compensation is limited to two-thirds of their lost wages, but they must shoulder that additional loss of one-third. They don't get their pension benefits covered. They lose their family's health care, so that they pay approximately 50 percent of the economic loss of their injuries. They also get their medical cost covered as it relates to the injury, but as I indicated, they also lose their health insurance for their family, so it is not a perfect deal.

Now, some want to take that away. The most shocking of the proposals will take away a worker's right to choose his doctor and then to allow the employer to dictate to the doctor the nature and means of treatment. How can we trust workers to build nuclear-powered submarines and aircraft carriers but not to choose their own doctor?

One of the speakers has referred to ambulance chasers. Well, I think I was one of the ones he was referring to, and I admit that on occasion, I have followed an ambulance to the hospital, but what they are taking to the hospital is one of my clients who has suffered a heart attack, who is dying of cancer, or has had his hands amputated. It is not a pleasant thing to go to the hospital to see your clients when that has happened.

What we are proposing here is not ambulance chasing but ambulance breaking. They want rules enacted which say that before you can get on the ambulance, you need their permission, that they get to pick the ambulance, and that the ambulance will drive you half-

way there, but you will have to get off and walk the rest of the way.

The relationship between a doctor and a patient is a special one based upon trust. The doctor uses his healing skills to get workers back to work as soon as possible. They want this to change so that they can pick doctors who will force them to go back to work or cut off his benefits before he is able to go back to work.

The guidelines which have been proposed are regulations which would require doctors to follow bureaucratic rules rather than to treat the patient. It is socialized medicine by another name. It is socialized medicine without the socialism. What it actually is is mercantilized medicine, where the doctors are forced to send people back to work in order to save money for employers.

The right to pick your own doctor is important. To give the employer the right to choose doctors and to control the doctor is like putting the fox in charge of the henhouse. It is like giving the employer the right to choose the claimant's lawyer, to tell him, you can pick any lawyer you want as long as it is Mr. Postol.

Mr. POSTOL. More business.

[Laughter.]

Mr. EMBRY. More business, thank you.

The Longshore Act is not perfect. Employers frequently engage in what Consumer Reports call starve-out tactics. In the year 2000, Consumer Reports looked at the State of workers' compensation in the United States and concluded that it was grossly inadequate and called upon the Congress to revisit the 1972 Commission report and to try to improve State workers' compensation systems. Now is the time to do that.

In terms of the Longshore Act, there are a number of things that do need to be improved. The *PEPCO* decision took away the right of the judge to award wage loss for certain types of injuries. If a person loses his hand, no matter what his actual wage loss is, he is limited to the scheduled award for the hand. Would those benefits be capped at one-half of the person's deceased wages rather than two-thirds?

Employers frequently engage in what we call starve-out tactics. They will unilaterally, without reason, cut off benefits without explanation, even in accepted cases where they have been paying the individual for 6 months. They can do this without getting permission from the Department of Labor, without putting on a prima facie case. We think that they should at least be required to go to the Department of Labor and present their prima facie case, saying "here is some evidence that indicates that the person is no longer disabled."

One of the comments was, why do so many cases settle? They settle because of these starve-out tactics, where the employers starve out the families and force them to the edge of bankruptcy and say, "the only chance that you will ever have to get 10 cents on the dollar, and it was two-thirds of the dollar that you are supposed to get to begin with, is by settling for cheap money and going out and then going on other alternative sources, such as Social Security Disability."

In New York State, where the maximum rate is $400 a week, many individuals are better off going on Social Security Disability

and going on the public trough rather than having the employer pay for the cost of the injuries that they have incurred and caused.

In general, we think the workers' compensation system called the Longshore Act works relatively well. We have tremendous problems with what is occurring around the State level. One of the reasons that happens, of course, is that because of the way the State system works, the employers can engage in what we call an auction to the bottom. They can go and suggest that I am going to take my business out of New York State and move it across the river into New Jersey unless you cut your benefits here. So New York cuts its benefits. California cuts its benefits. Florida cuts its benefits. Texas cuts its benefits.

The next year, Louisiana finds that their employers are saying, "well, Texas cut their benefits." New Jersey says New York is cutting their benefits, and they cut their benefits. The following year, New York and Texas return to the trough and begin to try to have an auction where they bid less and less to the lives of their workers.

This by itself leads to economic ruin for the worker. We cannot build a society where wealth is built on poverty. By driving down wages, by driving down benefits, by cutting pensions, we are not making people wealthier or better. Those people who lose their workers' compensation benefits because they are cut off as part of these starve-out tactics don't have money coming in. They can't buy cars. They can't buy clothes. They can't pay for their homes. Connecticut has studied this and found that with our workers' compensation system, when people are injured, the foreclosure rates go up dramatically.

This is simply unfair and unworkable, and in this country, that is not what we should be striving for. We should be striving for a system in which workers participate in the economic boom, not just CEOs. There was a recent report that indicated that the president of United Health was going to get a bonus of $1.5 billion. The president of Pfizer was going to get a retirement of $6.8 million a year. And they want to cut workers' compensation benefits to $200 or $300 or $400 a week.

All that we simply ask is that the Congress approach this problem very carefully. The workers' compensation system known as the Longshore Act has worked very well for some time and we ask you to leave that intact and to study it carefully before doing anything that might hurt our workers. Thank you.

Senator ISAKSON. Thank you, Mr. Embry.

[The prepared statement of Mr. Embry follows:]

PREPARED STATEMENT OF STEPHEN EMBRY

Good morning. I am Stephen Embry, an attorney who has represented over 10,000 injured workers under the Longshore Act over the past 31 years. I am past chairman of the Workers' Compensation Section of the Association of Trial Lawyers of America, and past president of the Workplace Injury Law and Advocacy Group (WILG). I was intimately involved in the legislative process that amended the Longshore Act in 1984, and am a co-author of the Longshore Textbook (4th Ed.). If being an expert means knowing too much about too little, I may qualify as such a person on Longshore matters.

First of all the state of the workers compensation systems in our Nation is a disgrace: benefits are low, many workers not covered, medical care corrupted and unavailable. Consequently workers who have done what we ask of them, work for a

living, and suffered injury or death are often left high and dry. Their families suffer foreclosure, college drop out, and hunger.

In the last decade a wave of reductions in benefits has brought workers and their families to the edge of financial collapse. Rather than talk about lowering Longshore Act benefits we should be trying to raise State benefits to a living level.

The Longshore and Harbor Workers Act is a national workers' compensation act providing uniform protection and health care for maritime employees who work upon the navigable waters of the United States or adjoining land areas customarily used for ship loading, ship construction and overhaul. Historically, the law was enacted following the U.S. Supreme Court's holding that the Admiralty provisions of the U.S. Constitution reserved to the Federal Government the right to regulate admiralty injuries, and that maritime workers were constitutionally entitled to a uniform remedy, and not subject to the growing hodgepodge of State workers' compensation acts. *Southern Pacific Co.* v. *Jensen*, 224 U.S. 205 Instead, the Constitution required that there be a uniform law that applied to such admiralty claims.

Over the next 50 years the Longshore Act provided uniform but low benefits, and engendered substantial litigation costs and delays as employers argued over whether the injury met the jurisdictional requirements of the act. A worker would be covered if he fell into the water, but left high and dry if he landed on land. By 1972 the maximum benefit provided to a worker was $70.00 per week, and in order to obtain that benefit he regularly had to seek the support of the Federal Courts. Consequently, injured workers were usually forced to seek other remedies for catastrophic injuries. They frequently would sue the vessel owner for full damages for the negligence of the stevedoring company that had employed the longshoreman, and if that suit was successful the shipowner would, in turn; seek indemnification from the stevedoring company.

The stevedores asked Congress for relief from these indemnification actions, and Congress agreed to provide such relief. But as part of the bargain, the benefit schedules of the Longshore Act were revised to provide fairer, but not munificent, benefits. In addition, due process under the act was improved by the provision of hearings by Administrative Law Judges. *Director, OWCP* v. *Perinni North River Associates*, 459 U.S. 297(1983).

The 1972 amendments to the act coincided with the presentation to the Congress of the 1972 Report of the Commission on State Workers' Compensation Laws. That report documented the inadequacies of State workers' compensation laws that provided limited and inconsistent benefits to injured workers. The Commission reviewed the State laws and concluded that, indeed, the State acts were often unreasonably parsimonious and lacked basic coverage for many workers and widows. The Commission proposed a series of recommendations for national minimum standards for workers' compensation. For the Longshore Act, these included such common sense reforms as compensating workers for 66.66 percent of the wages lost as a result of the injury to to a maximum based on the State average weekly wage eliminating caps on benefits and medical care, assuring that the benefits would continue as long as the disability did, and assuring that the maximum compensation rate would be adequate to compensate at least the average worker. In amending the Longshore Act, Congress also recognized that inflation frequently ate away at the purchasing power of the compensation benefits, and provided cost of living adjustments for workers who had suffered injuries causing permanent and total disability.

These modest reforms greatly improved the act and saved many poor workers' families from destitution and foreclosure. In 1984 insurers argued that the unlimited cost of living adjustment provisions of the act made it difficult to underwrite insurance, and Congress passed an amendment capping the COLAs at 5 percent annually. It also defined a modest benefit for workers suffering from long latent diseases such as asbestosis. Since that time the Longshore Act has provided a generally fair, reasonable, uniform and predictable workers' compensation remedy to the men and women who are engaged in the important but dangerous work of moving our cargo, and building and repairing our ships.

The Longshore Act also has been extended to cover those volunteer citizens who are working overseas at our defense bases in Iraq and Afghanistan to build and protect structures for our troops and move our military cargo. The act thus covers a group of workers who are uniquely important to our Nation. Longshore workers move billions of dollars of products, produce and materials through our ports daily. Shipyard workers produce and maintain our vessels used for commerce, war and recreation. They toil in dark, dirty and dangerous conditions to produce products vital to our national welfare and defense. Defense base workers are on the front lines of our national defense, volunteering for service that would otherwise require the reinstitution of the draft. All these workers typically toil in particularly harsh

and dangerous environments, are subject to high rates of injuries, and their efforts contribute a high percent of the creation of our Nation's wealth.

The combination of high risk of injury and wealth-producing functions means that these Longshore Act workers are compensated at rates which to a degree but not completely reflect the risks they take and benefits that they generate for the national economy. The act attempts to compensate them commensurate with their work, and the losses they suffer. Like all compensation acts, it is not perfect. Workers who become disabled still must bear a share of the loss, and shoulder completely the costs for loss of heath insurance for them and their families, and their pension benefits. Often even with the meager longshore benefits their families can no longer afford health insurance.

We have now had a generation's time to test the workability and fairness of the act. It has performed well in providing a reasonable level of wage replacement for maritime injuries. There are two major reasons for this success. The act is a reasonable compromise, providing a fair measure of compensation for workers while protecting the employer from the full costs of the injury. No one gets rich by receiving Longshore benefits. The worker always gets less than the wages he is losing from the injury, bearing at least ⅓ of the cost, and often more for high wage earners. He is not compensated for the loss of health insurance, pension benefits or other fringe benefits. Consequently, in real dollar value, a Longshore worker and his family bears 50 percent or more of the cost of injury or disease. The employer is protected from paying for the full economic losses and is relieved entirely from compensating the worker for pain and suffering and loss of life's enjoyment.

Second, the act provides a fair procedural framework for benefits. The simple extension of the act in 1972 to adjoining land areas greatly reduced uncertainty and litigation and simplified insurance underwriting problems. The act is a national model for reducing litigation and increasing fairness in workers' compensation by removing the insurer's incentives to argue about apportioning liability among causes and employers. Under this act one need not be concerned that a worker may walk in and out of Longshore jurisdiction many times a day. One need not be concerned whether the vessel was on the New York or New Jersey side of the channel. Longshoremen may work for several stevedoring companies a day as they meet the stevedores' requests at the union hall.

The Longshore Act works reasonably well by any standard. Properly complied with it is a fair and rational law, easy to administer, and has low transactional costs. It would not be reasonable to return to broken experiments, such as we had in 1972, or to return to a fragmented, roulette wheel approach to caring for our injured workers by creating a maze of exceptions to jurisdiction that will only drive up litigation costs.

As has been stated, the present system is not perfect. For example, employers frequently unreasonably contest claims, sometimes in bad faith. The requirement of an informal conference before the District Director often delays the trial while the worker's claim languishes. Some employers use this to their advantage.

Employers can unilaterally terminate compensation for no justifiable reason, and without making a prima facie case of reasonableness to the Department of Labor, or obtaining the Department's permission. Workers would like to have the right to a full remedy for such bad faith actions by the employer. Employers in cases where it is clear benefits are due should not be permitted to unilaterally terminate benefits without first making a prima facie case to the Department of Labor and obtaining permission to terminate benefits pending a prompt trial before an Administrative law judge,

The *Pepco decision* should be overturned. *Pepco* took away the Court's ability to award compensation for the actual wage loss suffered by employees who have suffered a scheduled injury such as an injury to the hand or arm.

The Longshore Act should be brought into conformity with the 1972 Commission's recommendation and modern State workers' compensation law that widows' benefits be ⅔ of their husbands' wages

If Congress were to open the box for full review of the act, a large number of other reforms would be advanced to improve it. On the other hand, the act as currently written is a reasonably fair compromise—generally fair, predictable, easy to administer and is an effective and efficient delivery system. This is a sharp contrast to the situation that exists in the workers' compensation systems of the 50 States.

As previously indicated, the 1972 Commission examined State workers' compensation laws and found them to be inadequate and capricious. It recommended a series of minimum national standards that would provide a basic floor to protect workers and insure the economic stability of their families and of communities ravaged by work-related injuries and death. Unfortunately, not only have we failed to meet those standards, but across the Nation we have seen a wholesale degradation of

workers' compensation systems resulting in increased poverty, foreclosure and family destruction.

To give you just a few examples, in New York the maximum rate for total disability is $400.00 per week—not enough to cover rent let alone keep a family in food and clothing.

In California, Florida and Texas total benefits are terminated after 104 weeks even though the worker remains totally disabled.

In Kansas, the maximum for permanent total disability in 2005 was $449.00 per week. Worse yet these benefits were capped at $125,000.00. At the $449 the $125,000 cap is reached in just over 5 years.

Florida caps widow's benefits even though death last forever.

Texas and Florida have set medical reimbursements so low that many doctors will not treat work-related injuries. In New Jersey workers struggle to obtain authorized medical care through a litigious system that precipitates huge delays impeding the appropriate and timely delivery of effective medical treatment.

Rhode Island apportions occupational diseases between the occupation and non-occupational causes. These and other apportionment schemes which seek to shift the burden of work-related injuries back onto the worker's families are not fair or workable; the worker never receives full compensation for his injury under a compensation act. The reduced rates and loss of remedies for pain and suffering already force the worker to bear much of the burden. Further such apportionment schemes are unworkable and based on junk science. They force delays and increase litigation.

Iowa reduces awards for prior benefits paid on an old injury. If you are injured and return to work and latter suffer a second injury the employer gets credit for prior injury. Employers should not be rewarded for injuring their employees multiple times.

Connecticut apportions compensation among all employers, driving up costs and delaying benefits for years while the employers argue over percentages, even where everyone agrees that the benefits are due and the worker's family has no income.

Nevada requires that the work-related injury be the predominant cause of the disability, denying benefits to workers who were working with preexisting conditions and thereby establishing a barrier to hiring of the handicapped.

The driving force behind these reductions and erosions of benefits in the States has been the astute use of the reverse auction threat. Businesses suggest that unless New York reduces its benefits, they will move to New Jersey. New York reduces its benefits and the next year New Jersey faces the same threat. The bids for business continue to fall. This drive to the bottom is an economic failure for many reasons and works to the detriment of the entire national economy. As a matter of principle, benefit levels for injured workers should not be subject to crass commercial arguments. The worker who becomes disabled suffers real losses and should not be asked to subsidize the employer's negligence by taking reduced benefits. Employers urge to place the concept of "fault" back into the workers' compensation process thereby eroding the fundamental principals upon which it was established.

Such economic policies are always self-defeating. The actual effect of reducing benefits for workers is exactly the same as losing a job. If workers' compensation benefits are reduced by $9,000,000 that is exactly the same as losing 300 jobs paying $30,000 a year. The people of the State are poorer by that amount; businesses are hurt since the workers cannot spend that amount on cars and food. Children suffer since their parents cannot afford that much for education.

In general, policies designed to make people poorer are not successful in making them richer. Poverty is not the way to wealth. The other result of this reverse auction concept is that the cost is shifted to workers' families and to the public and taxpayers at large, foreclosures increase, children are not fed. Families are forced to turn to welfare, food stamps, social security and Medicare to replace the losses created by workers' compensation reform. The Rand Corporation has looked at how effectively workers' compensation systems, in a number of States replace lost wages, and it found that before the recent reforms, the workers' compensation systems did poorly, and that after the reforms they are doing worse.

It was just such fear of the economic fracturing and pitting worker against worker that led the founding fathers to reserve the regulation of Admiralty claims to the Federal Government. It was the original intent, and continuing common sense of the framers of the Constitution, that workers on the high seas, New York Harbor, the Port of Los Angeles and the Mississippi river should be treated equally and fairly. A uniform compensation act such as the Longshore Act prevents forum shopping in which the employers threaten to and occasionally do search for the weakest and meanest workers compensation law to move their activities.

Oil should be applied where the squeaking occurs. The Longshore Act is relatively silent. The squeaks from the 50 State acts are significant. That is where our atten-

tion should be directed. We should revisit the concept of the 1972 Commission which felt that workers were valuable and entitled to a minimum compensation rate regardless of where the injury occurred. Perhaps it is time to force the States to restore fairness and justice to our system.

Senator ISAKSON. Mr. Postol.

Mr. POSTOL. Senators, my name is Larry Postol and I am a defense lawyer. I have other problems, too.

[Laughter.]

I have been doing this for 26 years and learned a few lessons along the way. The first thing I learned, which many people don't like to hear, is if you pay people too much money, it won't work. I mean, you see it again and again and again and you say, "well, we are only paying them two-thirds of their wages, so why wouldn't they go back to work?" Well, it is tax-free money. So if they are in the 35 percent bracket, they save 35 percent of the taxes. There is no Social Security taken out, no FICA, so that is another 7.5 percent. So now I am up to 42 percent. In addition—so I am actually making more money because two-thirds tax-free for someone in the 35 percent bracket, remembering also State taxes, is worth more than my wages. In addition, for some of the lower-paid workers, there is a minimum compensation rate, so workers can get 100 percent of their wages tax-free as compensation. So why would I go back to work?

In addition, what you see when you look in the file again and again is they are not only getting workers' compensation, there is no starve-out for longshoremen under the employer-funded benefit plan. They get short-term disability and long-term disability. So while I am fighting the comp case, actually, another employer fund is actually funding the claimant while he fights the case.

In addition, we find that they have disability insurance. Their car note is not being paid because there is some insurance paying that. Their mortgage isn't being paid because that is also being paid by insurance. If they owe child support, the child support can't be attached for longshore payments.

So for a lot of workers, when you look at the file, it is pretty obvious why the worker isn't going back to work. They are better off financially not working. And frankly, I blame it on the system.

The cases you see where I think most of us would call abuse, they are not evil, terrible people. They are people who are actually making a relatively smart decision. They are realizing the benefits are so good that they are being tempted away from being honest. They go to the lawyer. The lawyer sends them to the same doctor again and again. The doctor makes lots of money. Two or three years of physical therapy at a physical therapy center he owns. So the doctor is making lots of money. The case gets litigated.

Mr. Embry and I do very well because I get paid whether I win or lose. He gets paid not by the claimant, by the employer. So if you ask, well, the employer is just going to fight these cases when they have no defense, that doesn't happen, because they not only have to pay me, but then when they lose, they have to pay not only the claimant, but the claimant's lawyer.

So the system isn't set up for employers to not pay the claimant. It is set up for the claimants to get paid, and unfortunately, they

are getting paid so much, there is not an incentive even for an honest worker to go back to work.

So to those who say the system works great, it works great for Mr. Embry and myself. We make a very nice living off of it. There are lots of cases being litigated. It works great for the doctors who get these patients who—they are not being paid by the patient, they are being paid by the employer. So why not have physical therapy for 2 or 3 years? The legal system has a hard time telling a doctor that your treatment is not right.

In 1984, the amendments, we put in a provision that doctors can be barred if they abuse the system. How many doctors have been barred in the last 21 years after the 1984 amendments? None, because you are not going to find somebody who steals and cheats stupidly. They do it smartly. They just keep giving physical therapy. Is a judge going to come in and say, "you know, I don't have a medical degree, but I am pretty sure this is wrong?" Or you can have the Ninth Circuit, California, where the Ninth Circuit has said, even if the judge believes the independent doctor—independent, chosen by the employer—that the care isn't needed, the worker still has a right to get the care that his treating doctor has prescribed.

Now, I can understand the concern that, well, if you let employers offer a panel of doctors, they will just get doctors who will say whatever they want. Well, I would like to see that list of doctors. I have been looking for them for 25 years. I can never get them to say exactly what I want. I keep looking.

What you find is two things. One is that they are afraid of medical malpractice, because if they send the worker back to work too soon, the worker can sue the doctor for malpractice, whether the employer's doctor or their own doctor. So doctors tend to be very, very cautious.

When I started doing this work 25 years ago, if you had a herniated disk and surgery, you went back to full duty. That was the prescribed medical care. Now, every doctor, if you have a herniated disk and surgery, will put you on permanent restrictions of no lifting over 25 pounds. The human body hasn't changed. What has changed is that doctors are afraid of medical malpractice, so they are very cautious.

So there is a check and balance system if you let the employers choose. If you let the claimants choose, there is no check and balance and what happens is the claimant gets injured, he goes to the lawyer, the lawyer refers him to the same doctor over and over again and the doctor gives the same treatment over and over.

And then ultimately what happens is the employer has to settle the case because they look at it from an actuarial point of view and they say, "my God, we are going to have to pay this guy for the next 30 years and we are going to have to pay him $1,000 a week." You run the calculator, the cost-of-living increase every year, and it is a million-dollar liability. So the accountants say, "you better settle for $400 million." That is a great settlement because we will save $750,000.

So then you settle the case and the next day, what five neurosurgeons couldn't cure, three orthopedists, two priests could never get this guy better, but as soon as he got that settlement check,

a month later, he is at the doorstep. I am ready to go back to work. I have got my check. You see that over and over and over again. Again, great for the lawyers. We both got paid. The claimant got this nice chunk of money and he is back at work. But I don't think that was the system you envisioned when you passed this law.

Two things to address. You mentioned the GAO study, 1 percent of the workers were non-contested cases. I would suggest to you that is a little—not accurate in the sense that on occupational disease cases, you don't have any evidence. It is not like the worker got injured and someone witnessed it. So what happens is you get a medical report. The employer has to controvert it because they don't even know it is up. They don't even know—they have no medical records other than the worker went to usually a van that a lawyer supplied outside the employer.

What you find in traumatic injury cases—and by the way, those occupational disease cases, once the employer gets the medical evidence, way over 95 percent of them are going to settle, again, because if the employer fights and loses, they pay both lawyers. Again, great for lawyers, not so great for the employers.

Traumatic injury cases, 95 percent of employers end up just paying—they start from the beginning paying and they pay straight through. Why? Because they don't want to pay both lawyers. And ironically, what we are seeing now is lawyers are getting involved even when there are uncontested cases because it is a way to make money.

I think that sort of—oh, I know, the dual jurisdiction. I almost forgot. As if this isn't good enough for the lawyers to make money, we make twice as much because we have dual jurisdiction. The claimant files a claim under the State act and the Longshore Act, so we get to try the case twice, which, of course, means twice the legal fees. If the State systems were so terrible—and no one, by the way, is suggesting that we take these longshoremen and put them under the State system—but if it is so terrible, why are all these workers filing claims under both statutes? The reason is because they have differences. Some pay under a schedule. Some pay under straight wage loss. The workers get the best of both worlds.

We have cases where workers have two treating doctors. They have one under the State act and they have one under the Federal act and they are being treated by two doctors at the same time for one injury. If that is a good system, I don't know. Maybe then lawyers should be running the country.

[Laughter.]

I apologize for rambling a little bit, but thank you.

Senator MURRAY. As a preschool teacher, I object to that.

[Laughter.]

Mr. POSTOL. So do I.

Senator ISAKSON. The lawyers or the rambling?

[Laughter.]

Senator ISAKSON. Both. Well, thank you very much.

[The prepared statement of Mr. Postol follows:]

PREPARED STATEMENT OF LAWRENCE P. POSTOL

I am a partner in the national law firm of Seyfarth Shaw LLP. I have represented employers under the Longshore Act since 1980. I have tried hundreds of cases, I have handled over 25 cases before the United States Courts of Appeals, and I have

even won two cases before the United States Supreme Court. I have written two law review articles concerning the Longshore Act, as well as a chapter in an AMA text book entitled, "Disability Evaluations." I am not testifying on behalf of any of my clients, and indeed, no one is paying for my time in presenting these comments and my testimony. My comments and testimony reflect my views, and do not necessarily reflect the views of my clients.

My many years in this field have taught me a very simple reality—if you pay someone enough money NOT to work, they will not work. The Longshore Act is way beyond that point, being far more generous than any other workers' compensation statute known to man. The Longshore Act is so overly generous, it begs workers to abuse the system. Unfortunately, it is a temptation which many workers can not resist. There is a reason "entrapment" is a defense to a criminal act which the Government encourages the person to engage in. The law recognizes that it is human nature to take something if we think we can get away with it. The Longshore system allows and even encourages abuse, so it is no wonder that workers take advantage of it.

One example will make this point clear. Assume I am a 60-years-old longshoreman, and like the vast majority in that age group, I have some arthritis in my back. Indeed, MRI's are so sensitive, in persons 60 or older, over 50 percent of asymptomatic persons (having absolutely no back pain), the MRI will show abnormalities. In over 35 percent of such persons, the MRI will show a herniated disc. Yet, the person has no back pain. Now assume I have a minor back injury—it can be as simple as I bent over and felt pain. My choices are clear—if I recover, I might work another 5 years to age 65. If I complain of pain and say I hurt too much to work, I can recover 66 percent of my wages, tax free, for my lifetime—the next 20-plus years. Moreover, that is on top of my social security check and my retirement check. Indeed, if I am lucky, my car note and mortgage will have disability insurance, so I will be relieved of those payments. And if I owe child support, my longshore compensation check can not be attached to pay for child support.

You ask, how would I be able to get a physician to support such a claim? First, I go to a Plaintiff/Claimant's lawyer who refers me to a "liberal" doctor. The doctor can make a significant amount of money by ordering years of physical therapy at the facility he owns. Or I can get years of chiropractic care. The physicians understand that the lawyers and workers get to select who the treating doctor is, and thus they do not bite the hand that feeds then.

Lastly, you wonder, wouldn't the trial judge see through all this? Very rarely is the unfortunate answer. Deference is given to the medical opinion of the "treating physician," supposedly because he has seen the patient the most. However, since the patient and his lawyer selected him, he could hardly be more biased. Yet, the Judges are rarely willing to address that bias. Worse yet, every burden of proof possible is thrust onto the employer—there is a presumption the medical condition is work-related; and if the worker can not return to his regular work, the burden is on the employer to show there are other jobs available.

This pattern of abuse is not limited, moreover, to older workers. Time and time again, I see workers claiming for 2 to 3 years that they are totally disabled and that they will never be able to work again, and medical providers gladly affirm the worker is "permanently and totally disabled." Yet, as soon as their case is settled for say $250,000, the worker makes an amazing recovery, and goes back to his regular longshore work.

I am afraid I could give you hours of horror stories, but let me try a few examples. One of my first cases was a shipyard worker who had disc surgery to his back. While his working supervisor had had the same surgery and returned to work in 6 weeks, the worker had been out 6 months. When we took the doctor's deposition, the workers' counsel asked what percentage of the doctor's patients with this kind of surgery were able to return to work within 6 months. The doctor asked if we were talking about workers' compensation cases, or others. The other attorney and I were shocked (we were both novices) and asked why would it matter, the body is the same whether the injury occurred at work or at home. The doctor responded that was true, but his experience was that 90 percent of patients who are not workers' compensation cases return to work after disc surgery within 6 months, but in workers' compensation cases, it was only 50 percent. The doctor said he could not explain the difference, but that was in fact his experience, and he treated many longshoremen and shipyard workers.

I had a case where the Judge ruled that just because the Claimant cheated on reporting his wages, and that he committed perjury in his deposition, did not mean he is lying about his un-witnessed injury. I have had cases where workers have gone to chiropractic treatment for over 3 years, with absolutely no improvement. I had a case where the employer sent a compensation check to the address the worker had

on file with the Department of Labor, and yet when it turned out the worker had failed to update his address with the Department of Labor, the employer was still assessed a 20 percent late penalty. I have had Claimant's counsel file attorney fee petitions for over $50,000 in attorney fees they claim the employer should have to pay, when the Claimant recovered less than $2,500 in benefits.

I had a worker exposed to pesticides who later developed a terrible nerve disorder. However, I had a full medical school professor, who had studied agent orange for Congress, testify that while pesticides are well studied and cause some types of nerve disorders, pesticides had never been associated with the nerve disorder this worker had. The Administrative Law Judge nevertheless held the employer had not rebutted the presumption of compensability and awarded compensation. While the decision was eventually reversed on appeal, not until the employer paid over $50,000 in compensation which it had no way to recover.

I should also note that thanks to concurrent jurisdiction, lawyers get to try cases twice, and earn twice the attorney fees. The worker can file claims under both the Longshore Act and the State workers' compensation act where the injury occurred. In addition, there can be inconsistent results. I had a recent case where one doctor was declared the treating physician under the State statute, and the United States Department of Labor refused to recognize the State ruling, and thus held that under the Longshore Act, another doctor was the treating physician. Yes, two different physicians in the same specialty treating the same injury at the same time. I have also had a worker declared employable under the Longshore Act and thus only entitled to partial disability benefits; whereas, the State commission held it could ignore the Longshore Judge's decision, and awarded total disability benefits. Moreover, some States such as South Carolina, refuse to always provide a credit for Longshore Act payments against the liability found under the State act. Even Virginia, a conservative State, at times only allows a partial credit.

We have a system that is great for lawyers, who can team up with physicians who profit from over treatment, and both make a lot of money, including getting to try cases twice thanks to dual jurisdiction. Workers quickly learn if they say they are in too much pain to work, and they go to the physician their lawyer directs them to, they will obtain tax free compensation benefits. The system rewards those who lie and cheat, while honesty must be its own reward, because the Longshore Act does nothing to encourage nor reward the honest worker and honest physician.

Many States have reformed their workers' compensation system in recent years, and the Longshore Act is long overdue for reform. It is time to put limits on the amount of compensation injured workers receive, so they have some incentive to return to work and remain a productive member of the workforce. That is not only best for society, in the long run, it is also best for the workers as well. We need to take back control of the medical care, and limit the worker to a choice of a panel of physicians. The potential for medical malpractice lawsuits, and the natural relationship between a patient and doctor, will serve as an adequate check and balance on the fact the employer gets to select the panel of physicians. We need to assure the administration of the system is even handed, and does not tolerate fraud and abuse. Finally, we only need one legal system to adjudicate claims, and thus we need to eliminate the duplication of dual State and longshore jurisdiction. The only ones who will be hurt by these changes will be the lawyers, and those workers and physicians who have abused the system. For the honest workers and physicians, these changes will not adversely affect them in any material way. To the contrary, the changes will eliminate the temptation to abuse the system.

I realize for those who have never seen the Longshore Act system in action, my comments no doubt sound harsh and overstated. I assure you, however, that if you read the published decisions in the Benefits Review Board Service, you will see that the system is out of control. Not that my comments result from a personal unhappiness with the system. To the contrary, I very much enjoy litigating these cases, I make a very nice living litigating cases under the current system, and yes I win some of my cases. However, if I view the system as a member of society, and not as a lawyer who profits from the system, it is all too clear the Longshore Act needs to be fixed.

Senator ISAKSON. I would acknowledge that there is nothing better than a panel with a good plaintiff's lawyer and a good defense lawyer on the same panel, and I think we have got that today.

I think I heard correctly, and I will open the questioning and then go to my colleague, Senator Murray, I think I heard from everybody that I think you said, Mr. Postol, nobody is suggesting that we go to the State workers' compensation systems and everybody

else said—you said, Mr. Embry, that the Longshore Act was reasonably good. You, Mr. White, said you support it, but with modification and changes, I think, is that correct?

Mr. WHITE. That is exactly correct.

Senator ISAKSON. And I think Dr. Victor primarily commented on quality of care issues and didn't address that one or another, and because of his opening testimony, not knowing much about it, I would accept that, so thank you very much.

I have a question that is going to sound like it comes out of left field or right field or the bullpen, but one of my responsibilities or our responsibilities on this committee is workplace safety. Because of some other issues and other professions that had nothing to do with ports, the issue of drugs has come up in terms of drugs and their relationship to accidents. And then recently with Senator Coleman, I was in Mexico looking at the Port of Manzanilla and some of the other ports, offshore, out of the United States with regard to homeland security and port security, and the issue of drug testing of longshoremen came up.

I am asking this question because I think I will get the right answer out of this group. I was told that there is no drug screening for employment on the dock workers and that of those that are organized, that is a contractual situation where you can't drug test them. Do you know if that is correct or not? Does anybody know?

Mr. POSTOL. I am not sure about pre-employment. I think that you are correct for pre-employment, you can't do a physical exam, you can't do a drug test. But I believe after most work accidents, the collective bargaining agreement does allow for drug testing. Now, unfortunately, that is sort of after the fact.

Senator ISAKSON. That leads me to the second question of the Longshore Act. What does the Longshore Act say about use of drugs or alcohol?

Mr. POSTOL. Unfortunately, it says, or maybe fortunately, that it is not a defense unless you can show that the sole reason of the accident was drugs. I have been doing this 26 years. I have never won that defense, because how do you show it is solely the cause? The worker is up high. He falls down. He is dead and he has off-the-chart alcohol or drugs. But there is no way to know that the drugs alone caused the accident because he could have slipped off the ledge because he wasn't looking. So there is a provision in there, but it is useless.

Senator ISAKSON. Yes, sir?

Mr. EMBRY. I have been practicing for 32 years. I have represented over 10,000 workers. Never once has anybody ever suggested that those workers were taking drugs or that alcohol had caused their injuries. As a matter of fact, about 10 years ago, Electric Boat Corporation closed down their lunch period so that workers couldn't go across the street where there were a number of bars, and just sort of interestingly enough, what they found was that when they did away with that, work-related accidents increased in the half-hour after the lunch period compared to when they used to be able to go across the street to be able to get a shot.

I am not suggesting that we ought to let them go across the street to get a shot. All I am simply suggesting is that the Electric Boat found it was not a problem. I have found in 32 years of doing

this that it is not a problem. These are workers who are working in dangerous conditions. They are not particularly excited about getting drunk or high.

Mr. POSTOL. If I could just mention, I have seen cases where it happened, but I wouldn't call it a big problem. I mean, when it happens, it is very upsetting, but if you talk as a percentage of injuries——

Senator ISAKSON. My question was less the effect on this and more the fact of whether or not drug testing was something that was legal to be done on some of these workers in work other than longshoremen and I think you have answered my question there and I appreciate it.

Mr. Embry, I think you would be the right person to kind of expound on the other side of this question. A couple of the people testifying, again, Mr. Postal and Mr. White, referred to the lump-sum payments and people going right back to work. Do you want to address that for a second?

Mr. EMBRY. There are a couple of things that are true. First of all, generally, the lump sums are driven by the employer. They are the ones who want to get a lump-sum settlement. The Consumer Reports looked at that in their article, "Workers' Comp: Falling Down on the Job" in February of 2000. I have offered copies of that to the committee. We also prepared a film called "Disability Nightmare," which I have offered.

What we find is that it really is not a significant problem. It is important to remember that these are workers who are out there struggling every day to try to make ends meet. They are merely trying to take care of their families. That is what is expected of them and that is what they are really trying to do. What we really need to do is figure out something to be able to take care of them when these injuries occur, Senator.

Senator ISAKSON. So your contention would be that the employer really more often than not is encouraging the lump-sum settlement to get the case behind them and——

Mr. EMBRY. And occasionally, the workers do, too. There are situations where the worker—where everybody is better having the case over for psychological reasons. Every single time that worker gets a workers' compensation check, that tells them that he is less than a human being, that he can't go back to work and that he can't support his family. Sometimes, he is simply better off getting the settlement and going out and trying to rebuild his life as much as he can, or at least have that grinding fact of that check coming in every week and also knowing that somewhere out in those bushes, there is somebody who is watching to see whether or not he is shoveling his snow and following him around, and that every year he is going to be sent to another doctor trying to cut him off, and that occasionally, he will be cut off for no reason whatsoever, simply to try to force him to settle. And that was what "Workers Compensation: Falling Down on the Job" reported by Consumer Reports.

It is a fact of life that sometimes there are settlements, Senator, but, in fact, in most of my widows' cases, and I primarily represent widows whose husbands have been killed by asbestosis and mesothelioma, I frequently recommend to them that they don't settle so

that they can have that lifetime protection and the employers go berserk because they would really much rather save lots of money by settling the case cheaply.

Senator ISAKSON. Thank you. Dr. Victor, I think I heard you say, and correct me if I am wrong, that when an injured worker selected their doctor, their personal doctor, that both the outcomes and the costs were generally predictably reasonable. It was when that worker selected somebody about whom they had no knowledge that the costs went high. Did I hear that right, or——

Mr. VICTOR. That is correct.

Senator ISAKSON. OK. So you are suggesting that if the family doctor treats somebody, the worker can pick him, but in the absence of that, who should pick him?

Mr. VICTOR. In the State workers' compensation system, in many of the States, the employer controls the choice of physician. In the other roughly half the States, the worker controls by State law. And the debate is always, which of those two approaches is correct. This research suggests that there is a middle ground. So in States like Florida and Tennessee, where the employer controls the provider, it may be that you can improve worker satisfaction by letting the worker see their family doctor and without materially increasing the employer's cost. But in a State like Massachusetts, you may be able to get lower cost for employers without adversely affecting workers' outcomes by saying, "unless you go see your family doctor, the employer gets to choose."

Senator ISAKSON. Let me just give you a hypothetical situation. I am a worker. I am hurt. I go to my family doctor, who is an internal medicine doctor. My injury is musculoskeletal. He says, "you need to go to an orthopedist," and he refers me. Did the study go that far, even on the referral basis, the cost was better than when the guy was just going out on their own?

Mr. VICTOR. The designation of a—this is based in part on surveys of several thousand injured workers and asking them, who chose their doctor, and especially who chose the doctor who they considered the primary treater, the one who controlled the course of care. And so this study looks at those doctors, regardless of whether it was really the family doctor or not, where the worker said, "I saw this doctor previously for some unrelated condition." So it is really who is controlling the course of care.

Senator ISAKSON. Senator Murray.

Senator MURRAY. Thank you, Mr. Chairman.

Mr. Postol and Mr. White, both of you reflected some real frustrations with the way the Longshore Act is currently written and administered. Mr. Postol, you had quite a few statistics you threw out. I was wondering if either one of you have any comprehensive data or statistics that you can share with our subcommittee to support your positions as we look at this program.

Mr. POSTOL. I am just going by what my clients tell me as to how many injuries they have versus, frankly, how many files I end up litigating.

Senator MURRAY. So to the best of your knowledge, you don't have any back-up data to verify some of the numbers that you threw out? There isn't any——

Mr. POSTOL. No, but we could obtain it. I mean, it is not very hard. The employers keep track of how many injuries they have and how many they have who voluntarily started the comp. So I don't have it, but it could be obtained.

Senator MURRAY. Mr. White, do you have any comprehensive data or statistics that you can share with the subcommittee on some of the concerns that you put out there?

Mr. WHITE. Nothing comes immediately to mind. There is data out there, I am sure, though, that we could provide you from NIAX and elsewhere.

Senator MURRAY. Good. If either of you do have that, I think it would be helpful for the committee.

Dr. Victor, let me ask you, you stated in your testimony that a number of States around the country have already reformed their State workers' compensation laws and others, including my home State of Washington, are looking at some changes. I would like to know, based on your years of experience in analyzing State workers' compensation programs, do you think it would be appropriate for Congress to look at State workers' compensation models to replace the Longshore Act as the best means of protecting our maritime workers, or——

Mr. VICTOR. I am not sure about State as a model to replace. I think the States do a lot of innovation, some successful, some not, so that I think there are really important lessons that can be incorporated.

Senator MURRAY. What are some of the inherent problems with our State workers' compensation plans?

Mr. VICTOR. Well, the answer depends upon the State. Mr. Postol mentioned the low maximum weekly benefit in New York, which most observers agree——

Mr. POSTOL. Mr. Embry.

Mr. VICTOR. I am sorry, Mr. Embry. There are other States like Tennessee and Florida where our studies show workers have serious access to care problems. On the other hand, there are States like Massachusetts and States like Wisconsin where the costs to employers are reasonably affordable and where the outcomes that we see, as workers report to us in these surveys, are really quite good.

Senator MURRAY. In your testimony, you said that there hasn't been any conclusive analysis done yet to determine whether these changes that are made to some of the programs have had the desired effect of reducing costs. Do you see a need for some kind of comprehensive analysis of State workers' compensation programs that might help us reach some conclusions?

Mr. VICTOR. Would a researcher like to see more research? Yes.

[Laughter.]

Senator MURRAY. That was a free toss.

[Laughter.]

I think that it would be helpful. I think we hear a lot of anecdotal evidence and I think we need to be careful that we don't use anecdotes to produce laws. It never works very well.

Mr. Embry, let me ask you a few questions. Some of the testimony I heard today focused on the need for reform of the Longshore Act, claiming it was too generous for the employee with

the process slanted in favor of the injured worker. I know you are familiar with some of the provisions of the law. Do you think the law is working as the congressional authors originally intended it to?

Mr. EMBRY. I think without a doubt. The Congress intended that there be wage replacement that was relatively prompt, not full, but some, and that there be health care. My clients by and large can get health care, although, frankly, a huge amount of our time is spent arguing with the employers over whether or not they are going to pay for the health care, and that is a problem. But in general, I think the Longshore Act provides a fairly good remedy.

There are some statistics that indicate that there are problems, and you made reference to them yourself in terms of the 1990 study. As I indicated, I primarily represent widows whose husbands have died of work-related lung cancer and mesothelioma and I can tell you that from 1990 to the year 2006, it hasn't changed one bit. Not a single case is ever accepted voluntarily. The widows are always dragged out for a year or two before their benefits start. Even in cases of mesothelioma, where their doctor agrees that the injury is work-related, it takes a year or more before the widow begins to receive her benefits. And, frankly, by that time, the claimant has died and his medical care wasn't paid for by the employer.

So, consequently, we know that there are still some problems with the Longshore Act in terms of delay of benefits and cutting off benefits, and we know that that is also true in the State system because the Rand Corporation has looked at a number of States, including California, New Mexico and Wisconsin and found that, in general, they replace less than half of the wage loss that workers suffer, and that was before the reforms. There was some discussion about how the system works in Texas and Florida. Workers in Texas and Florida can't get a doctor. If they can get a doctor, they can't get workers' compensation, so they go on welfare and Social Security.

Senator MURRAY. The Longshore Act was last amended in 1984. Do you think that we should relook at it? Do you think there are some potential reforms that we should be looking at?

Mr. EMBRY. I think the act is working relatively well. It is not perfect. I have a couple of things I would like to have done. They would have some things that they would like to have done. But I was around and helped write the 1984 amendments and I can tell you that there was blood on the table before we got an agreement at that time. I would be hesitant at this time to reopen that agreement.

One of the things that happens frequently, lawyers think that once you have won the case, the situation is done. Employers recognize that once you cut the agreement, you come back 4 or 5 years later and then try to get Congress to give you a better deal. We made a deal in 1984 and I want to stick with it and I haven't heard any reason why we shouldn't stick with it yet.

Senator MURRAY. All right. Thank you very much. Thank you, Mr. Chairman.

Senator ISAKSON. Mr. Embry, do you ever file both Longshore Act and State workers' compensation?

Mr. EMBRY. Yes, sir.

Senator ISAKSON. Why do you do that?

Mr. EMBRY. As I pointed out to you, Your Honor—Your Honor, Mr. Chairman——

[Laughter.]

Senator ISAKSON. I am a lot of things, but I ain't that, so go ahead.

Mr. EMBRY. OK. For a simple reason. I practice in Connecticut primarily. As I pointed out, under the Longshore Act, the widows' benefits are one-half of the wages of the deceased. In Connecticut, they are two-thirds of the deceased's wages. So Connecticut has decided to be more liberal and to give better benefits to widows and I try to get those benefits that Connecticut has decided that it wants its widows to have. I really don't think there is anything wrong with States' rights in saying that if Connecticut wants to give two-thirds, they should. I think there is something wrong with the system where Congress says the widows are only worth—only get the top half of their husband's wages.

Senator ISAKSON. And in doing that, this is one of those unique systems where you actually have two insurance programs under which somebody can recover, is that correct?

Mr. EMBRY. It is one of those situations in which there are two programs that provide parallel benefits. Sometimes, they can recover under both. In most cases, the Longshore Act is the primary one, in Connecticut. It might not be true, for instance, in Alaska or a State that has more liberal benefits.

Senator ISAKSON. All right. I want to ask Mr. White a question which probably is going to elicit a response from both attorneys, but I want to make sure I heard you right. You were talking about last responsible employer being responsible for an injured person's benefits, is that correct?

Mr. WHITE. Yes, sir.

Senator ISAKSON. As I understood last responsible employer, that meant the employer on whose job the worker was hurt, which led me to believe that there must be a reach-back on some of these benefits. You get a guy who was covered under the Longshore Act. He worked on the Port of Savannah, for example, retired or left, went to work in Savannah for a local construction company, not maritime related, filed a workers' compensation claim. Can he go back under cumulative effects or whatever and go under the Longshore Act, even though his injury took place on a non-covered——

Mr. WHITE. That is correct. Even if the injury was never reported and no matter how minor, it can go back.

Senator ISAKSON. Under the Longshore Act?

Mr. WHITE. Under the Longshore Act.

Senator ISAKSON. Is that correct, gentlemen?

Mr. EMBRY. No. First of all, the last employer doctrine comes under the *Cardillo* rule which applies to occupational diseases and doesn't apply to acute trauma. What you can do—it is a different rule, and that is suppose you have a worker who falls off a ladder and ruptures three disks, goes to his doctor and gets a return to work but has a fusion and every time he bends over, his back flares up and he has to go out of work for another 6 months. He works and struggles with the shipyard for another 2 or 3 months and gets

laid off because he can't report to work. He goes to work handing out shoes at a bowling alley. Six months later, he bends over and injures his back again because he has picked up the shoes. If you can prove that that injury occurred in the shipyard and that is what is causing the disability now, it is a shipyard injury, it is a Longshore Act, then the longshore employer is required to continue to pay for it.

But the actual last employer rule simply says that the last longshore carrier to have exposed him to injurious stimuli, the last one to expose him to the asbestos that caused his mesothelioma is the one that pays, and it is a terrific rule compared to the rules that they have in, for instance, Rhode Island and Connecticut, where they bring in every employer who has ever spoken to him and then they spend 5 years arguing among themselves as to how to cut up the pot into 15 different pieces while the widow sits around and has no money coming in.

Mr. POSTOL. Senator, if I could just——

Senator ISAKSON. Mr. Postol.

Mr. POSTOL. The problem is twofold. One, an occupational disease, if a man works at a shipyard for 1 day and is exposed to asbestos goes and works in an asbestos mine for the next 35 years, then develops an asbestos-related disease, the longshore employer pays, not the asbestos mine. So while the rule was meant to be the last employer rule, and therefore was meant to even out eventually, you know, sometimes you go and work for my employer and vice versa, what has happened is it became the last maritime employer. So we hire workers from the coal mine or the asbestos mine, we pay. If they hire our workers and then they continue to expose them, even if their exposure was 99 percent of the exposure, the longshore employer still pays. Obviously, that is not a good system.

The second problem——

Senator ISAKSON. Do you agree with that, Mr. Embry?

Mr. EMBRY. That is, in general, part of the rule. What the actual rule is is that you then bring a claim against that asbestos mine that exposed them for the 30 years and they are the ones that really wind up, in most cases, because you have the dual State and Federal remedies, which you always have under those circumstances where the person is walking in and out of jurisdictions.

That was precisely the reason why the 1972 amendments were enacted, to try to expand jurisdiction and to try to take away a little bit of those types of litigation issues that put more money in my pocket and Mr. Postol's pocket and not enough money into workers' pockets.

Mr. POSTOL. But unfortunately, the employer can't bring a claim against the asbestos mines. The worker has either generally no incentive, because he is already being paid by us, or if he does bring it, and in most of the cases they do not, we are left holding 100 percent of the bag, then the State sometimes says, "well, we are not going to give you credit for your longshore payments." So the dual jurisdiction and the last employer rule have combined to make a gigantic mess.

In addition, there is a second problem and I think Mr. White referred to it, and that is the cumulative trauma injuries. Longshore-

men don't work for a particular employer. There could be six, eight stevedore companies in the port and every day they will work for a different one, depending on which one has ships in. So then they get carpal tunnel syndrome or cumulative arthritis and then the question is, who is responsible? Unfortunately, the Longshore Act is not clear on this point at all, so what happens is the claimant's attorney says, "sue them all." So all eight stevedores get claims against them.

It is a defense lawyer's dream come true because every defense lawyer in the city gets a client. In fact, most of the time, they run out of defense lawyers, so I have to go down to Savannah or Charleston because they ran out of longshore defense lawyers because there were too many employers. And then all the employers end up spending a huge amount of attorney fees figuring out which one is liable and the claimant's attorney just sits there. His meter is running, but frankly, he doesn't have to do much of the work.

Mr. EMBRY. Can I respond to that just briefly, Senator?

Senator ISAKSON. I just love lawyers. They are wonderful.

[Laughter.]

Mr. EMBRY. I know. I love them, too, Senator.

[Laughter.]

One of the things that you just heard, I think, points up some of the problems we have. We were told that we are supposed to bring the claim against the State employer, not the longshore employer, but you are being told that if we bring two claims, we are bad people. How can we bring a claim against the subsequent asbestos manufacturer or mine and not bring it against the ship owner? One we bring under the Longshore Act, because that covers them. One we bring under the State act, because that is what covers them. It is not double-dipping.

The Longshore Act specifically was amended in 1984 to say that to the extent that you get State benefits, the longshore carrier gets credit for it and they can cut off their payments. So as soon as I win that State case under the Connecticut Workers' Compensation Act for the widow, the longshore benefits cease and all those benefits transfer over to the State carriers. So that problem has already been addressed in 1984 and that is what we are hearing today.

Mr. POSTOL. Well, I am not saying——

Senator ISAKSON. I will tell you what we are going to do here now. I am abusing my time and we have a lovely lady here from the State of Washington, who is a Senator, who has time to ask questions, so let us let her ask any that she has.

Senator MURRAY. Mr. Chairman, as a preschool teacher, I know when time is up. I am fine. I am ready to move on to another hearing.

Senator ISAKSON. OK. Then I guess I will give you the last word, Mr. Postol, but not a long word.

Mr. POSTOL. I don't blame them. What I blame is there is uncertainty in the system the way the law is written, which is why it does need to be reformed, and second, having a dual system is inherently wasteful. That is the problem. So I am not blaming them. I am saying the system needs to be fixed.

Senator ISAKSON. Let me thank all of you for coming today. We wanted to have this hearing and we got a lot of good information

and probably will have more information that we will seek from all of you and would keep the record open. If you have anything you would like to submit to us based on things that came out in the questioning, please don't hesitate to give it to us on a timely basis, which I guess is 10 days, and we appreciate that very much.

I look forward to working with the ranking member as we take a look at this issue and see if there are any things that we need to do or how we might need to do any of those things.

Thank you. We are adjourned.

[Additional material follows:]

ADDITIONAL MATERIAL

BOYD & KENTER, P.C., ATTORNEYS AT LAW,
KANSAS CITY, MO, 64106–2317
May 12, 2006.

SENATE HEALTH, EDUCATION, LABOR, AND PENSIONS COMMITTEE,
U.S. Senate,
Washington, D.C. 20510.

Re: H.R. 940—Longshore and Harbor Workers Act Amendments

HONORABLE COMMITTEE MEMBERS: It is a mistake to use model amendments to H.R. 940 and its progeny, based upon recent amendments to the States' workers' compensation acts. The majority of those changes eliminate traditional access and restrict historic coverage once in the programs. By way of illustration, Missouri's laws were amended effective August 28, 2005 which is described as destructive to the historic *quid pro quo*. That refers to the elimination of the injured workers' access to a jury trial in exchange for employers promises to furnish timely and appropriate medical care and wage loss replacement.

A lawsuit has been filed in State court which challenges the constitutionality of this massive overhaul, effectuated by the 40 substantive topic changes in my State's Senate Bills No. 1 & 130.

The changes which have occurred in Missouri are not progressive, but are regressive. For example, over 90 percent of injuries traditionally covered since 1926 are now eliminated. Injuries have not been commensurately reduced, so the effect is clearly to transfer costs to (a) private health insurance, if available; (b) Medicaid; (c) Medicare; (d) taxpayers whose local taxes support charitable health care for which the recipient does not qualify for public or private insurance; (e) hospitals and physicians who in turn ultimately pass on the increased costs of uninsured care to those who are insured; and (f) the individual.

To further illustrate this point, and the balance of what is wrong with using Missouri's recent experience as a template for Federal action, I provide you with a copy of S.B. 1 & 130, the Petition from the constitutional challenge, and, the brief we have filed in this action which supports why the changes are fundamentally and constitutionally flawed. It is respectfully suggested that other States are now attempting to compete with Missouri, by incorporating portions of this law into pending legislation in various stages of development. Kansas Governor Sebelius recently vetoed a bill which contained language borrowed from S.B. 1 & 130.

Many of these changes are viewed in the light by their proponents of giving businesses a competitive advantage over businesses in adjoining States. Such changes create a race to the bottom, and lose sight of the initial purposes served by the creation of States workers' compensation acts of providing for the safety, health and welfare of America's workers injured or made sick by occupational exposures.

Please consider these statements and enclosures as you deliberate upon the important measures before you. Injured workers and their families depend upon you to watch out for their interests, and to continue to provide them with the current levels of protection so as to avoid shouldering the additional costs of injury and death caused by their work.

Sincerely yours,

BOYD & KENTER, P.C.

[Editors Note: Due to the high cost of printing, previously published materials submitted by witnesses (2005 Missouri legislative amendments, the Petition and Brief) may be found in the committee files.]

PREPARED STATEMENT OF LEWIS S. FLEISHMAN

Thank you for providing me the opportunity to express my thoughts about reform of the LHWCA. My name is Lewis S. Fleishman. I am a practicing attorney in the State of Texas. I have practiced law for almost 30 years. Since 1985 I have concentrated my practice in maritime law. Over the past 2 decades, I have handled multiple hundreds of cases arising under the LHWCA. I have also acted as a mediator in LHWCA cases on numerous occasions. These were instances where both parties—the injured worker and the carrier—agreed to use my services in order to resolve a dispute. I am proud to have resolved all claims but one while acting as a mediator. I have a strong background in administrative law. I was a prosecuting assistant attorney general for the New Mexico Attorney General's office during the early 1980's. I prosecuted cases arising under the Uniform Licensing Act for a vari-

ety of administrative agencies. Since I commenced the practice of law in Texas, I have worked for a maritime defense firm as well as a claimants' firm. Accordingly, because of my varied background, I bring what I believe to be a balanced view to the table regarding the Longshore Act. I have presented as a speaker regarding the Longshore Act in the following programs:

- University of Texas, Admiralty and Maritime Seminar (Houston, Texas)
- Loyola Annual Longshore Conference—Three separate articles and Presentations (New Orleans, La.)
- Signal Mutual Indemnity Assn. Annual Roundup (Connecticut)
- U.S. Department of Labor Roundtable Discussion (Dallas, Texas) Houston Claims Association (Houston, Texas) Lorman Workers' Compensation Seminar (Houston, Texas)

It is my understanding that the Subcommittee on Employment and Workplace Safety is considering testimony regarding amendments to the LHWCA. Specifically, I appreciate that testimony will be taken regarding the possible adoption of a different compensation and medical model based on recent State revisions. As a day-to-day practitioner, I have watched the system in Texas evolve into the present flawed model. The present system here has a number of defects which should preclude the hasty adoption of a similar system on a Federal scale without significant empirical data. For every horror story of abuse presented by an employer and carrier, I am confident that an equally compelling presentation can be provided by an injured worker or his family. However, data and specifics are what should be required before launching into a wholesale revision of the LHWCA. While imperfect, it is a significantly better system than what takes place in the Texas State system. The State system here in Texas suffers from at least the following major shortcomings:

1. The unavailability of a sufficient number of orthopedic specialists to treat injured workers. This is caused by insufficient payment for services rendered and administrative red-tape.
2. An increased burden on the public health care system caused by specialists not wanting to treat injured workers.
3. An increased burden on the public health care system caused by a voluntary system of compensation. The workers' compensation system in Texas is voluntary in nature. Therefore, in cases where the employer opts out of workers' compensation coverage, there is no satisfactory remedy for the injured worker short of a negligence lawsuit brought against the non-subscribing employer. That defeats the goal of a State workers' compensation system wherein truly injured workers are treated in a timely fashion so that they can re-enter the labor force and become productive members of society once again.
4. A decreased ability of injured workers to receive compensation, medical care or retraining because the Texas State system is voluntary, not compulsory.
5. An increased burden on the administrative agencies running the compensation program because injured workers are unable to obtain adequate legal help to pursue claims regardless how legitimate or serious the injury.

In closing, I have attached a reference to the WFAA-TV investigative series entitled State of Denial, which revealed a Texas workers' compensation system in crisis. While I cannot vouch for each of the articles referenced in the attachment, I am confident that a General Accounting Office (GAO) study or a credible analysis containing hard data should be a pre-requisite to any significant changes in the LHWCA. Anything less is to abandon a system refined over the course of a century without proper reflection.

PREPARED STATEMENT OF BRUCE C. WOOD

The American Insurance Association welcomes the opportunity to comment on issues arising under the Longshore and Harbor Workers' Compensation Act, the Federal program providing workers' compensation coverage to our Nation's maritime employers and employees.[1]

It has been 22 years since the Longshore Act was last amended and as long as Congress has sought to evaluate how the program is operating. Among the States, a focus on workers' compensation is continual, and it is not uncommon for legislatures to amend their statutes on an almost annual basis. All of which is to say that

[1] The American Insurance Association ("AIA") is a national property and casualty trade association of over 460 members writing a major share of workers' compensation throughout the Nation, including the Longshore Act. AIA is headquartered in Washington, D.C. and operates with six regional offices throughout the country and retained counsel in every State.

Congress' review of this program is long overdue. Since 1984, the world has changed considerably and so has the world of workers' compensation. States, many of which faced a financial crisis in the late 1980s and early 1990s, acted—some repeatedly—to rein in rapidly escalating benefit system costs and an equally dysfunctional insurance mechanism which had driven employer costs to record high levels while leading many insurers to exit the voluntary insurance marketplace. The result was a national financial crisis in workers' compensation, with annual multi-billion dollar losses that drove some insurers into insolvency, including the largest writer in Texas, and drove several State workers' compensation systems into an insurance meltdown, where coverage in voluntary markets was all-but-non-existent and residual market deficits—all requiring to be paid by these same insurers—reached billions of dollars.

Out of this blowtorch experience evolved sharpened disability management practices intended to improve availability of high-quality medical treatment from physicians with more of a focus on occupational medicine, improve determinations of permanent partial disability by ensuring a more consistent determination of impairment and a streamlined means of paying PPD benefits, strengthen workplace causation for injuries with weak workplace nexus, and enhanced return-to-work incentives. State systems responded and the financial crisis abated. State workers' compensation programs face continued cost challenges, with recent actions in California and Texas indicative of the States' response.

Unlike the atmosphere of a cost crisis that accompanied the 1984 amendments, the current program is not in the midst of crisis, although there are many aspects of the program that demand attention and for which improvements should be incorporated. Several of the act's design flaws are inherent to the Longshore Act and its unique maritime jurisprudence. However, many weaknesses are common to other workers' compensation programs and, for this reason, there are lessons to be drawn from the States' experience that can benefit the Longshore Act. Several problems are "unfinished business" from the 1984 amendments—issues unresolved all this time—while others are of more recent vintage. Congress should not wait until the next cost crisis to address the Longshore Act. It should recognize that the Nation's injury compensation program for maritime workers is in need of updating. In view of the States' record of "constant gardening," it is truly remarkable that the year Congress last amended the act this year's college graduating class was born.

From what key program weaknesses does the act suffer and how might they be remedied? How would a new-century Longshore program look? Let's start with unfinished business:

I. DUAL JURISDICTION

The Longshore Act is the only workers' compensation program in the Nation that permits filing under, and recovery from, multiple workers' compensation statutes. This quirk stems from the lack of clarity under the 1972 amendments, in which jurisdiction was extended landward of the water's edge to adjoining areas on the docks, and the U.S. Supreme Court's 1980 decision in *Sun Ship* v. *Pennsylvania*. In that decision, the Court held that the extension of Federal jurisdiction landward under the 1972 amendments, to encompass areas that heretofore had been solely within the jurisdiction of State workers' compensation programs, supplemented and did not supplant State jurisdiction. Thereafter, injured workers have been able to file under both Federal and State systems.

Although Longshore benefits are normally more generous than State system benefits—indeed, Longshore benefits generally are the most generous in the Nation, by far—there are States in which some feature provides benefits more generous than Longshore. In these circumstances, the act effectively permits an injured worker to pick and choose his benefits, not unlike a Chinese menu approach to workers' compensation. Although Congress attempted to address this flaw in the 1984 amendments, by incorporating an offset, the design of the offset itself is flawed, so as to be ineffectual, and the mere presence of a dual remedy drives up insurance coverage costs, as employers are required to purchase coverage under both systems. Furthermore, the assertion of dual coverage drives up administrative costs, as employers and carriers are required to administer claims under both State and Federal systems. This makes no sense.

Some States, not waiting for Congress to act, have acted on their own to withdraw State coverage where Federal coverage exists—New Jersey, Florida, Louisiana, Texas, Oregon, and Washington among them. However, this is a patchwork remedy. Far better for Congress to fix this problem with a comprehensive, Federal solution by eliminating dual jurisdiction and finally, after decades of inaction, overturn *Sun*

Ship and vindicate the intent of the 1972 amendments to preempt State workers' compensation laws where Longshore jurisdiction exists.

II. LAST EMPLOYER RULE

The "last employer" rule, common under State workers' compensation laws, holds that the last employer to injuriously expose a worker assumes all liability for that claim. This is sound workers' compensation policy, in successive employment situations, because it obviates the need for dispute and litigation between and among employers over which percentage of responsibility each employer might bear. Longshore Act case law also recognizes the "last employer" rule and has for decades. The problem arises, again with friction between Federal and State workers' compensation programs, where a worker's last employment was covered by State workers' compensation but prior employment—perhaps decades earlier—was subject to the Longshore Act. In that circumstance, the Longshore Act does not recognize the last employer as the last State-covered employer but the last maritime employer. Thus, an employee injured under a State workers' compensation program can still file a claim under the Longshore Act, despite not having been employed last—or for decades—by a maritime employer. However, if the worker first worked in State-covered employment and later in Longshore-covered employment, the Longshore employer also is responsible in this circumstance. This is a jurisdictional quirk that guarantees the maritime employer loses—whether the coin flip comes up heads or tails. This is inequitable, another flaw left unaddressed by the 1984 amendments.

III. SPECIAL FUND

The Longshore Special Fund serves a variety of purposes, but its initial role, and still its most costly feature, is to subsidize employers for the cost of certain pre-existing injuries or conditions, where a subsequent injury has combined with the pre-existing condition or injury to produce disability more extensive than what would have obtained through the subsequent injury alone. The noble purpose behind such so-called "second injury" or "subsequent injury" funds derives from a desire to encourage hiring (or retention) of disabled ("handicapped") workers. The theory—in contrast to the practice—was that an employer would be more willing to hire (or retain) a previously disabled worker if it knew that with a subsequent injury, it would not be saddled with the entire cost of the new and greater disability. Second injury funds were enacted in many State workers' compensation laws following World War II, to accommodate returning disabled veterans. The Longshore Act incorporated the same mechanism, in which all employers are assessed by the Labor Department annually for the expected cost of Special Fund claims during the ensuing year. Thus, the Special Fund, like Social Security, is financed on a pay-as-you-go, rather than on an incurred, basis. With a qualifying pre-existing condition, an employer (or its insurer) is responsible for the first 104 weeks of benefits and the Special Fund reimburses the employer (or its insurer) for the rest, perhaps lifetime benefits.

As noble has been the objective, there has never been an iota of demonstrable evidence under the Longshore Act or any State workers' compensation second injury fund that these funds have resulted in the hiring or retaining of a single "handicapped" worker. Even the theoretical foundation for these funds is obsolete with enactment of the Americans With Disabilities Act, affording employees a direct remedy for disability-related discrimination. All second injury funds have succeeded in accomplishing is permitting more hazardous employers to slough off their liabilities onto other employers who are assessed regardless of whether they ever have a claim qualifying for second injury fund "relief." Second injury funds benefit normally larger employers, those employers with more claims and therefore more second injury fund claims—at the expense of smaller and/or safer employers who experience fewer claims and perhaps no second injury fund claims.

Not surprisingly, the Special Fund has gotten into financial trouble. Indeed, this has been the experience with second injury funds under State workers' compensation systems. Injured workers still receive their benefits, but these funds have accumulated enormous unfunded liabilities; they have encouraged employers to "hunt for a pre-existing injury" as a means of limiting liability, created dispute, litigation, and generated unnecessary administrative costs as a consequence. The General Accountability Office has estimated several years ago that the Longshore Special Fund has an incurred deficit of over $2.5 billion. Many States, recognizing the financial time bomb these huge unfunded liabilities involve for their employers—assessments are not unlike another employment "tax"—have abolished their second injury funds, shutting off new claims and running off old liabilities which will take decades. Since 1990, 15 States have abolished their second injury funds, a clear trend in the States.

Actuarial analyses of their unfunded deficits are astounding: Connecticut ($6 billion), Florida ($4.5 billion), Georgia ($1 billion), and Kentucky ($2.5 billion). (New York's second injury and related funds' deficit is also expected to total multiple billions, but the actuarial analysis completed about 4 years ago at the behest of the Workers' Compensation Board has never been released).

The Special Fund's annual assessment currently is nearly $140 million—an effective "tax" on all maritime employers who must pay this tribute year in and year out.

The Special Fund's problems were recognized in the early 1980s, in the years leading up to the 1984 amendments. However, there was insufficient support among some employers for repealing the Fund, because the perceived benefits still outweighed the "costs" of assuming all losses directly. Congress adopted a different assessment formula designed to impose a "user fee" as a means for requiring employers using the Fund to pay proportionately more. However, this did not fix the underlying problem of rising incurred liabilities, a problem that has only worsened in subsequent years.

Since the 1984 amendments, second injury funds have come under intense scrutiny from the accounting profession, increasingly disturbed by reports of mounting unfunded liabilities and a recognition that insurers were obligated for those liabilities indefinitely. To enhance balance-sheet transparency, in 1997, the American Institute of Certified Public Accountants (AICPA), endorsed subsequently by the Federal Accounting Standards Board (FASB), adopted revised accounting rules (SOP 97-3) governing funds, such as insurance guaranty funds and second injury funds, requiring publicly traded companies to recognize on their balance sheets their proportionate share of a second injury fund's ultimate loss. In certain circumstances, this loss-recognition was not necessary, where the assessment was premium-based rather than loss-based, and the loss-generating event was therefore deemed to be premium-owed and not occurrence of the loss (work-related injury). For insurers, this change not only has forced footnoting their financial statements but effectively reduced the capital otherwise deployable into the workers' compensation market.

In 1999, 2 years later, the National Association of Insurance Commissioners (NAIC) adopted revised accounting rules ("statutory accounting" rules) governing all insurers that largely mirrored the AICPA rules but went one step further, exempting insurers from booking incurred second injury fund losses only where the assessment was based on premium and collectible through a separately stated policy surcharge.

The Special Fund's assessment formula is loss-based, meaning insurers are subject to the accounting profession's mandate for recognizing their proportionate share of the Fund's over $2.5-billion incurred deficit and constituting a drag on deployable capital.

A modernized Longshore Act would repeal the second injury component of the Special Fund and alter the assessment basis to premium, collectible through a policy surcharge.

So much for "old business." As to "new business," there are three key areas where the Longshore Act embodies weak or flawed policies, correction of which would not only restrain benefit system costs, but improve an employer's (or its insurer's) ability to manage disability:

- Ensuring delivery of high-quality medical treatment consistent with evidence-based medicine, reflected in nationally recognized treatment guidelines;
- Encouraging return-to-work through a more equitable indemnity payment formula, one that ensures injured workers receive benefits based more closely on actual pre-injury wages; and
- Enhancing anti-fraud protections.

IV. ENSURING DELIVERY OF HIGH-QUALITY MEDICAL TREATMENT

(A) *Medical Networks.*—One clear trend among the States over the past 15 years has been law changes enhancing the ability of employers (or their insurers) to direct treatment, through medical networks similar to what workers encounter with their health insurance. Treatment networks preserve for workers the ability to select treating physicians from within a network while giving employers the ability to negotiate volume prices and, by virtue of a contractual relationship with a network, minimize treatment disputes while preserving for workers the ability to dispute treatment, first through network processes. The Longshore Act, as do still about half of State workers' compensation laws, permits an employee an unfettered authority to select the treating physician. The problem is that frequently these treating physicians are unfamiliar with workers' compensation—they may only treat a few cases annually—and be unfamiliar with the nature and intensity of treatment required

to treat a work injury. Neither do they have any preexisting relationship with the insurer, and they may have been selected by a claimant's attorney whose client's position is already legally adverse—all of which produces an atmosphere for greater dispute.

What is central to recognize is the workers' compensation medical treatment is not the same as medical treatment delivered under other payment systems. First, its objective differs from that provided under an employee's health benefits plan, in that such treatment is inseparably part of a disability program, with the overarching objective of returning injured workers to work. Therefore, certain treatment, appropriate in nature and intensity to a health benefits claim, may not be appropriate in treating a work injury. Second, workers' compensation medical treatment remains first-dollar coverage, without dollar or duration limitations, or co-pays. Thus, demand controls common on the group health side do not exist on the workers' compensation side. For these reasons, it is imperative for the workers' compensation system to have tools to manage medical treatment that are critical to comprehensive and cost-effective disability management.

In the years since 1984, extensive research has been conducted on delivery of medical treatment via networks, and the results confirm the critical importance networks can play in not only delivering necessary treatment but in quicker return to work. The Workers' Compensation Research Institute (WCRI) has produced analysis in recent years that has shown:

• ". . . [W]orkers' compensation networks are associated with much lower medical costs, and . . . those savings do not increase the duration of disability or income-benefit costs among claims treated exclusively or predominately within those networks . . . [N]etwork care is less expensive because prices in network are lower; but the more important factor is that providers in workers' compensation networks use fewer services than do providers out of network." "Are workers' compensation networks saving money by cutting back care and, in turn, increasing both the duration of disabilities and payments for those disabilities? Although we cannot say for certain, we found no evidence in the data we analyzed . . . In fact, we know that indemnity costs for claims treated in workers' compensation networks were lower than the costs for non-network claims. In every injury type, across all three States [studied], the duration of disability payments was shorter and indemnity costs were lower among claims treated in workers' compensation networks." [*The Impact of Workers' Compensation Networks on Medical Costs and Disability Payments*; Workers' Compensation Research Institute; Executive Summary].

• "Workers' compensation networks are generally associated with lower medical costs—16–46 percent lower if the patient is treated exclusively by network providers, and 0–11 percent lower if the patient is treated predominantly, but not exclusively, by network providers . . . Lower network medical costs . . . do not appear to increase the indemnity benefit costs among claims treated predominantly in network . . ."

• "The initial non-emergency visit plays an important role in determining the extent of network/non-network costs differences. When the initial non-emergency visit is with a network provider, this is the single largest factor that determines higher subsequent involvement by network providers. We found that network involvement in the initial visit was associated with very large differences in network penetration rates . . . Claims treated exclusively within workers' compensation networks has medical costs that were between 16 and 46 percent lower than claims treated exclusively outside of networks. Claims treated predominantly within the network had medical costs that were between 0 and 11 percent lower than similar clams that were predominantly treated outside of the network . . ." [*The Impact of Initial Treatment by Network Providers on Workers' Compensation Medical Costs and Disability Payments*; Workers' Compensation Research Institute; Executive Summary].

• "Comparing cases in which the worker selected the primary provider with otherwise similar cases in which the employer selected the provider, we found that costs were generally higher and return-to-work outcomes poorer when the worker selected the provider. Workers reported higher rates of satisfaction with overall care *but similar perceived recovery of physical health"* [*emphasis* added]. [*The Impact of Provider Choice on Workers' Compensation Costs and Outcomes;* Workers' Compensation Research Institute; Executive Summary].

A modernized Longshore Act would be informed by this extensive research.

(B) *Evidence-Based Medicine and Treatment Guidelines.*—"Evidence-based medicine (EBM) uses analysis and summaries of scientific studies to: (1) guide effective clinical decisionmaking; (2) ensure the consistent use of proven medical practices; and (3) reduce unproven, ineffective care . . . EBM has evolved into a different style

of medical practice based on knowledge and application of the medical literature underlying each clinical decision rather than anecdote or personal experience."[2]

The application of EBM in workers' compensation is a newly evolving "best practice," having been incorporated into recent reforms adopted in California and Texas. It is a construct through which both employers and employees can be assured the injured worker is receiving medical treatment that is consistent with that recognized by the scientific literature. EBM evolved from early 1970s studies by the British Health Service and leading commentators within the United Kingdom, the Canadian Medical Association, American Medical Association, and in Federal legislation enacted with the 1989 Omnibus Budget Reconciliation Act creating the Agency for Healthcare Policy and Research (AHCPR).

Through EBM can be developed treatment guidelines that are consistent with an accepted hierarchy of quality evidence and the application of "clinical judgment and logic to formulate recommendations for practice or practice guidelines."[3] According to the National Institute of Medicine (NIM), "high-grade" guidelines would evince: Validity ("Guidelines should consider outcomes and costs of alternative courses of action, the strength of the evidence, and the relationship between the evidence and the recommendation"); Reliability and Reproducibility ("Practice guidelines should be reliable and reproducible, so that another panel of experts would reach the same conclusions and practitioners would interpret and apply them similarly in similar circumstances"); Clinical Applicability ("Guidelines should apply to as many patient groups as possible"); Clinical Flexibility ("Guidelines should identify known or expected exceptions to their recommendations"); Clarity ("Guidelines should use unambiguous language, precisely defined terms, and logical, easy-to-follow presentation"); Multidisciplinary development ("Guidelines should be developed with representatives of key participants"); Scheduled Review ((("Guidelines should include provisions and timetables for periodic review as evidence or professional consensus change"); Documentation ("Documentation should include methods, participants and their affiliations, evidence used, assumptions and rationales"); and Disclosure ("Developers should disclose all affiliations and economic interests and be independent of political, legal, and economic pressure and influence.")[4]

CWCI's study of EBM concluded that:

> Evidence-based medicine offers significant promise to curb excessive, unnecessary, and sometimes harmful levels of medical care in the California workers' compensation system. The results of this study added to the results of other research, make it clear that under correct conditions, such guidelines can both raise the quality of care and reduce costs.[5]

CWCI's study focused on the benefits of guidelines promulgated by the American College of Occupational and Environmental Medicine (ACOEM). Foreshadowing actual experience under the California reforms which adopted the ACOEM Guidelines, CWCI's analysis concluded that there was:

> significant variation and excess levels of radiological imaging testing . . . significantly higher than ACOEM-expected levels of medical services for physical medicine, chiropractic and surgery, and longer than expected durations of temporary disability. The gulf between actual and expected levels of treatment illustrates the scope of the challenge that lies ahead—yet it also points to the huge potential to reduce unnecessary or ineffective treatment and generate significant savings. To reduce medical costs and assure the highest quality of care, as intended by the Legislature, will require all stakeholders to integrate EBM guidelines into their medical practices, administrative processes, and judicial determinations.[6]

CWCI's post-2004 reform research:

> . . . found no evidence to support the assertion that providing treatment outside ACOEM-recommended targets improves medical treatment or return-to work outcomes for injured workers with low back soft tissue injuries. On the other hand, among claims involving physical therapy and chiropractic services, those in which the level of care remained within the ACOEM guidelines were associated with reduced treatment duration, faster return to work, and reduced medical and indemnity payments. Beyond that, claims in which services exceeded ACOEM-recommended levels were strongly associated with higher total

[2] Harris and Swedlow, *Evidence-Based Medicine & the California Workers' Compensation System: A Report to the Industry*, January 2004, p. 2.
[3] Ibid, p. 4–5.
[4] Ibid, p. 6–7.
[5] Ibid, p. 40.
[6] Ibid, p. 40–41.

(medical and indemnity) claim costs, prolonged treatment, and delayed return to work, as evidenced by the greater number of temporary disability days. In some cases the costs were substantial . . .[7]

A modernized Longshore Act would integrate evidence-based medicine and require treatment to be in accordance with a high-quality treatment guideline, as ACOEM has been proven to represent.

(C) *Utilization Review*: Closely linked to the application of evidence-based treatment (and the incorporation of treatment guidelines) is an accepted process for ensuring expeditious and balanced review of treatment. Here again, the private sector over the past 15 years has developed accepted "best practices," not only for workers' compensation but all medical treatment. Utilization review standards consistent with those promulgated by the Utilization Review Accreditation Commission (URAC). Established in 1990, URAC certification of networks and providers, recognized by 35 States and three Federal agencies, is intended to assure regulators of those certified abide by high standards of professional health care.

A modernized Longshore Act would recognize URAC-consistent utilization review standards as a benchmark for ensuring injured workers receive the quality of medical treatment consistent with treatment standards.

V. ENCOURAGING RETURN-TO-WORK THROUGH A MORE EQUITABLE INDEMNITY PAYMENT FORMULA, ONE THAT ENSURES INJURED WORKERS RECEIVE BENEFITS BASED MORE CLOSELY ON ACTUAL PRE-INJURY WAGES

In addition to providing all reasonable and necessary medical treatment, workers' compensation replaces lost wages, generally for the duration of the disability. However, in order to encourage return-to-work, workers' compensation does not seek to replace 100 percent of lost wages but a portion thereof. Historically, most workers' compensation laws provided for replacement of two-thirds of the worker's pre-injury average weekly wage—a formulaic determination, itself a matter of some dispute among State systems and the Longshore program. When workers' compensation laws were first enacted, nearly a century ago, two-thirds of average weekly wages generally was close to two-thirds of actual pre-injury wages, but with actual pre-injury income now distorted by progressive income tax laws, post-injury benefits based on two-thirds of gross wages—tax-free—commonly replaces far more than two-thirds of actual pre-injury wages—sometimes close to or more than 100 percent. Furthermore, actual wage-replacement ratios are skewed by the effect of different tax brackets, meaning that wages replaced of workers in different tax brackets are highly variable.

In its 1972 report, the National Commission on State Workmen's Compensation Laws, recommended that States adopt a benefit formula tied to net pay instead of gross pay. The Commission made 83 other recommendations, and Congress incorporated the thrust of one other into the 1972 amendments—a maximum benefit of 200 percent of the national average weekly wage—but ignored the net pay recommendation. In the years since, several States have adopted a spendable income formula—typically either 75 or 80 percent of after-tax income.

The Longshore Act also includes an archaic formula for determining a worker's average weekly wage, one that inflates actual pre-injury wages and therefore guarantees, in conjunction with the distortions of a gross pay benefit formula, that post-injury benefits bear no relationship to a percentage of actual pre-injury earnings that would encourage return to work.

A modernized Longshore Act would incorporate a spendable income benefit formula and rationalize average weekly wage determinations, and thereby inject stronger return-to-work policies.

VI. FRAUD

State workers' compensation laws over the past 20 years have incorporated stronger tools for combating fraud. These include authority to deny a claim based on fraudulent representations, and to require restitution of ill-gotten benefits. They also have imposed obligations on system participants to report suspected fraud to State workers' compensation or insurance department fraud bureaus for investigation and/or referral for prosecution. The Longshore Act does not include these tools.

A modernized Longshore Act would (1) provide an affirmative defense for a knowingly false statement, thus precluding the improper payment of benefits in the first place; (2) provide for restitution for benefits paid as a result of fraud; and (3) require

[7] California Workers' Compensation Institute; Bulletin; No. 05–14; September 28, 2005.

employers, insurers, medical providers, and other system participants to report suspected fraud, while ensuring civil immunity to those with the obligation.

CONCLUSION

The Longshore Act is a relic of an earlier part of the last century. Although it has been amended a number of times since its enactment in 1927, no changes have been made in virtually a generation—changes at the time that were necessary to staunch the bleeding caused by amendments adopted in 1972 that inflated system costs exponentially. The world of workers' compensation has passed by the Longshore Act. Congress should meet its responsibility to review the act and to consider reforms that would reflect improved disability management policies, while ensuring injured workers receive improved medical treatment and are able to promptly return to work. That is the promise of any successful workers' compensation program. It is a promise that the Longshore Act currently fails to meet.

[Whereupon, the committeee was adjourned]

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