Special Committee on IL Workers' Compensation Reform
December 8, 2010
Presentation Outline and Text– John C. Tuisl, VP Risk Management, Kenny Construction Company

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I would like to thank the Committee and Doug Whitley, President of The IL Chamber of Commerce for this opportunity to present views developed over my years of experience in the IL Work Comp arena.

Kenny Construction Company (KCC) is a well-known 83 year-old, family owned, Chicago based general contractor (GC) with national operations from Seattle, Washington to Philadelphia, Pennsylvania. KCC is best known as a premier U.S. tunneling contractor and currently listed in Engineering News Record as the largest GC for Power Transmission & Distribution for the U.S. Power Grid. Our reputation for safety is nationally recognized.

I have been a risk manager since 1995 and previous to that I worked as the Project Safety Manager for the CTA's $400M Greenline Rehabilitation Project. Prior to that, I worked as a Loss Control/Safety Engineer for a Chicago based insurance brokerage firm. As a front line "mud & boots risk manager" I have been investigating, reporting and managing IL workers compensation claims long enough to fully understand when underwriters, claims adjusters and defense attorneys state that the first rule in IL Work Comp is **"When you hire'em you buy'em",** that statement pays homage to the IL Work Comp Act's Causation Standard.

CAUSATION STANDARD

The issue of work comp reform is complicated and diluted by all the different opinions and interests in the name of reform. There is only one change to make - change the one part of the Act that will have the biggest impact in reducing workers' compensation cost to employers in the State of Illinois: the Causation Standard.

In IL, to establish medical causal connection, an employee must prove that his employment was "a causative factor" in his medical condition. In other words, an employee is not required to prove that an act or phase of his employment was the **sole or principal** cause of his medical condition. Rather he need only prove that some phase of his employment was **"a causative factor."** If the employment resulted in 1% of the employee's medical condition, but the other 99% was caused by non-occupational factors, the employer is responsible for 100% of the medical condition. This standard has resulted in **"an avalanche of compensable claims in IL."** Simply put this is not fair.

PROPOSED CHANGE

Black's Law Dictionary defines **"proximate cause"** as the "primary" cause of the injury/medical condition. In other words, the work related injury must be the **primary or prevailing cause** of the employee's medical condition for the claim to be compensable. If the work injury is only an incidental cause to the medical condition, then the employee does not have a compensable work related claim. If the work injury resulted in **50% or more** of the employee's medical condition, then the employer would be responsible for the medical condition, but if the work injury resulted in **less than 50%** of the medical condition the employer would not be responsible for the medical condition. Simply put this is fair.

EFFECT

This proposed change from **"a causative factor" to "the proximate cause"** would significantly reduce the number of compensable cases in IL. This not speculation, but has been proven by changes to the MO Work Comp Act. Prior to 2005 a work related injury in MO only needed to be **"a factor"** in the employee's medical condition for the claim to be compensable. The same as the current IL system.

A 2005 amendment to the MO Work Comp Act provided that the claim is only compensable if the accident was the **"prevailing factor"** in the subsequent medical condition of the employee. **"Prevailing factor"** is defined as the **"primary factor."**

RESULT

NCCI reported a **14.5% REDUCTION** in claims submitted in MO between June 2005 through June 2008. The largest workers' compensation carrier in MO announced a **5% across the board premium rate cut** beginning in the year 2006. Most importantly, since the 2005 amendment, **workers' compensation costs have dropped by 20% in the State of Missouri.** Compare to IL – since our 2006 amendment the **workers' compensation costs have gone up anywhere from 7.5% to 16.5%.**

INTERPRETATION OF THE ACT

There was a question posed by a member of the House Committee at last week's House Hearing asking whether the IL Workers' Compensation Commission (the Commission) was biased in favor of employees. In fact, the Commission operates openly that the Act is to be liberally construed in favor of the employee. This position is due to a 2004 case known as **Flynn vs. Industrial Commission.**

The Illinois Supreme Court in rendering its decision in Flynn not only reversed judgments by appellate and circuit courts but opined that the Workers Compensation Act is a remedial statute intended to provide financial protection for injured workers and is to be liberally construed to accomplish that objective. Notably, this case has not been cited as precedent in any subsequent Appellate Court decision. The case has been cited by the Commission in order to support the conclusion that the Act is to be liberally construed to provide financial protection to the injured worker despite this position being nowhere written into the Act.

The Court committed **judicial activism** with the Flynn decision and tipped the balance in favor of the worker. When Legislators passed the original WC Act in 1911, it was a bargain between labor and management; labor gave up the right to unlimited jury awarded damages in the Circuit Court since the process took too long and instead took the scheduled benefits under the WC Act and management gave up it's common law defenses such as contributory negligence and assumption of risk and took the certainty of paying the scheduled benefits under the Act. It was an equal bargain and a good deal for both parties without one being advantaged over the other. We need to reinstate that the Act be strictly construed with no favoritism toward employees and that evidence is to be weighed **"impartially"** without giving the benefit of the doubt to one party over the other in resolving factual conflicts.

LABOR REPRESENTATIVES COMMENTS

Representatives for Labor presented their comments to the House Hearing last Friday, December 3rd. Following are but a few of the more deceitful statements made:

- The work comp system is an "All Capped System" – the only capped part of the system negatively impacting the plaintiff attorneys is the 20% of the employees' settlement. IL benefits are some of the highest in the country with the wage loss, max rate and lifetime benefit calculations that drive costs through the roof.
- "There are over 400 insurance companies in the state and they are in collusion just look at their corporate profits." Actually, the IWCC website provides a list of the carriers licensed to write work comp in IL. The list has 388 companies of which 104 write $0 premium. The top 25 carriers write 47% of the total work comp premium in the state. The IWCC states; "Work comp insurance business in IL is healthy and highly competitive. In fact, IL has more workers' compensation carriers than 48 other states.
- "Why is it reformists are first looking to the hourly working man?" "We are penalizing honest workers" This Working families vs. Insurance companies rally cry is a page right out of Karl Rove's playbook. I have been to the Commission many a time and have seen and heard these very same attorneys refer to their clients as body parts not by their name. It is a macabre kind of meat market not a noble protection of the "honest working man" as they have depicted.

The bottom line is we have businesses leaving our state because of out of control workers' compensation costs. I implore the Committee members to preserve the intent of your 20th century legislative brethren and restore the Work Comp Act of 1911 to its original intent.