Statement on Workers' Compensation

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Written Statement to the Committee of the Whole of the Illinois Senate

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President of the Senate John J. Cullerton, Senate Majority Leader James Clayborne, Jr., Senate President Pro Temp Don Harmon, Senate Minority Leader Christine Radogno, and Senators of the Illinois Senate:

Thank you for the opportunity to provide this written statement to you. I apologize that I was unable to join you in person for this important meeting of the Committee of the Whole of the Senate of the State of Illinois.

My name is Emily Spieler. I am currently the Edwin W. Hadley Professor of Law at Northeastern University in Boston, where I served as Dean from 2002 to 2012. In the past, I served as the head of the workers' compensation program in the State of West Virginia. I have written and spoken frequently on issues relating to state workers' compensation program, and I have served on committees relevant to this issue for the National Academy of Social Insurance, the National Academies of Science, and the American Bar Association. I served as Chair of the Federal Advisory Committee to the Department of Energy on the implementation of the Energy Employees Occupational Injury Compensation Program Act, and I currently chair the federal advisory committee on Whistleblower Protection Programs for the U.S. Department of Labor. I was a member of the seven-member Steering Committee appointed by the American Medical Association to provide advice on the development of the Fifth Edition of the *AMA Guides to the Evaluation*. That committee was disbanded before the edition was completed, and five of us from the committee then published "Recommendations to Guide Revision of the Guides to the Evaluation of Permanent Impairment" in the *Journal of the American Medical Association*.[1] I provided testimony regarding the Sixth Edition of the Guides to the Subcommittee on Workforce Protections of the Committee on Education and Labor of the U.S. House of Representatives in 2010.[2]

Introduction

Workers' compensation is a critical component of our torts and social insurance system. Changes to the program must be assessed in light of the benefits that the system offers to employers, insurance carriers and to injured workers. Alterations can affect the system as a whole in unintended ways, and can also have impact on the civil justice system more generally.

This written statement provides a brief description of the background of workers' compensation programs and the recent amendments in Illinois, and then addresses two issues in the proposed workers' compensation legislation in Illinois: the change to a "major contributing cause" standard of proof for compensability of work-related health conditions; and the use of the AMA *Guides* for the

[1] Emily Spieler, Peter Barth, John F. Burton, Jr, Jay Himmelstein, Linda Rudolph (2000) Recommendations to Guide Revision of the *Guides* to the Evaluation of Permanent Impairment. *JAMA* 283 (4) 519-523.

[2] My testimony can be found at http://republicans.edlabor.house.gov/uploadedfiles/11.17.10_spieler.pdf .

evaluation of permanent disability.

Background and history

As you know, workers' compensation is the social benefit system designed to provide income replacement benefits and medical care to people who have been injured or made ill by their work. After an injury, a worker generally requires a temporary period of healing, during which he or she may not be able to work and will, if eligible, collect temporary total disability (TTD) benefits and receive medical treatment for the injury. The length of this period may vary, but at the end of it the health condition will stabilize and the individual will be viewed as having reached maximum medical improvement (MMI). Hopefully – and in most situations – the worker will then return to work. If he or she suffers from any permanent impairment, workers' compensation programs provide compensation for the permanent effects of the compensated injury or illness. In almost all cases, if the individual is partially (not completely) disabled, he or she will receive permanent partial disability (PPD) benefits. These benefits are calculated in different ways in the different states. In very severe cases, the worker may receive permanent total disability (PTD) benefits, generally paid for life or until retirement age (depending on the state). Awards of PTD benefits are, however, extremely rare, even if an individual is unable to reenter the workforce successfully.

Workers' compensation laws were enacted in the first quarter of the 20th century with the support of workers, unions, employers and employers' association, including the National Association of Manufacturers. The broad support for the new programs reflected concerns about the uncertainties that were produced by the litigation system that existed at that time. Employers had been largely protected from these lawsuits in the 19th century because of defenses that were available to them at that time. But the law began to change, some workers successfully pursued lawsuits and received large jury verdicts, the number of cases that were being filed rose, and uncertainty for employers rose simultaneously. At the same time, many seriously injured workers did not meet the requirements for tort litigation, and they became destitute.

In the end, the workers' compensation programs reflected important political compromises. Workers would be eligible for limited benefits and medical care, without proof of negligence. In fact, the burden of proof was deliberately kept at a low level: all things being equal, the claimant would win. The system was intended to be quick, fair and efficient. Employers could purchase insurance to cover the risk, and pass this cost along to consumers. Workers, in return, would give up their right to sue an employer for an occupational injury – and thus employers received blanket protection from tort liability through the creation of this alternative remedy.

Despite the initial broad support from all parties, the program has come under attack annually in state legislatures. Workers and unions charge that benefits are inadequate and that legitimately injured workers do not receive timely and adequate benefits; employers and insurers assert that costs are too high, that benefits are awarded too liberally, and that economic development is stifled. This debate has been going on for decades.

To put this into context right now, the National Academy of Social Insurance publishes an annual report on benefits, coverage and costs of workers' compensation. The most recent report, published in 2014, showed that, nationally, workers' compensation costs per $100 of private payroll declined substantially from the

early 2000s through 2010, and have been relatively steady since that time.[3] In Illinois between 2010 and 2012, cash benefits paid to injured workers declined by 4.0 per cent and the amount of benefits paid per $100 of covered wages declined by $0.19. [4] Overall, the total of workers' compensation benefits, including medical benefits, fell by 10.1 percent in this period in Illinois.[5] Illinois' employers' costs per $100 of payroll declined between 2008 and 2012 by $0.11, compared to a national average decline of $0.03. [6]

Declines in benefits have been attributed to both changes in statutory benefits and to limitations on the compensability of claims. In Illinois, legislative changes in 2011 added a requirement that the injured worker meet a burden of proof of preponderance of the evidence; limitations on the choice of treating physician; limitation on awards for carpal tunnel syndrome; and introduction of the use of the AMA *Guides to the Evaluation of Permanent Impairment*. The decreases in Illinois are likely a reflection of these 2011 statutory amendments. In fact, workers' compensation costs in Illinois are declining at a faster rate than most other states. [7]

To the extent that the intent of the 2011 amendments was to reduce costs to employers and benefits to workers: they are working. These costs and benefits have declined in both absolute terms and relative to declines in other states. Whether this is a good outcome as a matter of social policy is another matter.

At the same time, according to data provided to me by Professor John Burton, the profitability of workers' compensation insurance for the insurance industry remains robust and demonstrates further that employers' costs are declining. He noted, "The National Council on Compensation Insurance estimated the effect of HB 1698 would reduce workers' compensation premiums by 8.8 percent on September 1, 2011 (the effective date of the bill). Subsequently, the NCCI calculated that experience with the Illinois law warranted a 3.7 percent increase in premiums as of January 1, 2012 (shortly after the law went into effect), followed by 5.1 percent and 6.0 percent declines in premiums due to the experience with the Illinois law on January 1 of 2013 and 2014." [8] NCCI indicates that there was an underwriting profit for the industry of 4.0 percent of premium in 2013, ahead of the national average of 1.6 percent; this profit is enhanced to 9.1 percent when investment gains and taxes on transactions are added to the calculation.[9]

Proposed Changes in Illinois, 2015

Despite the declining costs of the Illinois workers' compensation system and the health of the insurance market, further changes are now proposed that are specifically directed at reducing benefits to injured workers. As is always the case in these discussions in state legislatures, the proposals are focused on improving the competitive business environment of the State by decreasing employers' costs.

At the outset, it is important to note two things:

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[3] Ishita Sengupta, Marjorie Baldwin, and Virginia Reno (2014) Workers' Compensation: Benefits, Coverage, and Costs, 2012, Figure 5, available on line at https://www.nasi.org/sites/default/files/research/NASI_Work_Comp_Year_2014.pdf.

[4] *Id*, Table 11, 12.

[5] *Id.,* Table 9.

[6] *Id.,* Table 14.

[7] *Id.,* Tables 9, 12.

[8] Statement of Professor Burton to the Committee of the Whole of the Illinois House of Representatives on May 5, 2015, citing National Council on Compensation Insurance (NCCI) (2014) Annual Statistical Bulletin: 2014 Edition, Exhibit 2.

[9] *Id*, citing NCCI Statistical Bulletin at 129-130.

First, the current Illinois workers' compensation system is not out of line with the systems in most other states. State systems vary in many respects. There is always some aspect of another state's system that is less generous to workers, and some that are more generous. This does not mean that the system as a whole is better or worse: they are simply different.

Second, there is absolutely no evidence that reducing workers' compensation costs has the beneficial effect of increasing a state's ability to attract industry and jobs.

Below I address more specifically two of the current proposals.

Major Contributing Cause Standard of Proof

The traditional approach in workers' compensation combined three elements of proof that were intentionally more liberal than civil litigation; the idea was that proof would be easier, but benefits would be much more limited. First, the employee did not have to show the employer was negligent. Second, the employee would be awarded benefits if the evidence was equal on both sides. The Illinois statute was previously amended to require that the worker win by a preponderance of the evidence, making this standard more stringent. Third, the worker could win if the work injury was a non-trivial source of the disability. The thinking behind this was that the worker was able to do his or her work prior to the injury; the injury tipped the balance, and therefore the worker should receive the necessary medical care and wage replacement benefits while he or she was recovering and for wages that were lost as a result of the injury.

Governor Rauner now proposes that Illinois change this third element: "the causation standard should be raised from an 'any cause' standard to a 'major contributing cause' standard. The accident at work must be more than 50% responsible for the injury compared to all other causes."[10] With this change, a worker who is working at her job, but who has an underlying condition, who then is hurt as a result of work and cannot continue to work, would be ineligible for benefits unless she could prove that the injury caused at least 51% of the disability.

This approach has a number of problems that are worth noting.

First, workers who have been working despite underlying impairments will now be unable to receive any benefits if these underlying impairments significantly contributed to the new disability. These workers – who were able to perform their job duties at the time of the work-related accident – will now be without wage replacement benefits if they are off work due to the injury. They will not have an alternative form of income, unless their employers voluntarily provide short term disability benefits. Their medical costs will be transferred to their general health insurance provider, despite the work-related cause of their disabilities.

Second, as the level and complexity of required proof for cases is raised, the use of experts in the cases will also rise. Both injured employees and the workers' compensation carriers will be using experts to determine not only the fact that the disability was due to work, but will need to look at underlying impairments and compare the level of contribution to the level of disability. The entire medical history of

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10 http://ilturnaround.com/page.asp?content=issue_workerscomp_causation&g=il_turnaround#sthash.vSApmAGw.dpuf

the injured worker thus becomes relevant to the claim. This invites a higher level of litigiousness in a system that was supposed to be simple. It is an invitation for dueling experts, increased costs for the parties, more hearings and delays, more inefficiencies (for everyone), and higher administrative costs.

Third, this invitation to litigation undermines the relationship between employees and their employers. Most workers who collect workers' compensation benefits return to work, many of them to work for their pre-injury employer. Litigation between an employee and employer never contributes to a positive working relationship.

Fourth, the exclusion of workers with work-related injuries from the workers' compensation system may open up the possibility of civil actions against employers – a possibility that the system was precisely designed to prevent. The Illinois Constitution guarantees the possibility of a remedy for an injury:

> RIGHT TO REMEDY AND JUSTICE - Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.[11]

I am not an expert on Illinois constitutional law. But another state, interpreting constitutional and statutory provisions that were similar, found that an injured worker had a constitutional right to proceed with a civil action. In Oregon, the state constitution says, "Every man shall have remedy by due course of law for injury done him in his person, property, or reputation." [12] The worker had an underlying respiratory condition and was seriously injured when exposed to sulfuric, hydrochloric, and hydrofluoric acid mist and fumes at work. The administrative system found that the exposures were not the "major contributing cause" of his respiratory condition and, therefore, that the employee had not suffered a "compensable injury" under the workers' compensation statutes. Because the worker believed that he had suffered an injury at work as a result of his employer's negligence, he brought a civil action. Although the legislature amended the statute to indicate that workers' compensation was the exclusive remedy "even if a claim is not compensable," the Oregon Supreme Court ultimately held:

> [If] a workers' compensation claim alleging an injury to a right that is protected by the remedy clause is denied for failure to prove that the work-related incident giving rise to the claim was the major contributing cause of the injury or condition for which the worker seeks compensation, then the exclusive remedy provisions of ORS 656.018 (1995) are unconstitutional under the remedy clause.[13]

It is certainly possible – perhaps even probable – that the Illinois courts would reach a similar result.

This development would make no sense, from either an economic or a policy perspective. Most workers will not be able to prove negligence. Enough workers will, however, be able to bring law suits so that the amount of expensive litigation will rise. At the same time, workers who are off work (often for short periods) will not receive benefits that would help them bridge the gap when they are not receiving their regular wages. This is precisely the problem that state legislatures confronted 100 years ago when they first enacted the workers' compensation systems.

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[11] Ill. Const. art. I, § 12.
[12] Or. Const. art. I, § 10
[13] Smothers v. Gresham Transfer, Inc., 332 Or. 83, 86, 23 P.3d 333, 336 (2001)

Adoption of the AMA Guides to the Evaluation of Permanent Impairment

According to the website that summarizes Governor Rauner's Turnaround Agenda,

> The 2011 reforms added the use of AMA Guidelines as one of five factors in determining permanent partial disability (PPD) awards. The AMA Guidelines are more conservative in determining the awards and thus it was hoped that allowing Commissioners to use these guidelines would reduce awards. While complete data on the use of AMA guidelines since 2011 is not yet available, a study of 20 cases from the IWCC shows a 12.24% reduction in awards when using the AMA guidelines.

This is an explicit attempt to simply reduce the level of PPD benefits that are awarded to workers with permanent impairments. That is: some savings have been achieved, and more can be achieved by making more use of the AMA *Guides*. This may be true, but a system that allows Commissioners – who are presumably experts – to assess the value of these *Guides* in a particular case, may be one that more accurately assesses the individual worker's level of disability.

The generally accepted standard is that workers' compensation benefits should replace two-thirds of the wages lost because of the work injuries. Notably, studies of PPD benefits have shown that benefits do not meet this standard. [14] The expanded use of the AMA Guides will further the race to the bottom in the adequacy of benefits.

I think it is important to understand the nature of the AMA *Guides* in addressing this important issue.[15] The book is organized by organ system, providing a methodology for examination and then rating (numeric quantification) of the extent of impairment, currently expressed as a percentage of whole person impairment (WPI). Many of the specific WPI ratings have not changed over time, despite significant advances in the understanding of impairment, functional loss and disability.

It is critical to understand that the key element that these ratings add to the existing medical literature is the numeric quantification of impairment. It is this aspect of the *Guides* that has encouraged its expanding use. But there are significant problems with the use of this system in workers' compensation claims.

First, the impairment ratings are not now, nor have they ever been, evidence based. The Sixth Edition acknowledges again that the whole person impairment percentages are based on "normative judgments that are not data driven" that still "await future validation studies."[16] In the years since publication of the First Edition, the AMA has never made any attempt to conduct validation studies. Each new edition claims that it is objective – and to have corrected the errors of the past edition(s). Although the Sixth

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[14] *See* Allan H. Hunt (2004*)* Adequacy of Earnings Replacement in Workers' Compensation Programs. *W.E. Upjohn Institute for Employment Research (*providing a comprehensive survey of adequacy of benefits); Leslie I. Boden, Robert T. Reville and Jeff Biddle (2005) "The Adequacy of Workers' Compensation Cash Benefits", in Karen Roberts, John F. Burton, Jr. and Matthew M. Bodah, (eds), Workplace Injuries and Diseases: Prevention and Compensation: Essays in Honor of Terry Thomason, W.E. Upjohn Institute for Employment Research, p. 37-68 (finding that in the five jurisdictions they examined - California, New Mexico, Oregon, Washington, and Wisconsin - permanent partial disability benefits only replaced between 16 and 26 percent of earnings losses in the ten years after the workers' were injured).

[15] Much of this discussion is excerpted from my prior testimony, cited at n. 2, *supra*.

[16] AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition, p. 6, 26

Edition sets up a new approach so that the evaluation of different organ systems is placed within similar diagnosis-based grids, there is still no validation of the percentages that are attached to diagnoses nor is there any attempt to validate consistency across organ systems.

Second, although the *Guides* is predominantly used for assessment of work disability, there has never been any attempt to correlate the percentage values to work disability. In fact, ability to work is excluded from consideration in setting the percentage. To the extent the Sixth Edition now appears to be creating correlation by including functional assessment, the *Guides* use activities of daily living ("ADLs"), which do not correlate with work disability.

Third, the development of these numbers is neither scientific nor transparent. The numbers are developed based upon consensus of a small number of physicians. This persists in the Sixth Edition, which gives "consensus-derived percentage estimate of loss." [17] Only 53 specialty-specific experts contributed to the Sixth Edition; the extent of involvement of each is unclear; the process for derivation of new numbers is not described. This is consistent with past editions. There is not, and there has never been, a possibility for public discussion and input into the process, despite the use of the Guides in federal and state governmental programs.

Fourth, the *Guides* presumes that 100% impairment represents a state close to death – a scale inappropriate for assessing the impairment of workers. The scale used to generate whole person impairment ratings is a critical component of the validity of the numerical ratings. The appropriate top of the impairment scale for assessing workers should reflect a level of functional loss related to inability to perform tasks necessary for independent life and capacity to work. By defining 100% as comatose or approaching death, and 90+% as totally dependent on others, the values for all impairments are inappropriately depressed.

Fifth, the *Guides* combines impairments by reducing the value of each subsequent injury after the first injury, failing to reflect the true effect of multiple injuries. The scale that presumes that 100% is equivalent to death forces the devaluation of all injuries after the first. The Guides, including the Sixth Edition, therefore requires that each subsequent impairment be reduced in value. Thus, if the first impairment is valued at 25% for one limb, and the same injury occurs in a second limb, the value for the second limb will be less than 25%, and the total impairment will be less than 50%. From the standpoint of real life, this makes no sense at all. If I were to lose the use of one arm, and then lose the second arm, surely I am more – not less – impaired by this second loss!

Sixth, the *Guides* is not broadly acceptable to the many constituencies involved in workers' compensation. As I noted in 2000, "Acceptability depends in part on the origins of the relative values and in particular on whether there is some scientific basis for the ratings."[18] Plainly, this has not been achieved.

The last edition of the *Guides* – the Sixth Edition – added additional problems. Key changes were made in the definitional structure. Ratings for the most severe impairments for non-musculoskeletal organ systems were reduced significantly, including for some common occupational diseases such as pulmonary disease. This edition claimed to add consideration for functional impairments, but held

[17] Id., p.5.
[18] Spieler et al, *supra* n. 1, at 523.

these within inappropriately limited boundaries. Pain and range of motion were both devalued.[19]

The attraction of the AMA Guides – that these ratings create an objective and accurate measure of disability – is simply not true.

Conclusion

Together, these proposed amendments would unquestionably lead to reductions in both the number of claims that are approved for compensation, and the level of PPD benefits that are awarded. If the goal is simply to reduce costs, they would be effective for that. If the goal is to maintain a reasonably fair system of compensation for injured workers – and to avoid opening employers up to civil liability – then they are seriously flawed.

Thank you.

[19] A more complete description of the problems with the Sixth Edition can be found in my prior testimony, see *supra* n. 2.