

SENATE INSURANCE AND FINANCIAL INSTITUTIONS COMMITTEE

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Ohio Association of Claimants' Counsel
Philip J. Fulton

Chairman Hackett, Vice Chairman Hottinger, Ranking Member Craig, and members of the Senate Insurance and Financial Institutions Committee. My name is Phil Fulton and today I testify as a proponent of HB 80, except for the provision dealing with illegal immigrants added on the floor, on behalf of the Ohio Association of Claimants' Counsel (OACC).

The OACC is a group of experienced workers' compensation attorneys who strongly support and believe in Ohio's workers' compensation system, educates the public about our system, and who work with the Administrator and all stakeholders in making our WC systems the finest in the country. Many do not know that the Ohio Association For Justice was originally founded in 1954 as the Ohio Chapter of the National Association of Claimants' Counsel. Thus, I guess you can say that the OACC has circled back to assist in the original purpose of the OAJ.

Attached is my curriculum vitae. You will note that I have spent my entire professional life engrossed in the field of the Ohio WC system. As a result, since 1991, I have authored the treatise, Ohio Workers Compensation Law, with the 5th Edition just recently published.

What my vitae may not fully reveal is that over the last 25 years I have been fairly involved in the majority of workers' compensation legislation that has been enacted. What I have learned during this journey is that the best legislation is what some term, the "Compensation Bargain," legislation which accommodates the rights and duties of both

employers and employees. Thus, talking to all of the stakeholders is always a key component of my process.

I have heard the rumor that some stakeholders claim that they have not had enough time to analyze the substantive amendments. I personally found that allegation disingenuous.

In March 2018, Rep. Brinkman requested the stakeholders to submit a list of their legislative wants and wishes. Probably to nobody's surprise, these wish lists become somewhat "public knowledge." On February 12, 2019, I met with Administrator McCloud to discuss with her the BWC's pending submission of their budget bill. She discussed a few substantive provisions that the BWC may be seeking and I provided her with an update on two proposals that the business stakeholders and I were working on that we were hopeful would be added to the BWC's Budget Bill.

In early March 2019, Rep. Brinkman had LSC draft amendments from the various stakeholders. Gongwer reported the following:

Rep. Brinkman said lawmakers have been working through potential changes and meeting with groups about the measure. . . Among changes being considered by the committee are proposals to help small business, the chairman said. Members of the committee in February voiced support for proposals offered by the National Federation of Independent Business and the Ohio Chamber of Commerce.

Meanwhile, I met with the Chamber on March 27, 2019 and the NFIB on April 15, 2019, to discuss the pending BWC Budget Bill. On April 15, the BWC sent 7 substantive amendments to Chairman Brinkman to consider for HB 80—including the two proposals which the business community, labor and trial lawyers supported.

Sub. HB 80 contains those 2 provisions fully supported by business, labor and the BWC. I would therefore like to address these two provisions which not only have the full support of the stakeholders and the BWC, but are great public policy.

The first one is simple, and is found in the uncodified language of the bill, Section 9, lines 3430-3433. In the last BWC biennial budget bill, the General Assembly passed what is called the Intent To Settle provision. Also, supported by all stakeholders and the BWC at that time, this provision will save thousands and possibly millions of dollars for employers, employees and the BWC. Rather than go thru a costly court of common pleas trial, this provision lets the parties and the BWC negotiate a settlement of the issue(s) before any judicial filing is ever commenced.

This uncodified provision simply corrects a drafting error from the previous bill. The Intent To Settle process was supposed to apply to all claims, but due to the drafting mistake, can only apply to claims filed after the effective date of that bill. Section 9 corrects this mistake and again, will save employers and employees thousands of dollars. Further, if you look at Section 1 of the bill, the BWC is scheduled to pay the AG over \$4.6 million for court representation. This provision will substantially reduce this amount in the future. This is obviously great public policy.

The second agreed provision, and I emphasize again is supported by all stakeholders and the BWC, may be the most important WC amendment in the last 50 years. Found in RC 4123.56(F), lines 1036-1046, and RC 4123.58(D)(3), lines 1094-1096, this agreement nullifies 30 years of judicial activism and places the General Assembly back into the proper role of policy-making.

In 1985, the 10th District Court of Appeals introduced into WC jurisprudence the voluntary abandonment principle. Two years later, the Ohio Supreme Court expanded the principle and has continued doing so over the last 30 years. During this time, the Supreme Court twice had to take the extreme action of granting reconsideration because of erroneous law and policies caused by its decision. At least twice, Chief Justice O'Connor has pleaded that the General Assembly "vitiates" the voluntary abandonment principles. This past fall, in a case called *Klein*, the Supreme Court escalated the confusion by overruling 2 of its prior cases, altering another, and essentially leaving employers and employees alike without any idea of how to counsel their clients.

The language adopted by SB 80 was primarily drafted by the business community's attorneys, followed by some wordsmithing by labor and then the BWC. The language is essential to the orderly processing of claims, but also to the recognition that it is the General Assembly that sets policy, not the courts. I cannot emphasize enough that this is simply great public policy.

I know I have talked for awhile but I would be remised if I did not address the elephant in the room, PTSD for first responders. I wish I could say that like the previous two amendments, I could advise you that the provision had consensus support but we all know that is not true.

However, we do know that the Senate, I believe, has passed coverage for first responders with PTSD 3 times previously. As a result, the issues is neither new nor has there been a lack of debate. However, what is more evident than ever is that the evidence of the harm that is happening to first responders is overwhelming. First responders are at least twice as likely to suffer from PTSD; in fact, first responders' occurrence of PTSD is

comparable to that of combat veterans. Shockingly, police and firefighters are more likely to die by suicide than in the line of duty (and 20% higher than the general public). This is both a national and Ohio tragedy occurring right before us.

As a result, in 2018, 16 states considered mental—mental PTSD legislation. Minnesota, Florida and Washington passed bills in 2018. Idaho, Louisiana, Connecticut, New Mexico, and New Hampshire have passed bills in 2019. I believe we are now up to at least 15 states that have passed the legislation. These states all have taken different approaches, with some including what we call gatekeeper provisions, but many are being passed by unanimous vote in their legislatures.

It is my opinion that the passage of WC coverage of PTSD for first responders is great public policy. The alternative I believe is not, especially for Ohio's political subdivisions and in the long run our first responders. The alternative will result in a bevy of lawsuits filed against our cities and counties for the intentional infliction of emotional harm, a lawsuit permitted by the Ohio Supreme Court in *Bunger v. Lawson*. *Bunger* holds that if there is no WC coverage for a psychological condition, then there is no immunity for employers from an employee pursuing a common law remedy against them.

Delaying the passage of these important provisions to the WC system will cause serious harm, in money, confusion and protection, to employers and employees alike. For the very good public policy that SB 80 contains, I urge passage from this committee. Mr. Chairman, I am happy to answer any questions regarding my testimony or any other provisions from SB 80.