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Oregon State Legislature
Oregon State Capitol
House Committee on Business and Labor
900 Court Street NE
Salem, OR 97301

2/26/15

Sent via email to: jan.nordlund@state.or.us

Re: HB 2764, Attorney's Fees Awards in Workers' Compensation Claims - NAMIC's Written Testimony in Opposition

Dear Representative Holvey, Chair; Representative Barton, Vice-Chair; Representative Kennemer, Vice-Chair; and members of the House Committee on Business and Labor:

Thank you for providing the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written testimony to the committee for the February 27, 2015 public hearing. Unfortunately, I will be in another state at a previously scheduled legislative meeting at the time of this hearing, so I will be unavailable to attend. Please accept these written comments in lieu of my testimony at the hearing. This letter need not be formally read into the committee hearing record, but please reference the letter as a submission to the committee at the hearing.

NAMIC is the largest property/casualty insurance trade association in the country, serving regional and local mutual insurance companies on main streets across America as well as many of the country's largest national insurers.

The 1,400 NAMIC member companies serve more than 135 million auto, home and business policyholders and write more than \$196 billion in annual premiums, accounting for 50 percent of the automobile/homeowners market and 31 percent of the business insurance market. NAMIC has 153 members who write property/casualty insurance in the State of Oregon, which represents 46 percent of the insurance marketplace.

Through our advocacy programs we promote public policy solutions that benefit NAMIC companies and the consumers we serve. Our educational programs enable us to become better leaders in our companies and the insurance industry for the benefit of our policyholders.

NAMIC is opposed to HB 2764, because it will be an unnecessary and inappropriate workers' compensation insurance rate-cost driver, and will facilitate and reward the filing of frivolous or inflated-damages claims to the detriment of the business community and the health of the Workers' Compensation System and ultimately injured workers.

From a conceptual public policy standpoint, NAMIC is concerned that the proposed legislation starts out by saying that it is intended to, “to ensure that injured workers have access to adequate representation to assist them in obtaining the full benefits allowed by the Workers’ Compensation Law.” Where is the data and evidence supporting the existence of a Workers’ Compensation System access to legal benefits problem? Since there isn’t a real injured workers access to WC benefits problem in the state, one has to ask *who* really benefits from this proposed attorney’s fees award provision?

NAMIC is opposed to employers, small businesses, and workers’ compensation policyholders being forced to pay the cost of providing WC attorneys with higher wages. This “money maker” proposal is further evidenced by the fact that the proposed legislation instructs the Workers’ Compensation Board to adjust the schedule of attorney’s fees biennially based on increases to average weekly wage, and the proposed removal of the provision that states, “an attorney’s fee awarded pursuant to this subsection may not exceed \$3,000 absent a showing of extraordinary circumstances”. NAMIC is concerned that the practical impact of this removal of a reasonable cap on attorney’s fees is that it will create a “blank check” attorney’s fees billing mentality that will increase legal expenses for workers’ compensation insurers and their policyholders.

Additionally, NAMIC is concerned that the proposed legislation would arguably create a “de-facto presumption” of benefits. HB 2764 specifically states, “the provisions of the Workers’ Compensation Law shall be interpreted to allow benefits if a reasonable reading of the law so allows.” Current state law already requires benefits to be awarded based upon a reasonable interpretation of the law, so why is this language even necessary, unless it is being inserted to allow WC attorneys the ability to assert that benefits are to be legally presumed, unless the claimed benefits are based upon an unreasonable read of the WC statute? This legislative attempt to create ambiguity as to the legal standard for a WC claimant to prove the existence of a valid entitlement to a WC benefit is unreasonable and detrimental to the entire workers’ compensation system.

NAMIC is also concerned that HB 2764 creates a “quasi-value billing” attorney’s fee compensation program for WC attorneys who are able to secure reclassification of the claim from “non-disabling to disabling.” First of all, this approach to calculating an attorney’s fees has an improper and questionably unethical “contingency fee” quality to it, i.e. if the attorney merely represents the injured worker, he/she gets an hourly rate attorney’s fee, but if the WC attorney is able to secure the reclassification of the claim, the attorney is entitled to “reasonable assessed attorney fees.” What does that even mean or entail? How is it calculated? Why should the attorney be paid for more than the time he/she expended in providing legal services?

Additionally, NAMIC is concerned with how Section 10 of the bill authorizes “reasonable assessed attorney’s fees” for specific categories of WC benefits. In effect, the proposed legislation provides economic incentives for WC attorneys to obtaining temporary disability compensation benefits. NAMIC is concerned that this “reward” to WC attorneys for securing temporary disability compensation benefits is going to lead to the filing of frivolous claims, which will delay the timely resolution of legitimate WC claims and act as an unnecessary insurance rate cost driver.

Further, NAMIC doesn’t understand the public policy rationale for including awards of attorney’s fees, penalties and costs to the statutory requirement to pay interest. Statutory interest is intended to reimburse the injured party for the loss of potential investment income resulting from the injured party not having timely access to settlement funds. It is compensatory, not punitive in nature. Why should an award of attorney’s fees and penalties, which are exemplary damages in nature, as opposed to compensatory damages intended to compensate for potential investment losses sustained by the injured worker, be subject to the statutory interest provision?

NAMIC is also concerned by the provision in the bill that fundamentally alters the process for an employer or insurer to appeal an administrative law judge ruling. HB 2764 would require the employer or insurer to have to pay the attorney's fees for the appellate work done by the WC attorney for the appeal if, "the employer or insurer does not *fully prevail on all issues raised*, regardless of whether a decision on the merits occurs." [Emphasis added]. What does "fully prevail" mean? This sounds like a legal standard rife with potential for litigation, which of course pursuant to the proposed legislation, exposes the employer or insurer to more WC attorney's fee for the appeal. Moreover, why does the employer or insurer have to fully prevail on "all issues raised"? This provision is extremely one-sided and inconsistent with the very concept of promoting fair and equal access to judicial review. NAMIC is concerned that this provision could have a chilling effect upon employers and insurers appealing a meritorious legal position, because the legal standard for prevailing, i.e. insurer or employer must "*fully prevail on all issues raised*", is unfairly and inappropriately skewed heavily in favor of the WC claimant and his/her attorney.

The blatant anti-employer and anti-WC insurer slant to the proposed legislation is further evidenced by the fact that HB 2764 authorizes the WC attorney to be paid for "for all work performed at the level of the proceeding and for any other work performed on the claim *prior to commencement* of the proceeding." [Emphasis added]. NAMIC is concerned that this will encourage and facilitate dilatory trial tactics by certain WC attorneys, because they will be entitled to wages before they even really start the administrative law adjudicatory process where they make legal representations about the case as "officers of the court" and are subject to disciplinary actions relating to misuse or abuse of the legal process. Attorneys should not have a vested economic interest in delaying the filing and resolution of a WC claim. Injured workers need and deserve prompt resolutions of their WC insurance claims, not delays that benefit the wage earnings of their WC attorney.

Finally, NAMIC does not understand how HB 2764 can be categorized as an immediate effective date emergency legislative measure "necessary for the immediate preservation of the public, peace, health and safety." There is not a single provision in the bill addressing a necessary WC benefit that is either being withheld or not timely provided to injured workers. This proposed legislation is all about awarding WC attorneys greater fees. From a public policy standpoint, how does a bill that is focused upon increasing attorney wages rise to the level of being a public safety necessity?

For the aforementioned reasons, NAMIC respectfully requests that the committee **VOTE NO on HB 2764 – WC legislation should be focused upon the *reasonable needs of injured workers, not the unreasonable financial desires of WC attorneys.***

Thank you for your time and consideration of NAMIC's written testimony. Please feel free to contact me at 303.907.0587 or at crataj@namic.org, if you have any questions pertaining to my written testimony.

Respectfully,



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