

WORKERS' COMPENSATION (C) TASK FORCE

Workers' Compensation (C) Task Force, April 8, 2019, Minutes

W:\National Meetings\2019\Spring\TF\WC\Contents.docx

Draft Pending Adoption

Draft: 4/15/19

Workers' Compensation (C) Task Force
Orlando, Florida
April 8, 2019

The Workers' Compensation (C) Task Force met in Orlando, FL, April 8, 2019. The following Task Force members participated: John G. Franchini, Chair (NM); Lori K. Wing-Heier, Vice Chair (AK); Allen W. Kerr represented by William Lacy (AR); Keith Schraad represented by Erin Klug (AZ); Ricardo Lara represented by Ken Allen (CA); Andrew N. Mais represented by George Bradner (CT); Stephen C. Taylor represented by David Christhilf (DC); Trinidad Navarro represented by Michael Gould (DE); David Altmaier represented by Sandra Starnes (FL); Colin M. Hayashida represented by Kathleen Nakasone (HI); Doug Ommen represented by Travis Grassel and Andria Seip (IA); Robert H. Muriel represented by Judy Mottar (IL); Vicki Schmidt represented by Heather Droge (KS); Nancy G. Atkins represented by Patrick O'Connor (KY); James J. Donelon represented by Warren Byrd (LA); Steve Kelley represented by Tammy Lohmann (MN); Chlora Lindley-Myers and Angela Nelson (MO); Mike Causey represented by Fred Fuller (NC); Marlene Caride represented by Mark McGill (NJ); Glen Mulready represented by Cuc Nguyen (OK); Andrew Stolfi represented by TK Keen and Tashia Sizemore (OR); Jessica Altman represented by Michael McKenney (PA); Elizabeth Kelleher Dwyer represented by Rachel Chester (RI); Larry Deiter (SD); Julie Mix McPeak represented by Brian Hoffmeister (TN); Todd E. Kiser represented by Tracy L. Klausmeier and Reed Stringham (UT); Michael S. Pieciak represented by Kevin Gaffney (VT); and James A. Dodrill (WV). Also participating was: Peg Brown (CO) and Edwin Pugsley (NH).

1. Adopted its 2018 Fall National Meeting Minutes

Mr. Byrd made a motion, seconded by Director Deiter, to adopt the Task Force's Nov. 17, 2018, minutes (*see NAIC Proceedings – Fall 2018, Workers' Compensation (C) Task Force*). The motion passed unanimously.

2. Heard a Presentation from the NCCI

Susan L. Donegan (National Council on Compensation Insurance—NCCI) said state insurance regulators are concerned with the drivers behind workers' compensation rate decreases. Over the past several years, claims frequency has declined. The NCCI said the downward trend in workers' compensation rates is driven by technology, safer workplaces, improved risk management, and the long-term shift from manufacturing to the service sector. Ms. Donegan said the NCCI has no expectation that this downward trend is going to change course. She said, through year-end 2017, the NCCI's financial data has continued to reflect decreasing frequency and moderate severity in most jurisdictions. The frequency decline is a result of lower incident rates for all workers, which is not just being driven by recent changes in the singular workforce demographic segment.

Ms. Donegan said Mr. Bradner raised a concern in November 2018 regarding an insurer that thought it was looking at a slight increase and trend change. She said the NCCI has done more than 20 interviews with insurers and asked them questions regarding whether they were seeing any increases in frequency and severity. She said insurers are not seeing this trend. She said the workers' compensation insurers are seeing stability and decreasing frequency. For some insurers, the economic growth in recent years may generate an increase in payroll and a rise in the number of inexperienced workers. The NCCI's research shows that these factors lead to less of a decrease or increase in frequency from its current level; however, claims reported prior to the recording of additional audit premium can exacerbate that result. Ms. Donegan said until the audit dollars come in, it might appear to be an increase in frequency; however, when looking at the earned but not recorded premium, it may help to determine whether this is an actual factor. She advised not to jump to conclusions until the data matures. She said there is a dramatic downward trend regarding workers' compensation rates in most states.

Jeff Eddinger (NCCI) said the major driver behind loss cost decreases is declining claims frequency. He said the average cost per claim has moderated in recent years. Medical severity was increasing above the wage inflation rate in the past. Currently, the medical and indemnity costs are moving in line with wage inflation.

Mr. Eddinger said the NCCI recently published research about demographic changes. He said younger workers, including inexperienced workers, are showing lower frequency than that of older workers. This is the opposite of the way the demographics looked 10 years ago. He said the number of females in the workplace has been increasing, and females have lower frequency than males. However, he noted that the frequency decline is driven by lower incident rates across the board; there has not been a demographic shift. Mr. Eddinger said the NCCI found that the aging workforce has almost no impact on frequency.

Draft Pending Adoption

Mr. Eddinger said, during the November 2018 meeting, state insurance regulators said million-dollar claims no longer seem to be an anomaly and are happening more often. He agreed with this statement, noting that the NCCI recently released a study regarding mega claims, which are claims of at least \$10 million. The research shows that there has been an uptick in the number of mega claims in recent years. Mr. Eddinger said these large claims are not impacting the overall loss cost or rate filing due to the drop in the number of claims.

Mr. Eddinger said the NCCI does not believe insurers will be tightening their underwriting, causing the residual market to grow. He said the residual market has remained stable over the past five years and has remained around 8%. In the past, where there has been tightening of underwriting, there has been growth in the residual market during times when there was perceived loss cost inadequacy. For the most part, rate decreases are being approved as they are filed. The NCCI believes loss costs are adequate across all the states where the NCCI makes the filings.

Ms. Donegan said the focus needs to be on rate adequacy. The NCCI's goal is to bring forward recommendations that are adequate. She said this is because solvency is a component of rate adequacy.

Mr. Bradner asked if the rate increases in Hawaii are due to a state-specific issue. Ms. Donegan said the rate increases in Hawaii are state-specific, as there were a couple of mega claims and court decisions that influenced the rate increases.

Mr. Bradner asked if the federal Affordable Care Act (ACA) has had any impact on rate decreases. Mr. Eddinger said the NCCI has studied the impact of the ACA on workers' compensation rates and found almost no impact.

Director Wing-Heier asked about the 20 insurers the NCCI spoke to regarding declining rates and wanted to know if any of them believed the rates are going down too quickly, as this is what she hears from some insurers in Alaska. Ms. Donegan said there were some insurers that said there was a slight increase in frequency over the past 12 months. She said these insurers were in the vast minority.

Ms. Klug said there is a big range in decreases among the states. She asked for the NCCI to speak to the key differences among the states. Mr. Eddinger said the claim frequency in some of the states is dropping faster than the average. Some of the states that are not seeing larger decreases are those that are not seeing as much of a decrease in claims frequency. Mr. Eddinger said there can be some large claims that drive a lower decrease. He said looking at the data for the past two years shows that most states have seen a double-digit rate decrease.

Mr. Gaffney said a one-year snapshot of the rate decreases does not reveal a lot. He said looking at three years of data would be helpful. He asked if there is anything the NCCI has modified or adjusted and what their expectations are regarding trends and how this affects the classification system. Mr. Eddinger said most rate filings for the past three years included decreases. He said the trend lines are beginning to move. When the NCCI sees good experience, it must adjust the trend lines. Mr. Eddinger said this is done in a conservative way.

Mr. Gaffney asked if the NCCI has experienced this type of three-year decrease in the past. Mr. Eddinger said the NCCI has not seen this type of decrease for this many years in a row. He believes the one component that is in line now is the claims severity. He said payroll is the base in workers' compensation, so if payroll goes up in line with claims severity, then nothing needs to change. Any gain from claims frequency is going to go right through to the loss cost levels.

Mr. Byrd said looking at workers' compensation rates for the past 25 years in Louisiana, the rates are down approximately 50%. He said the trend is clearly decreasing due to workers' safety and education.

Mr. Bradner said he can point to Connecticut, which has experienced a 50% reduction in loss costs over the past five years. He said workers' compensation is a heavily regulated line of business. He said insurers can run with higher profit margins, and he asked if insurers are concerned that because workers' compensation is heavily regulated, they would like to have more profit but cannot get what they really would like. Ms. Donegan said insurers are doing well regarding profit.

Ms. Donegan said the NCCI's unified adaptive project is allowing them to put their manuals in a searchable online format. She said the project includes artificial intelligence (AI) and provides a more intuitive environment that provides information faster and more accurately. The NCCI is in its second phase of development and anticipates a rollout of a new modernized scopes manual. The NCCI plans to do a full rollout of its manuals in 2020.

Draft Pending Adoption

3. Heard a Presentation Regarding What Litigation Can Reveal About a Claim

Toby Unwin (Premonition) said Premonition collects data regarding which lawyers win before which judges. Premonition has one of the world's largest litigation databases. The U.S. court system consists of 3,124 circuit courts that are not connected. Premonition visits every online court every hour, downloads all the latest cases, normalizes the data and places the information in its database.

Premonition's database looks at attorneys and their win rates. The database collects information showing how many cases a lawyer has and how long a lawyer takes to settle a case. There are attorneys that consistently drag out cases. Mr. Unwin says law firms do not keep statistics regarding how long an attorney keeps a case open.

Premonition's database also shows the lawyers who rarely lose when they appear before particular judges. For example, Mr. Unwin said two cases with the same facts were heard on the same day, and one of the cases was lost while the other case was won; this should not happen. He said some of the most popular lawyers have the most losses. He said, in some judges' courts, plaintiffs are getting judgments only 5% of the time. The data collected by Premonition reflects large spreads of wins and losses depending on which attorney goes in front of which judge. The data shows a correlation between the judge and attorney's relationship in the average case.

Mr. Unwin said this data is useful for underwriting, too. He said, for example, if an insurer is going to underwrite supermarkets, the insurer assumes it understands the risk. However, the supermarkets risk varies from company to company, as well as by risk type. Mr. Unwin said risk also varies across the country. He said Premonition has mapped case types across the various insurance lines of business. He said instead of knowing claims results on a historical basis, Premonition can know these results on an hourly basis.

Mr. Unwin said there are some jurisdictions that suffer due to local laws and regulations. He said different rules have effects on case volume and outcome. The data shows the effects of things such as lawyer advertising, statutes of limitations when a response must be filed, and discovery differences. Mr. Unwin said the data shows whether a judge is likely to have a high-to-low plaintiff win rate before he or she is appointed and not afterward.

Mr. Unwin said lawyers in large law firms win approximately 7% more of their cases than lawyers in small law firms. He said law firms do not keep track of their attorneys' wins or losses. He said 93.3% of all cases won come from small law firms because there are few lawyers that work in big law firms.

Mr. Unwin said insurers are asking if they are getting the best from their panel firms. He said insurers do not want to go outside their panel because they do not want to have to onboard new counsel all the time. Insurers can use the data to see which attorney in a panel firm wins most frequently; win rates can vary by attorney.

Mr. Gaffney asked how Premonition controls for sample size and difficulty of cases. Mr. Unwin said Premonition does not get into the facts and law of individual cases; however, its sample size is more than 100 million cases. He said Premonition does not compare lawyers who do traffic cases against those who perform appellate work, nor does Premonition filter by the same case type and judge. Mr. Unwin said those using the database still must use their judgment when choosing attorneys, but they can tell if the pool they are using is good.

Mr. Unwin said, based on Premonition's data, the more someone pays for an attorney, the better the result. He said making partner at a law firm depends on how much is billed, not how many cases are won. Premonition found that partners are only 1.5% better than associates. He said female associates win 3% more of their cases than male associates, and female partners win 12% more of their cases than male associates.

Mr. Unwin said when a case comes to an insurer, Premonition looks at the case type and jurisdiction. The idea is the most potentially dangerous claims can be settled before they go to litigation. Mr. Unwin said Premonition can tell its clients who the best lawyers are in their panel firm to represent them. He said picking lawyers based on results are 50% better and 50% cheaper than hiring a major law firm.

Mr. Byrd said, in a single judge district, litigants cannot get an allotment, but courts are supposed to have a random allotment. He asked Mr. Unwin how this is factored in to eliminate some of the bias judges may have from the plaintiff lawyer. He said if Mr. Unwin has a better system of allotment, maybe it could be manipulated.

Draft Pending Adoption

Mr. Unwin said it can be manipulated. He said some jurisdictions only have one judge, so both litigants know which judge they will get. On the insurer side, he believes there is a benefit to being the defendant. He said the judge is assigned when the case is filed, but the plaintiff does not get this assignment.

Ms. Brown asked if Premonition considers the propensity to settle a case before it goes to litigation. Mr. Unwin said he has not done research in the area. He said Premonition will be adding trial modules later this year.

Mr. Byrd said the courts in Louisiana have a \$50,000 threshold and some states have a \$0 threshold, but \$10,000 to \$15,000 is more the norm. He asked how this factors into the states that have a judge who is heavily plaintiff or heavily defendant, but the jury brings another level regarding the result. Mr. Unwin said Premonition would have to do a study on those outcomes, both in terms of the volume and whether the case goes to the plaintiff or defendant. Premonition does not do many studies on juries or jurors because there is not a lot of data.

Having no further business, the Workers' Compensation (C) Task Force adjourned.

W:\National Meetings\2019\Spring\TF\WC\04-WCTF.docx