

**TESTIMONY OF THE TEXAS AFL-CIO ON
THE STATE OF WORKERS COMPENSATION IN TEXAS**

**BEFORE THE SENATE SELECT COMMITTEE
ON WORKERS' COMPENSATION**

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Submitted by:

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To The Honorable Members of the Senate Select Committee on Workers' Compensation:

The mission of the Texas Workers' Compensation Commission, is in its own words, to

- encourage and assist in the provision of safe workplaces;
- implement an effective and efficient regulatory framework in which employees affected by work-related injuries and illnesses receive timely and appropriate benefits; and
- assist in timely returning injured workers to productive roles in the Texas workforce.

Why then, was Marcos Lopez, a worker at Tyler Pipe Company, one of the most dangerous workplaces in the country, denied treatment for his broken back- an injury that should have been prevented in the first place if workplace safety standards had been enforced? And why, after Mr. Lopez became paralyzed as a result of his inability to obtain proper medical treatment, was it the New York Times, and not the Texas Workforce Commission, that investigated?

Why has the system has turned a deaf ear to workers like Brenda Poole, who cannot receive treatment for the brain injury she sustained when she was assaulted while working as a teacher in the Karnack School District. Or the 15-year veteran of the Lubbock Fire Department who cannot find a doctor to treat a neck injury she sustained on the job? Why can't a police officer shot in the line of duty have access to the specialist he needs to treat his injuries?

The system is in crisis and needs an overhaul. The problems cannot be solved by the knee jerk reaction to cut costs by giving insurers and employers even more control over a process that is already subject to so much abuse. What is needed is for this committee to lead the way in an analysis of how the mission of the system is not being fulfilled, and what we can do together to achieve our lofty goals. What follows is a summary of the key issues in implicated in Charges 4 and 5 that we feel must be addressed in this effort.

Return-to-Work – I will start with return to work issue. The system remains woefully ineffective at developing effective return to work initiatives. Sustaining a workplace injury remains a catastrophic economic event for far too many workers. Recent data developed by the WCRI indicates how dramatic this problem is. **One Fourth of all Texas workers who have an injury that results in seven days lost time never achieve substantial reemployment!** This is an astounding statistic that compels us to question the very core of our system.

Low wage workers and workers without much formal education fare the worst under the current system. More than 70% of workers with a grade school education who have an injury that results in seven days lost time never again are able to work, and that figure is almost 40% for those who have not graduated high school. The figure is 55% for Spanish speaking workers.

In Texas, there is no unified system for addressing return to work strategies within the workers compensation system. Without aggressive action, workers experience serious financial problems, resulting in bankruptcy and loss of home. They also develop co-occurring disorders such as alcohol and drug dependency and mental health problems, which lead to further dissolution of the family and ego strength. Depression, divorce and poverty are frequent outcomes of long term disability diagnoses. The cost extends to the community at large: not only is there a waste of human capital, but there is also a significant impact on society and government programs.

Successful models for return to work programs are available. Labor unions have participated in the formulation of some of the most successful return to work programs available saving employers literally millions of dollars and providing effective services for injured workers. We would be glad to share these experiences with the committee in a more detailed manner as perhaps a blue print for future policy.

The hallmark of these programs is early intervention, and high levels of communication and cooperation between the employee, the employer, health care and rehabilitation professionals, and the carrier. This activity and cooperation is achieved by aggressive case management, that has several key components. One key component is ensuring physician awareness and understanding of the relationship between the medical diagnosis and importance of work activity. Employer education is another key activity, especially with respect to transitional employment during the rehabilitation phase, which may involve modification of the pre-injury job or reassignment to temporary or light duty. Finally, the worker must be educated and motivated to participate in his or her own rehabilitation. Central to that is a comfort level that he or she will be treated fairly, a comfort level that is wholly absent from our current system.

This is not a problem that can simply be solved by adopting treatment guidelines that mandate when an employee should return to work for a given injury. Getting an injured worker back to work is hard work, and must be approached in a comprehensive way. Care must be taken to make sure that the return to work is appropriate. Doctors and workers both have repeatedly expressed concerns that employees who are released to work with restrictions or modifications often are forced to exceed those conditions, resulting in aggravation, and heightened severity of injuries. This becomes a real impediment to future cooperation.

The workers compensation system must also consider investing in training and retraining of workers who can no longer perform their pre-injury employment. Many states have funds that allow workers to gain these services when eligibility criteria are met. Texas has virtually no services in this area.

Denial of care - In what has reached perhaps epidemic proportions, injured workers across the state are being denied access to medical care and services.

Doctors across the state are dropping out of the system. In the Tyler and Longview area, large numbers of doctors and clinics are no longer accepting patients covered by workers' compensation insurance. Attempts to address this issue with the TWCC have not yielded any significant results.

This is not confined to the Longview area. Over half of the TWCC authorized doctors in the Lubbock region are no longer taking workers compensation patients. And for those workers who are unfortunate enough to sustain injuries that require a specialist, the list of available doctors is even more diminished. In some cases, workers are losing their doctors in mid-treatment, as more and more Texas physicians find themselves unable to practice medicine and remain a part of the current workers' comp system.

The issue is not simply the agency cutting the fees of medical practitioners, although the misguided efforts of the agency in this regard certainly have contributed. More fundamentally, doctors have repeatedly left the system after becoming fed up with the barriers that insurance carriers have erected that interfere with their ability to practice medicine. Confrontational tactics, unaccountable peer review processes, paperwork and red tape all have it more difficult for doctors to treat patients. We must create a climate where doctors can be doctors.

Choice of Doctor – One critical issue that this committee will undoubtedly address will be the concept of employer directed care. We are adamantly opposed to this concept. We would also caution against viewing this as the panacea for cost containment that they are held out to be by their proponents. This is for several reasons.

First, the historical nature of the workers compensation bargain must be kept in mind. Workers Compensation involves a historic tradeoff. Workers give up the right to sue employers for workplace injuries in exchange for certainty in terms of medical care and limited income replacement benefits. This tradeoff has been in effect for nearly a century. Taking the choice of doctor from the employee infringes upon this historic bargain.

Second, we are very opposed to the notion of giving control over medical care to the employer. The financial nexus between the employer and the provider would end up influencing the care and orienting it more to the financial imperatives of the employer than to the medical needs of the worker. If the employer has control over the selection, providers will contravene the employer at their peril.

There are abundant examples of this dynamic in operation even under the current system where the employee supposedly does have choice. The above mentioned McWane Industries case is perhaps the most dramatic example. There, doctors were told that if they wanted to be able to continue to treat workers, they would have to diagnose and treat the workers according to the needs of the company as directed by company management. This led to outrageous abuse, and in documented cases, death, as employees were sent back to the plant with critical untreated medical issues.

While perhaps the most dramatic and severe, this is in no way isolated. We have consistently received calls from medical providers with this same complaint: employers are wielding economic power to unduly influence the practice of medicine. One doctor in a more rural community who treated mostly immigrant employees in the poultry industry reported that he was threatened that if he didn't stop diagnosing certain injuries, he would no longer be permitted to treat these employees and would be subject to further retribution. The throwing

around of economic weight to influence treatment decisions would only escalate if we formally delivered the power to choose to the employer. We have moved away from the “company town” and the “company store.” We oppose now going back to the “company doctor.”

In addition, despite the drumbeat for networks, there is considerable evidence that networks are simply not effective in workers compensation to reduce cost. In fact, recent insurance company data shows that medical cost per claim is growing at a more rapid rate in several states that allow employer directed care than in Texas. Of the five employer choice states studied by the WCRI, only one, Louisiana, is experiencing slower medical cost growth than Texas.

In addition, managed care simply hasn't been the silver bullet that it is touted as. In Florida, for example, the legislature mandated network care beginning in 1998. Last year, the legislature rolled back managed care, making it voluntary. Why? Because it wasn't working. If we are attempting to attract quality doctors to the system, why would we want to start with a model that doctors find generally abhorrent and unduly interfere with their practice of medicine? Workers must continue to have the choice of medical provider.

In addition, the TWCC must do a better job utilizing the tools that the legislature has provided to them to remove doctors who abuse the process from the system. This includes both doctors who over-utilize care as well as doctors who orient care towards the needs of the employer and insurance carrier as opposed to the needs of the workers.

Insurance company practices - Even when a worker is able to find a doctor, the insurance companies are denying claims through a peer review process that unduly interferes with the doctor's ability to practice medicine. Out of state peer review doctors with little accountability are driving the process. Evidence of wrongful denials of needed services is mounting.

The TWCC's own data suggest that insurance carriers are by far the most likely to abuse the system. Over 1700 administrative violations were issued in calendar year 2002. Evidently the fines that have resulted are not sufficient to deter bad behavior. Some mechanism must be developed to improve accountability of the carriers.

TWCC ineffectiveness – The TWCC has not adequately fulfilled its role as administrator of the system. This is due to a combination of ineffective leadership and an over identification with the views of the insurance industry. The entire administrative process is infused with bias towards the carriers. In addition, the TWCC has been especially ineffective at working with stakeholders to forge productive initiatives to jointly address system problems. Finally, the structure of the commission needs to be addressed. The current part time structure is simply not working.

Unfairness in the Administrative Process - Injured workers continue to be at a significant disadvantage in the administrative process. As should be obvious, the dispute resolution process is a very complicated, high stakes affair. Yet few injured workers have access

to advocates in the process. Carriers, on the other hand, are well represented throughout the process. For example, carriers were represented by an attorney in the first six months of 2003 89% of the time at the appeals panel level. Injured workers did not even have representation at half that percentage of cases. In addition, the payments to defense attorneys is steadily rising, growing at a greater than 20% rate from 2001-2002.

Even when carriers do not have an attorney, they will have a trained adjuster to shepherd its interests through the process. The ombudsman process is simply not effective in representing workers. Rather than invest such resources in a system that does not achieve the desired result, I would suggest a system modeled on the public defender system, where attorneys would represent those who cannot gain representation on their own. These attorneys would be salaried, thereby reducing any incentive for litigation, but would be trained to actually insure that injured workers were able to navigate the system. There must be some equity in this system if it is to have any semblance of fairness.

Safety and Health Initiatives - The system still lacks a comprehensive initiative to focus on improving health and safety, particularly as it relates to extra-hazardous employers.

These are just some of the issues that the legislature will have to address in the upcoming session, and we look forward to working with you to develop effective policy solutions to the problems that plague the system.

Thank you for your consideration of our views. We remain ready willing and able to work with you to make a functioning, fair, efficient workers compensation system a reality for workers and employers in Texas a reality.