

WORKERS' COMPENSATION (C) TASK FORCE

Workers' Compensation (C) Task Force Oct. 19, 2010, Minutes

Workers' Compensation 2011 Proposed Charges (Attachment One)

NAIC/IAIABC Joint (C) Working Group Sept. 21, 2010 Minutes (Attachment Two)

Workers' Compensation (C) Task Force
Orlando, FL
October 19, 2010

The Workers' Compensation (C) Task Force met in Orlando, FL, Oct. 19, 2010. The following Task Force members participated: Merle D. Scheiber, Chair (SD); William W. Deal, Vice Chair, represented by Shad Priest (ID); Linda S. Hall represented by Sarah McNair-Grove (AK); Jim L. Ridling represented by Charles Angell (AL); Jay Bradford represented by William Lacy (AR); Steve Poizner represented by Ron Dahlquist (CA); Marcy Morrison (CO); Michael T. McRaith represented by John Gatlin (IL); Sharon P. Clark represented by Frank Goins (KY); James J. Donelon represented by Ed O'Brien (LA); Mila Kofman represented by Eric Cioppa (ME); Ann M. Frohman represented by Alan Wickman (NE); Brett J. Barratt represented by Marie Holt (NV); Kim Holland represented by Kathryn Stepp (OK); Teresa D. Miller represented by Rae Taylor (OR); Joseph Torti, III represented by Paula Pallozzi (RI); Neal T. Gooch represented by Brad Tibbitts (UT); and Alfred W. Gross represented by Mary Bannister (VA).

1. Receive Update on Proposed Bill to Establish the National Commission on State Workers' Compensation Laws (H.R. 635)

Aaron Brandenburg (NAIC) reported that H.R. 635 would create a commission to study and evaluate state workers' compensation laws with an emphasis on evaluating workers' compensation benefit structures. It is expected that no action will take place on this legislation in 2010.

2. Adoption of NAIC/IAIABC Joint (C) Working Group Report

Mr. Cioppa reported that the NAIC/IAIABC Joint (C) Working Group met in Los Angeles, CA, Sept. 21. The Working Group discussed the National Conference of Insurance Legislators (NCOIL) "Proposed Trucking and Messenger Courier Industries Workers' Compensation Model Act" and comments previously submitted by the Working Group. NCOIL has not had any conference calls since its July meeting but will pick up discussion of the Act at the NCOIL national meeting in November in Austin, TX.

The Working Group discussed the possibility of revising the NAIC white paper *An Overview of Workers' Compensation Independent Contractor Regulatory Approaches* by looking at four or five models in the states that have created stable laws with which the auditors and administrative law judges are comfortable, and explicitly stating the pros and cons of each model. The Working Group may also sponsor a joint discussion forum with the IAIABC ADR/Adjudication Committee at the IAIABC meeting in March to discuss the revised position paper. The symposium would bring in administrative law judges and adjudicators, regulators, carriers, and employers, and have each discuss how independent contractors are viewed.

Mona Carter (National Council on Compensation Insurance—NCCI) suggested that the Task Force distribute the Independent Contractor White Paper in order for members to see if the White Paper needs to be updated due to changes in legislation within the states. She believes the independent contractor issue is the largest single issue on most states' legislative dockets.

Ms. Carter said the issue of proof of workers' compensation coverage on the Information Page of the employer's workers' compensation policy, Item 3A (Part One: Workers' Compensation Insurance) or Item 3C (Part Three: Other States Insurance), was discussed at the Working Group meeting in September. She said the IAIABC website includes a document that outlines the issue.

Upon a motion by Ms. Stepp, seconded by Ms. Bannister, the Task Force adopted the report of the NAIC/IAIABC Joint (C) Working Group (Attachment Two).

3. Update from Large Deductible Study Implementation (C) Working Group

Mr. Wickman reported that the draft Third Party Administrator (TPA) Guidelines were previously sent to the Producer Licensing (EX) Task Force for final review. At its Oct. 19 meeting, the Producer Licensing (EX) Task Force agreed to discuss and consider the TPA Guidelines for adoption during a November conference call.

Mr. Wickman explained that the Casualty Actuarial and Statistical (C) Task Force adopted a report from its Large Deductible (C) Subgroup at the Summer National Meeting. He said if the subject is to come up again, the Workers' Compensation (C) Task Force would want to revisit the issue.

4. Adopt 2011 Proposed Charges

Mr. Priest explained that the 2011 Proposed Charges were previously distributed and comments received, resulting in the current version. Upon a motion by Mr. Cioppa, seconded by Mr. Wickman, the 2011 Proposed Charges (Attachment One) were adopted by the Task Force.

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

W:\National Meetings\2010\Fall\TF\WC\10-wctf.doc

2011 PROPOSED CHARGES

WORKERS' COMPENSATION (C) TASK FORCE

The mission of the Workers' Compensation (C) Task Force is to study the nature and effectiveness of state approaches to workers' compensation and related issues, including but not limited to assigned risk plans, safety in the workplace, treatment of investment income in rating, occupational disease, cost containment, and the relevance of adopted NAIC model laws pertaining to workers' compensation.

Ongoing Support of NAIC Programs, Products, or Services:

1. Discuss issues arising with respect to advisory organization and insurer filings for workers' compensation—*Essential*
2. Provide assistance to participating states in conducting a 2010 multi-state examination of the National Council on Compensation Insurance—*Essential*
3. Appoint a **Large Deductible Study Implementation Working Group** to ensure that the NAIC charges presented in the Findings and Recommendations of the NAIC *Workers' Compensation Large Deductible Study* are properly completed. The Working Group is to report the results of their ongoing charge on an as-needed basis—*Important*
4. Appoint a **NAIC/IAIABC Joint Working Group** to study issues of mutual concern to insurance regulators and workers' compensation administrators. Review relevant model laws and papers and consider possible charges in light of the joint working group recommendations. The Working Group is to report the results of their ongoing charge at each national meeting—*Important*

Staff Support: Aaron Brandenburg

Drafted: 10/26/10

NAIC/IAIABC Joint (C) Working Group
Los Angeles, CA
September 21, 2010

The NAIC/IAIABC Joint (C) Working Group of the NAIC Workers' Compensation (C) Task Force met in Los Angeles, CA, Sept. 21, 2010. Alan McClain (IAIABC—AR) chaired the meeting. The following Working Group members participated: Greg Krohm (IAIABC Executive Director); Stacey Roig (IAIABC—MD); and Elizabeth Crum (IAIABC—PA).

1. Independent Contractor Trucking Issues

Mr. McClain said the Working Group sent comments to the National Conference of Insurance Legislators (NCOIL) with regard to the draft "Proposed Trucking and Messenger Courier Industries Workers' Compensation Model Act." He said that the American Trucking Association is drafting comments and addressing areas in which they feel the draft proposal needs to be modified regarding who is (and who is not) an independent contractor for the purposes of driving a truck.

There was discussion amongst the attendees about how the various states were identifying what qualifies one as an independent contractor. There are several states that have been successful in identifying who qualifies as an independent contractor and subcontractor; however, some of the individuals that were identified as independent contractors (and, therefore, not subject to workers' compensation) are now filing third-party claims against the insurers.

It was the consensus of the Working Group that it is difficult to develop a model for the trucking industry when a trucker's status can change during the course of a trip. Additionally, many times a policy excludes the owner, who might technically be the only employee.

Mr. Krohm asked for discussion and feedback regarding New York's workers' compensation construction law. He said that he and Keith Bateman (Property Casualty Insurers Association of America—PCI) recently attended a meeting in New York with regard to this law. Mr. Krohm said the New York representatives seemed to think their law was unique; however, he said he felt it was similar to what Florida had already put into place. Mr. Krohm said there seems to be a presumption in construction that if you are working, you are an employee. Several of the meeting attendees said there were similar laws in many of the states. Mr. Krohm said the NCOIL model seems to state the same thing, in that there is the presumption that you are an employee if you are performing any duties related to construction.

Mona Carter (National Council on Compensation Insurance—NCCI) said the NCOIL model began primarily due to the input of Charles Curtiss (TN) with regard to NCOIL's "Employee Misclassification Workers' Compensation Coverage Model Act." She said Tennessee reviewed several other states' models looking for a solution, but they decided the model would be limited to construction; however, Tennessee is including the trucking industry.

Ms. Crum said there was a Sept. 21 hearing on Pennsylvania House Bill 400 addressing independent contractors in construction. She said the bill started out including construction and trucking, but it has evolved to include construction only. She said Pennsylvania has been working on this issue for approximately five years.

Ms. Carter said there was confusion among the legislators due to the variety of tests that are in place for determining whether a person is an independent contractor. These tests were being considered at the most recent NCOIL hearing. Due to the confusion regarding the tests, NCOIL is planning to hold a conference call to clarify each of the tests currently being used. Ms. Carter said she believes there will be some type of drafting note in the model law that will suggest that the states consider various types of tests. She added that it has been brought to the attention of NCOIL that the federal government is in the process of developing new tests.

Mr. Krohm asked that, while there is a proliferation of tests, "do you have a hard rule, or do you consider everything all at once?" He said he felt that, initially, NCOIL was willing to establish a hard rule like Massachusetts and Wisconsin have done; however, in the end, NCOIL decided to leave it relatively broad. Mr. Krohm said that, no matter which test is used, it is eventually up to the courts to decide.

Ms. Carter said NCOIL was appreciative of the comments submitted by the Working Group and that they were helpful.

Dr. Krohm said there is a global problem with regard to independent contractors. He said he feels that what is being done in the construction industry is a step in the right direction. He said this does not address the myriad of existing jobs, including the jobs in which employers are allowing their employees to do from home.

Ms. Carter said the reason NCOIL is looking at the problems regarding independent contractors is because she took the white paper written by this Working Group and pointed out to them that this was an issue. She said NCOIL looks for issues to talk about, and this Working Group is a good place to put these types of issues on the table for discussion.

Ms. Carter said there was reason to continue the discussion on things like the "definition of work," "temporary" and "incidental," because eventually there will need to be a new definition. She said this was partly due to the trend of employers to do things such as rehiring their employees through a temporary agency, so that the company does not have to pay benefits; however, they are still the company's employees. Ms. Carter said this looks a lot like professional employer organizations (PEOs), which is a problem that continues to warrant discussion. She said these kinds of things needed to be looked at before there is legislation that will require a quick turnaround fix, which might or might not work.

The Working Group discussed various forms that can be signed by an employer indentifying themselves as an independent contractor. Some of the states have had success with this, while others have not. In the unsuccessful cases, a company ends up having to pay a claim with no premium collected.

Ms. Carter said that the NCOIL model holds the contractor responsible for making certain that an independent contractor is indeed an independent contractor. If the independent contractor does not have certificates on file, the company has the ability to charge him or her a premium.

Susan Schulte (NCCI) said a workers' compensation insurance policy allows for the collection of premium after a claim has been presented; however, some of the states will not allow the collection of premium after a claim has been presented, because they do not want post-claim underwriting to occur.

Ms. Carter said the No. 1 reason for court appeal across the country in the area of workers' compensation is the independent contractor status.

Mr. Krohm proposed that the Working Group undertake revising the NAIC white paper, *An Overview of Workers' Compensation Independent Contractor Regulatory Approaches*, by looking at four or five models in the states that have created stable laws in which the auditors and administrative law judges are comfortable with, and explicitly stating the pros and cons of each model.

This was discussed by the Working Group and it was agreed that, from a regulatory point of view, a position paper with concrete recommendations based on best practices was something that could be taken back to legislators and would, therefore, be helpful.

Ms. Carter suggested that the Working Group sponsor a joint discussion forum with the IAIABC ADR/Adjudication Committee. Mr. Krohm agreed with Ms. Carter and said that, during the IAIABC meeting in March, they will hold a symposium with regard to the revised position paper. He suggested that this Working Group bring in administrative law judges and adjudicators, regulators, carriers and possibly an employer, and have each discuss how independent contractors are viewed. Ms. Carter suggested the Working Group might also find someone from NCOIL to join the symposium.

The Working Group discussed this and additionally pointed out that the NCOIL model is a "one-size-fits-all" model, which presents problems for some of the insurance carriers and it does not present solutions for situations in all cases.

2. Workers' Compensation Enforcement on Out Of State Employers

Stacey Roig (Maryland Workers' Compensation Commission) said there is a presentation scheduled for Sept. 23 regarding "Workers' Compensation Enforcement on Out-of-State Employers." She said panelists will represent the industry, workers' compensation state regulation and state regulatory points of view. Ms. Roig said they also have the form that Massachusetts provided to discuss during the presentation. She said that this issue is not just a Massachusetts issue, as various states have similar issues. She said the group is also going to discuss the definition of "temporary" and "incidental" employment.

3. NAIC Large Deductible Study Implementation (C) Working Group Update

Sara Robben (NAIC) said the draft of the *Third Party Administrator (TPA) Guidelines* was adopted by the Workers' Compensation (C) Task Force and has been sent to the Producer Licensing (EX) Working Group for review. She said the review will take place at either the NAIC 2010 Fall National Meeting or the NAIC 2011 Spring National Meeting. Once the guidelines have been reviewed by the Producer Licensing (EX) Working Group, the draft will be sent to the Property and Casualty Insurance (C) Committee. Ms. Robben said the *TPA Guidelines* were available for review on the NAIC website.

4. NAIC Workers' Compensation Large Deductible (C) Subgroup of the Casualty Actuarial and Statistical (C) Task Force Update

Ms. Robben said the Casualty Actuarial and Statistical (C) Task Force adopted the draft *Workers' Compensation Assessment Bases and Accounting Issues Related to Deductible Insurance* white paper. She said the Task Force was not recommending any changes to the accounting practices, as no dissatisfaction with the current procedures have been expressed. Ms. Robben said David Snyder (American Insurance Association—AIA) disagreed with the recommendation made by the Task Force that stated, "that the use of supplemental paid losses, in spite of its reserving implications, is preferable to written premiums net of deductible credits or net earned premiums plus case incurred losses as the basis for workers' compensation assessments" because the AIA feels premium methods are better than loss-based methods." The Casualty and Actuarial Statistical (C) Task Force was willing to accept the document, even though there was some imperfection.

5. NAIC Model Law Review (C) Working Group Update

Ms. Robben said the Model Law Review (C) Working Group met Jan. 14, March 9 and May 18 to consider whether it should recommend to the Workers' Compensation (C) Task Force that the *Twenty Four Hour Coverage Pilot Project Model Act (#960)* be amended, deleted or retained in its current form. This action was in keeping with the 2010 charge of the Working Group to review this model in accordance with the NAIC standards for model law review.

The Working Group found that no states had adopted the *Twenty-Four Hour Coverage Project Model Act*. Additionally, no states were currently found to be involved in 24-hour coverage programs. While the model was timely when it was adopted, times have changed and there is little discussion now of combining the health care component of workers' compensation with traditional group health benefits. Congressional action to implement general health care reform has rendered the model essentially useless; as such, there was a strong consensus among regulators and interested parties to delete this model.

She said that, at the Summer National Meeting, the Property and Casualty Insurance (C) Committee voted to delete the *Twenty Four Hour Coverage Pilot Project Model Act (#960)* from the list of active NAIC model laws.

6. H.R. 635 Update

Ms. Robben said H.R. 635, the National Commission on State Workers' Compensation Laws Act of 2009, picked up three more co-sponsors since the NAIC Summer National Meeting. She said there is still strong opposition to the bill and no further activity is expected during this Congressional session.

7. Next Working Group Meeting

Ms. Robben said the Working Group meeting that had been scheduled during the NAIC Fall National Meeting has been cancelled.

8. Discuss 2011 Working Group Meetings Dates and Activities

Mr. McClain said the next IAIABC meeting will be in March 2011 and, once the dates are finalized, they will decide on the date for the NAIC/IAIABC Joint (C) Working Group meeting in St. Louis.

Ms. Robben asked if the Working Group would be planning to meet during the NAIC 2011 Spring National Meeting. The group felt like this would be too close to the IAIABC meeting in March and, therefore, did not want to meet in Austin.

The Working Group discussed the possibility of meeting at the 2011 Summer National Meeting in Philadelphia. Mr. McClain said the IAIABC would also be meeting Aug. 20, 2011, through Aug. 25, 2011. The Summer National Meeting will be

Aug. 30, 2011, through Sept. 2, 2011. It was decided that Ms. Krum would represent the IAIABC at a NAIC/IAIABC Joint (C) Working Group meeting at the NAIC 2011 Summer National Meeting. The group also decided that, sometime following these two meetings, a conference call would be held so that regulators would have a chance to discuss topics with IAIABC members.

Mr. Krohm proposed that the Working Group consider a study on group self-insurance regulation. He said the group self-insurance issue raises some interesting problems for workers' compensation regulation and insurance regulation. Due to the fact that this is a problem regarding group self-insurance in many jurisdictions, Mr. Krohm suggested that this topic would be a good candidate for a white paper or technical paper. He said that if a self-insured entity was going to be considered as a mutual insurance company, as it is in some jurisdictions, it really is not self-insurance, because the self-insured groups are treated as a mutual insurance company.

Mr. Krohm said there are also sub-issues regarding this topic, considering the difference between heterogeneous and homogenous self-insurance. Homogenous self-insurance provides more loss control with regard to safety as a condition of being in the group.

Mr. Krohm, Mr. McClain and Skip Shewmaker (Safety National) will work on an outline for a technical paper and expose the outline for comments.

9. Any Other Matters Brought Before the Working Group

Mr. Batemen asked the Working Group if anyone had any problems with workers being brought in from overseas to work on a project on a temporary basis. Mr. McClain said he thought Florida used to have some legislation for this, because every year Haitians were brought in to harvest sugar and there were many injuries doing this type of work. Ms. Carter said she thought there was a federal migrant worker act through the U.S. Department of Agriculture, and that migrant workers were afforded benefits under this act. She said that, in Florida, there also were some questions brought about when U.S. construction crews were sent to Haiti to do construction work. She said it was her understanding that the U.S. Department of Labor wants this type of coverage information in companies' files.

Having no further business, the NAIC/IAIABC Joint (C) Working Group adjourned.

W:\National Meetings\2010\Fall\TF\WC\IAIABC\0921min.doc