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COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES
JOINT COMMITTEES ON JUDICIARY
AND LABOR RELATIONS

In re: Workplace Safety and Tort Reform Issues

* * * * *

Stenographic report of hearing held
in Room 140, Majority Caucus Room,
Main Capitol Building, Harrisburg, PA

Thursday,
November 30, 1989
11:00 a.m.

HON. THOMAS R. CALTAGIRONE, JUDICIARY COMMITTEE CHAIRMAN
HON. MARK B. COHEN, LABOR RELATIONS COMMITTEE CHAIRMAN

MEMBERS OF COMMITTEES ON JUDICIARY
AND LABOR RELATIONS

- | | |
|-------------------------|---------------------------|
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| Hon. Robert Freeman | Hon. John F. Pressmann |
| Hon. Patrick E. Fleagle | Hon. Karen A. Ritter |
| Hon. Richard Hayden | Hon. Jere L. Strittmatter |
| Hon. David W. Heckler | Hon. Thomas A. Tangretti |
| Hon. Gerard Kosinski | Hon. Michael R. Veon |
| Hon. Ronald S. Marsico | |

Also Present:

- Hon. H. William DeWeese, Majority Whip
- Michael Cassidy, Maj. Executive Director, Labor Relations
- Eric Fillman, Research Analyst, Labor Relations
- Nevin Mindlin, Min. Executive Director, Labor Relations
- Paul Dunkleberger, Research Analyst, Judiciary
- Katherine Manucci, Staff, Judiciary

Reported by:
Ann-Marie P. Sweeney, Reporter

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1 CHAIRMAN CALTAGIRONE: This is a joint
2 hearing between the House Judiciary and the House Labor
3 Relations Committees, and for the benefit of the public
4 and the press that are here, I'd like to have the members
5 introduce themselves, and if they'd start from the far
6 left and come right over. And staff. Members and staff.

7 REPRESENTATIVE HECKLER: Representative Dave
8 Heckler, Bucks County.

9 MR. MINDLIN: Nevin Mindlin, Labor Relations
10 Committee.

11 REPRESENTATIVE McHALE: Paul McHale, to the
12 left of Mr. Heckler, Lehigh County. I'm always to the
13 left Mr. Heckler.

14 REPRESENTATIVE HECKLER: But not far.

15 REPRESENTATIVE RITTER: Karen Ritter, Lehigh
16 County, to the left of Paul McHale.

17 CHAIRMAN COHEN: Mark Cohen, Chairman of the
18 Labor Relations Committee.

19 CHAIRMAN CALTAGIRONE: Tom Caltagirone,
20 Chairman of the Judiciary Committee.

21 REPRESENTATIVE CHADWICK: Scot Chadwick,
22 Bradford County.

23 REPRESENTATIVE FREEMAN: Representative
24 Freeman. This is the first time I've ever been to the
25 right of Paul McHale.

1 REPRESENTATIVE TANGRETTI: Tom Tangretti,
2 Westmoreland County.

3 REPRESENTATIVE FLEAGLE: Pat Fleagle,
4 Franklin County.

5 REPRESENTATIVE MOEHLMANN: Nick Moehlmann,
6 Lebanon County, Minority Chairman of the Judiciary
7 Committee.

8 REPRESENTATIVE MARSICO: Ron Marsico,
9 Dauphin County.

10 REPRESENTATIVE HAYDEN: Dick Hayden,
11 Philadelphia County.

12 REPRESENTATIVE PRESSMANN: Jack Pressmann,
13 Lehigh County.

14 CHAIRMAN CALTAGIRONE: All right. If we
15 have the first witnesses that are going to be testifying
16 before the committees, Eric Oxfeld and Jeff Rouch.

17 MR. ROUCH: Good morning, Chairman Cohen,
18 Chairman Caltagirone, and members of the committees. I am
19 Jeffrey D. Rouch, Director of Government Affairs for the
20 Insurance Federation of Pennsylvania. I am here today in
21 place of Henry G. Hager, President and Chief Executive
22 Officer of the Insurance Federation, who is unable to be
23 here today because of a Federation board meeting being
24 held in Philadelphia right now. He apologizes for his
25 absence and asks that I read his statement and field

1 questions as best I can.

2 Not being an expert on workers' compensation
3 insurance or the workplace safety issue per se, I have
4 with me today Eric Oxfeld from the American Insurance
5 Association. Also with us is Loudon "Hap" Campbell, with
6 the law firm of Calkins and Campbell, who is the American
7 Insurance Associations' Pennsylvania counsel. At the
8 completion of our testimony, we will be glad to answer any
9 questions that members of this committee might have.

10 "The Insurance Federation is a Pennsylvania
11 State trade association which represents more than 200
12 insurance companies, both domestic and foreign, offering
13 all lines of life, health, property and casualty insurance
14 in this Commonwealth. Included among our member companies
15 are those offering workers' compensation insurance and
16 general commercial liability insurance. We are thankful
17 to the chairman of the joint committees, Representatives
18 Caltagirone and Cohen, for affording us the opportunity to
19 comment briefly on the workplace safety legislation,
20 specifically House Bill 1012 and House Bill 1013.

21 "The purpose of my testimony is to suggest
22 the adverse insurance-related implications of such
23 legislation rather than offer substantive commentary on
24 the language in each of the particular bills.

25 "I am informed by the National Council of

1 Compensation Insurers and the National Trade Association
2 for Workers' Compensation Insurers that no other State has
3 enacted legislation allowing an employee to elect to
4 accept a civil action or tort judgment in lieu of or in
5 addition to a worker's compensation award, as would be the
6 case under the two bills in question. There have,
7 however, been unsuccessful efforts in Pennsylvania and
8 other jurisdictions to expand workplace liability.
9 Nonetheless, the nature of the workplace liability
10 proposals makes it difficult to definitively assess the
11 impact on workers' compensation and general liability
12 coverages.

13 "At first glance, logic may suggest that one
14 possible impact on workers' compensation would be lower
15 costs as a result of the tort judgment being selected.
16 This is not the case, however, because the bill provides
17 that the workers' compensation benefits paid prior to
18 judgment are to be applied to satisfy the tort recovery.
19 As a result, there would be no savings on the workers'
20 compensation costs to employers. Indeed, rather than
21 costs going down, the lure of a tort recovery will provide
22 a powerful incentive to a claimant to fully exploit the
23 workers' compensation benefits prior to seeking a tort
24 recovery. Providing the tort recovery option will,
25 therefore, probably increase workers' compensation claim

1 costs and in turn workers' compensation premiums, not
2 lower them.

3 "Because of the current form of workers'
4 compensation law, a typical employer's general liability
5 coverage is intended to dovetail with the workers'
6 compensation coverage. That is to say that general
7 liability coverage ends where the workers' compensation
8 coverage begins, and vice versa. However, the tort
9 liability created by the two bills is not an insurable
10 event under general liability insurance as that coverage
11 is now provided.

12 "This leads to the question: Will general
13 liability insurers choose to amend their coverage to
14 include this newly created liability exposure? Because of
15 the constraints of the antitrust laws which do apply to
16 insurers and their trade associations, I am not able to
17 report what the present intention of insurers might be.
18 Nonetheless, it stands to reason that providing the add-on
19 coverage has never been attractive to insurers. General
20 liability insurers would confront essentially the same
21 problem which affects automobile insurers. The claimant
22 in both cases would be able to build their special
23 damages, medical expenses and wage loss on their no-fault
24 benefits, whether auto insurance or workers' compensation,
25 and then claim general damages for non-economic loss, pain

1 and suffering, in a liability action.

2 "Given auto insurer's often stated
3 preference for a first-party auto insurance system, I must
4 infer that in the short-term there may be no insurer
5 willing to make a market for an extended general liability
6 coverage including workplace safety. As a result,
7 employers would have to self-insure against that which the
8 insurance industry finds an uninsurable risk. This will
9 place Pennsylvania employers in an intolerable competitive
10 disadvantage.

11 "In closing, when acting as legislators must
12 for the common good, you should weigh this economic and
13 competitive disadvantage heavily against adopting an
14 expansion of workplace liability."

15 I'll now turn the microphone over to Eric
16 Oxfeld from the American Insurance Association who will
17 comment more specifically on the nuances of workplace
18 safety.

19 MR. CAMPBELL: I'm going to have to just say
20 something since the microphone is passing by me. My name
21 is Loudon Campbell and I'm with the Harrisburg law firm of
22 Calkins and Campbell. We represent the American Insurance
23 Association as legislative counsel here in Pennsylvania.
24 The AIA, as some of you may know, is a national trade
25 association which consists of large stock insurance

1 companies, over 280 member companies, all of whom write
2 through the independent agency system as opposed to being
3 direct writers. They write all lines of property and
4 casualty insurance, including workers' comp. Today we're
5 very happy to have with us Eric Oxfeld from the AIA
6 offices in Washington, D.C. Eric is a counsel for the AIA
7 and specializes in the workers' compensation issues and
8 I'm sure he'll be very happy to enlighten you with his
9 knowledge on it.

10 MR. OXFELD: Mr. Chairman, Mr. Chairman, and
11 members of the committee, I appreciate very much the
12 opportunity to be here this morning on behalf of the AIA.
13 As Hap mentioned, I'm a counsel in the law department of
14 the AIA and I'm a Secretary to the AIA's Workers'
15 Compensation Committee.

16 I come before you this morning in opposition
17 to House Bills 1012 and 1013. This opposition, however,
18 does not come lightly. Our member companies have an
19 historic interest in the health and safety of American
20 workers. In fact, we were a critical part of the reform
21 movement that led to enactment of workers' compensation
22 laws back at the early years of the century. We're proud
23 to have been part of that movement and we continue to
24 support responsible measures that will better protect
25 worker health and safety. In fact, the AIA was an early

1 and ardent proponent of enactment of the Federal
2 Occupational Safety and Health Act. In addition, our
3 affiliated organization, the American Insurance Services
4 Group, is the nation's leading insurance safety
5 engineering organization, and they are heavily involved in
6 assisting our member companies, in fact all insurance
7 companies who choose to belong in providing preventive
8 loss control services.

9 Moreover, although we oppose these bills, I
10 must hasten to add that we agree with the good intentions
11 of the bills before the committee. Workers need financial
12 security when they're hurt on the job. Employers need
13 incentives to make safety and health of their workers a
14 priority. But good intentions are not enough.
15 Legislation has to work, it has to pass the test of
16 rigorous analysis. In our view, House Bills 1012 and 1013
17 are fatally flawed. The fundamental problem in these
18 proposals is the provision they each contain which would
19 permit workers covered by the Pennsylvania Workers'
20 Compensation and Occupational Disease Act to bring an
21 action for damages against their employers for injuries
22 they suffer on the job. The workers' compensation program
23 in Pennsylvania already provides income support and
24 medical care for workers, for all workers injured on the
25 job, and I might add that protection in Pennsylvania is at

1 a relatively generous level compared to the workers'
2 compensation programs in many States.

3 Although the particulars of workers'
4 compensation programs vary from one State to another, all
5 of them, including your law, derived from an essential
6 social compact. Injured workers are entitled to an
7 administrative remedy for lost earning capacity without
8 any consideration of who was at fault in causing the
9 injury for all disabilities, that includes occupational
10 illness as well as traumatic injury that arises out of in
11 the course of employment. In return for providing those
12 benefits, employers' liability for damages and tort is
13 completely extinguished. This means in Pennsylvania that
14 even when a worker is at fault he can recover medical
15 care, which I should remind you is first dollar medical
16 coverage, without any dollar or time limits. In addition,
17 a relatively generous level of income support for the
18 duration of disability which may be up to a lifetime in
19 case of a permanent and total disability. This is
20 completely at the expense of the employer.

21 To be sure, there are indeed improvements
22 which we believe ought to be made in the Pennsylvania
23 workers' compensation program. It's certainly far from
24 perfect. We think that there are changes that would make
25 it more equitable for workers and at the same time we

1 think that it's necessary and timely to attack the root
2 causes that have been, in recent years, rapidly driving up
3 the cost of workers' compensation insurance.

4 But AIA is convinced that the workers'
5 compensation system, although it has some flaws, is
6 fundamentally sound. We believe that a return to the tort
7 system, as these bills would establish, would not serve
8 the interests of workers or employers or anyone in our
9 society, with the possible exception of those who make
10 their living representing people in court.

11 We understand that House Bills 1012 and 1013
12 purport to allow this tort action only against employers
13 that might loosely be characterized as bad actors.
14 However, I respectfully submit that such a distinction is
15 meaningless in a practical sense because the conduct
16 described in the bills falls far short of the standard of
17 deliberate injury which properly would justify tort
18 liability. Furthermore, it's extremely doubtful to us
19 that public support could be sustained for a program which
20 holds employers liable in tort when they're at fault for
21 an injury and yet requires them to pay workers'
22 compensation benefits for injuries caused by worker
23 negligence.

24 The committee should also understand that
25 these bills, as Jeff said, would add directly by dimension

1 an amount whose dimension I don't think anyone can guess
2 to the cost of workers' compensation insurance. Workers'
3 compensation insurance policies include a Part B coverage,
4 employer's liability, which covers all liability for work
5 injuries arising in addition to benefits due under the
6 Workers' Compensation Act. Although there may be some
7 uncertainty as to whether liability under the statutory
8 civil actions would come under Part B or not, in all
9 likelihood they would, and as such it would add -- any
10 additional costs that employers incur under these bills
11 would fall under the Part B coverage under the workers'
12 compensation insurance policy. So there would be a direct
13 increase in the costs.

14 At this time, it's certainly a concern to us
15 that the legislature might consider taking action that
16 would have the potential for increasing the costs of
17 workers' compensation insurance at a time when that has
18 become a major focus with a need for reviewing the
19 workers' compensation program in this State in order to
20 try and control the cost escalation.

21 In expressing our views on House Bills 1012
22 and 1013, I do want to distinguish them from House Bill
23 1030. The primary thrust of that bill is to impose
24 criminal sanctions for safety and health law violations.
25 The AIA advocates vigorous and active enforcement by all

1 appropriate enforcement tools of health and safety laws.
2 Criminal sanctions may indeed, in our judgment, be a
3 meritorious, even desirable, means of punishing employer
4 conduct of such a heinous nature that it is tantamount to
5 deliberate injury. However, House Bill 1030, as presently
6 drafted, appears to raise some of the same problems I have
7 mentioned with regard to House Bills 1012 and 1013 insofar
8 as it would allow a court to award what a bill describes
9 as restitution in the amount of the damages. Under
10 circumstances where the employer's action was not even
11 required to be a predominant cause of the injury, the bill
12 invokes criminal sanction as it is currently drafted where
13 the work injury was only a substantial contributing
14 factor. It doesn't even have to be the predominate cause.
15 It's questionable as a matter of public policy whether it
16 would be easy to obtain a criminal conviction under such a
17 weak standard.

18 Furthermore, I am concerned about statements
19 in the bill's legislative findings and determinations
20 which I think, although I'm sure it's not intentional, may
21 be seriously misleading. Section 9302, subsection 2, says
22 that personal injury lawsuits against employers are
23 unavoidable -- are unavailable in Pennsylvania to deter
24 negligent or even intentional actions causing work injury.
25 While that is literally true, the bill fails to

1 acknowledge that all States have extinguished personal
2 injury lawsuits against employers and have replaced those
3 tort rights with workers' compensation benefits. And
4 secondly, which you may not be aware of, that workers'
5 compensation system in Pennsylvania and in all other
6 States contains an extremely sophisticated mechanism to
7 give employers a direct financial stake in loss
8 prevention, in other words in the safety and health of
9 their employees. This mechanism includes a job
10 classification system which distributes costs among
11 employers by grouping them according to the potential for
12 loss. There are more than 250 different job
13 classifications under the Pennsylvania workers'
14 compensation insurance system.

15 In addition, and perhaps more important, the
16 insurance pricing system relies on experience rating of
17 individual employers. As a result of experience rating,
18 the actual premium collected from an employer is adjusted
19 either upward or downward to reflect the results of
20 effective workplace safety programs. Employers whose
21 workforce suffer more injuries pay higher premiums than
22 other employers in the same line of business. The
23 premiums are commensurate with the frequency of injuries,
24 so those who have more injuries pay higher rates, those
25 who have fewer injuries pay lower rates.

1 Conclusion. We've examined the proposed
2 legislation both from the standpoint of the extent to
3 which the insurance mechanism can cope with it as well as
4 from a broader public policy view. Enhancement of
5 workplace safety and health is a praiseworthy objective,
6 however we don't believe that returning workplace injury
7 to the tort system is an appropriate or effective means of
8 accomplishing those goals. The problems these bills would
9 create underscore the fact that very careful consideration
10 should be given to the impact of these bills before you
11 move them to enactment.

12 We would be happy to work with you to
13 develop constructive approaches, but we do not believe
14 that the legislation before the committee, HB 1012 and
15 1013, merit enactment in their current form.

16 Thank you. We appreciate the chance to
17 comment to you this morning.

18 CHAIRMAN COHEN: Thank you.

19 Would you care to submit amendments to all
20 three of these bills?

21 MR. OXFELD: In our view, 1012 and 1013 are
22 unamendable to make them acceptable because their primary,
23 indeed sole, purpose is to create a new tort civil right
24 of action which we regard as inconsistent with the
25 continuation of a workers' compensation system. I believe

1 that it might be possible to consider 1030 and address
2 some of the concerns we have in there.

3 CHAIRMAN COHEN: Okay. I believe I'm the
4 prime sponsor of House Bill 1030. I would welcome your
5 amendments, if we would make that acceptable to you.

6 Are there any questions by members of the
7 committee? Joint committees?

8 Representative McHale.

9 REPRESENTATIVE McHALE: Thank you, Mr.
10 Chairman.

11 To any one of the three gentlemen sitting at
12 the table, under current Pennsylvania law, if an employee
13 is intentionally injured by his or her employer, may that
14 employee bring a lawsuit against the employer whose
15 conduct resulted in the injury to the employee?

16 MR. OXFELD: I'm not a member of the bar in
17 Pennsylvania nor am I an expert on the specifics of your
18 system. In most States, an injury which amounts to a
19 deliberate injury could not be regarded as arising out of
20 in the course of employment. If I were to pull a gun on
21 an employee in my office and shoot him, I'd be
22 hard-pressed to find any court that would defend allowing
23 the employer to stand behind the exclusive remedy clause
24 under those circumstances. The difficulty is in our view
25 distinguishing deliberate injury from injury which occurs

1 under circumstances which might be under other conditions
2 considered negligent or even grossly negligent.

3 REPRESENTATIVE McHALE: Sir, I wish that
4 were the law in Pennsylvania. Indeed, I think that's what
5 the law should be. That is not what the law is. If
6 counsel would like to comment on that point, I'd be happy
7 to listen to his perspective, but in fact in Pennsylvania
8 our Supreme Court, in March of 1987, obliterated the
9 distinction between negligent injuries and intentional
10 injuries so that both types of actions are now barred in
11 the Commonwealth of Pennsylvania, and it was that
12 decision, the Poyser case, which gave rise to the
13 motivation, I believe, for this legislation. So if
14 someone who is familiar with Pennsylvania law could
15 comment on that, because I think that's a critically
16 important distinction, I would appreciate any references
17 you might make.

18 MR. OXFELD: We would urge you in looking at
19 that question to consider very carefully the standard of
20 what is considered intentional conduct and not allow an
21 inference that because an injury occurred under
22 circumstances which are hard to defend that it was a
23 deliberate injury, and I'm using that word very
24 deliberately.

25 REPRESENTATIVE McHALE: No, sir. We're not

1 talking about questions of judgment here. Our Supreme
2 Court has held in Poyser vs. Newman Company, decided March
3 17, 1987, that torts which are the legal equivalent of
4 intentional injuries are barred as a result of the Supreme
5 Court's view of legislative intent, just as accidental
6 injuries are barred. And that's a distinction that did
7 not come out clearly in your testimony and one that I
8 think is, again, central to the meaning of these bills.

9 You indicated a social compact during the
10 course of your testimony, and your description of that
11 social compact is, I believe, accurate, and that is for
12 many years not only in this jurisdiction but in every
13 other jurisdiction employees gave up the right to sue for
14 accidental injuries in exchange for the certainty of
15 payment under the workmen's compensation system. As a
16 result of the Poyser decision in March of 1987,
17 Pennsylvania has gone beyond that so that now in
18 Pennsylvania, as I understand the law, not only are
19 accidental injuries barred from the courtroom, intentional
20 injuries are barred from the courtroom, and while I might
21 agree with you on the first point, I have grave concern on
22 the second. And so if you could address that distinction
23 between intentional injuries and accidental injuries, I'd
24 be grateful.

25 MR. ROUCH: I, not being a lawyer and not

1 having read the Poyser decision, I'm not prepared.
2 However, if you'll notice in our testimony, we do
3 reference that. I would be glad to have our general
4 counsel review it and provide an opinion back to you
5 regarding the impact of that decision, to what extent it
6 tightened up the law and prevented the opportunity to
7 bring a suit in a deliberate situation and what the net
8 effect of that has been, from an insurance standpoint
9 anyways.

10 REPRESENTATIVE McHALE: Well, I would ask
11 for that because, frankly, that is the homework that we
12 all should have done--

13 MR. ROUCH: Sure.

14 REPRESENTATIVE McHALE: Before we arrived
15 here today. Were it not for the Poyser decision, I don't
16 think Representative Cohen would have felt the need to
17 introduce these bills, and that's critically important
18 because repeatedly in your testimony you referred to an
19 expansion of liability that these bills would create, and
20 I would respectfully submit to you that for the most part,
21 that expansion of liability would amount to nothing more
22 than a return of the law to what most people believed it
23 was prior to the Poyser decision in 1987. I think most
24 attorneys in Pennsylvania believed for 15 years following
25 the 1972 amendments to the workmen's compensation statute

1 that indeed accidental injuries were barred from a tort
2 recovery in exchange for the certainty of a workmen's
3 compensation coverage. You got insurance, you were denied
4 access to the courtroom. But I think also throughout that
5 entire period of time, up until the decision of the Poyser
6 case, most attorneys in this Commonwealth believed that
7 where you had an intentional injury, where the employer
8 didn't accidentally hurt the employee but did so
9 consciously and intentionally, that that kind of injury
10 could still be the subject of a common law tort action.
11 I, for one, was astounded in March of 1987 when the
12 Supreme Court took an entirely different view of those
13 1972 amendments and said that not only were accidental
14 injuries barred, but intentional injuries as well. I
15 believe and would submit to you that accidental injuries
16 ought not be the subject of a tort action, but I think
17 it's outrageous that intentional misconduct can only find
18 a remedy through the workmen's compensation system. And I
19 don't mean to belabor this issue, but I think that is the
20 heart of the matter.

21 MR. OXFELD: I would agree with you that it
22 is, but I think that I'm not sure that I could agree on
23 the distinction you're making between accidental and
24 intentional. There's a difference between accidental -- I
25 mean, there's a difference, quite a difference, between

1 deliberate injury. There's a broad range of circumstances
2 that can give rise to an accidental injury. A
3 construction firm which digs a ditch and doesn't adhere to
4 safety standards in protecting workers who have to work in
5 that ditch, which no one condones, may even know that
6 they're not adhering to the safety standards. But yet if
7 a worker is injured, it's ludicrous to me to think that
8 that, with all due respect, that the employer intended
9 that worker to be injured, even if they go into that ditch
10 and something terrible happens and an injury occurs. And
11 that's quite a different case in our minds from deliberate
12 injury where the employer intended that that worker be
13 hurt, and that's the distinction that we would like to
14 preserve.

15 REPRESENTATIVE McHALE: Unfortunately,
16 that's not a distinction that exists in Pennsylvania law
17 currently.

18 Let me give you a brief hypothetical. Do
19 you believe an employee who was injured because an
20 employer knowingly, consciously and intentionally removes
21 a safety device in violation of Federal law should have a
22 cause of action against the employer? The employer comes
23 in, knows what the law requires in terms of that safety
24 device, and for reasons perhaps related to productivity
25 removes that safety device in conscious violation of

1 Federal law, and because of the removal of that safety
2 device the employee is injured, should that employee, in
3 that kind of case, have a cause of action against the
4 employer?

5 MR. OXFELD: With all due respect, my answer
6 would have to be no. It's unimaginable to me that even
7 under the circumstances that the employer, under those
8 circumstances, intended a worker who might be injured in
9 that case to suffer an injury. It's just -- I can't
10 conceive that any employer would intend that worker to
11 have their hand hurt. It doesn't benefit the employer one
12 iota for that worker to be hurt under those circumstances.
13 Any employer who did I think deserves to have everything
14 you could throw at him occur if they really wanted that
15 worker to be hurt, but that means that they have to stop
16 their processes, they have to pay benefits, they have to
17 incur all the costs and travail an interruption of their
18 business to deal with the injury. The circumstances where
19 you could convince me that the employer intended -- it
20 would be a matter of fact a finding that the employer
21 intended that harm to occur to that employee would be very
22 tall order, and that's why I'm making -- would urge the
23 committee to make a distinction between deliberate injury
24 and injury which results from negligent or even grossly
25 negligent conduct. That would be gross negligence, but

1 I'm not sure that it would rise to deliberate injury.

2 REPRESENTATIVE McHALE: What if it is
3 deliberate injury?

4 MR. OXFELD: It would be hard for me to
5 defend that a deliberate injury occurred out of the course
6 of employment.

7 REPRESENTATIVE McHALE: Wait a minute.

8 MR. OXFELD: If you deliberately injure
9 someone, if you push somebody into a machine because you
10 intended them to be hurt, I don't think you'll see the
11 insurance industry rise to the defense of that conduct as
12 something where the tort action should be barred. At
13 least not the AIA.

14 REPRESENTATIVE McHALE: But you do rise to
15 the defense of the employer who intentionally violates a
16 safety standard by knowingly removing a safety guard
17 required by law?

18 MR. OXFELD: That is -- I wouldn't defend
19 that conduct, but that conduct does not, in our judgment,
20 give rise, and in no State, to my knowledge, is such
21 conduct recognized as rising to the level of deliberate
22 injury.

23 REPRESENTATIVE McHALE: I've monopolized the
24 microphone too long, but I would strongly suggest to you,
25 in order to comment from an informed standpoint on the

1 current status of Pennsylvania law, that you read the
2 Poyser case and read all of the subsequent cases decided
3 in reliance upon Poyser because to the best of my
4 knowledge, under current Pennsylvania law, there is no
5 cause of action available to an employee who is
6 intentionally hurt by his or her employer, deliberately
7 hurt, and I find that lack of a tort remedy to be
8 unconscionable.

9 Let me ask a final point, if I may. If
10 these bills were to become law, and as I read these bills,
11 they have to do with the intentional violation of the
12 safety standard or exposure to toxic chemicals in the
13 workplace, perhaps your counsel is the best one to comment
14 on this, what would be the status of other kinds of
15 intentional tort? What about other kinds of intentional
16 injuries not involving toxic substances and not involving
17 the removal or a violation of the safety standard? What
18 would be the status of those other types of intentional
19 torts? Would you still be able to sue or would you be
20 able to sue for that kind of misconduct?

21 MR. OXFELD: I think we would need to
22 review, I certainly haven't had the opportunity to do
23 that, the Poyser decision and any related case law in
24 order to give you a reasonable answer to that question,
25 and we would be happy to take a look at that law and I

1 think, you know, the points that you raised are well
2 taken. But again, if you review the discussion and the
3 workers' compensation treatise of what is considered an
4 intentional injury, that's, I think, probably we agree in
5 principle but disagree in where you might find intention
6 someone else might not.

7 REPRESENTATIVE MCHALE: Well, that's true,
8 but what I would point out is that while you and I agree
9 regarding the overriding principle of law, which is to say
10 a remedy should be available for the employee who is
11 deliberately injured, who is intentionally hurt, I would
12 point out to you that our Supreme Court disagrees with
13 both of us. That remedy is not currently available under
14 Pennsylvania law.

15 MR. OXFELD: But there is a workers'
16 compensation remedy, to be sure. It may not be an
17 unlimited liability, but there is some measure of
18 protection.

19 REPRESENTATIVE MCHALE: Let me give you a
20 dramatic example. If an employer doesn't like his
21 secretary's typing and he slaps or otherwise physically
22 assaults his secretary, do you really believe that a
23 workmen's compensation recovery is adequate to address
24 that kind of outrageous conduct?

25 MR. OXFELD: It would be hard for me to

1 imagine that if an employer assaulted their secretary--

2 REPRESENTATIVE McHALE: It happens,
3 unfortunately.

4 MR. OXFELD: --that that would be conduct
5 that arises out of in the course of employment.

6 REPRESENTATIVE McHALE: Well, read Poyser.
7 The hypothetical that I gave you earlier regarding the
8 employer who knowingly and intentionally removed the
9 safety guard comes straight out of a factual situation in
10 the Poyser case, and that employee who was subsequently
11 injured was barred from recovery. The reason why I raised
12 the point I did a moment ago was that I'm not convinced
13 that these bills go far enough, and I applaud the prime
14 sponsor. These bills address the situation of a toxic
15 chemical, and these bills address the situation of a
16 knowing violation of the safety standard, but I'm
17 concerned about other kinds of intentional torts which
18 might still be barred from a tort recovery even if these
19 bills were passed.

20 Look, I agree with you on accidental
21 injuries. That's the premise of workmen's comp. When
22 accidental injuries occur, the recovery should lead to
23 workmen's comp. When an intentional injury is inflicted,
24 it seems to me the courthouse doors should still be
25 opened.

1 I apologize for taking so much time, but
2 I've had a longstanding interest in this particular issue
3 and a longstanding dissatisfaction with the Supreme
4 Court's decision in the Poyser case, and we cannot
5 intelligently discuss the issue before the committees this
6 morning without a thorough understanding of how the law is
7 dramatically changed by the Poyser decision in 1987.

8 MR. ROUCH: Mr. McHale, I will make sure
9 that this committee gets at least a review and opinion by
10 our staff with respect to the Poyser decision. Also, that
11 we will comment as to whether there may or may not be
12 another tort remedy available in the event of an
13 intentional action. I can only note one thing. With
14 respect to any type of insurance, it is pretty much a
15 standard attitude within the industry and I think outside
16 the industry that intentional actions should not be
17 insured. And that makes it very difficult whether you're
18 talking about workers' compensation coverage or general
19 liability coverage or whatever from the insurance
20 industry's standpoint. To be setting a new precedent that
21 we are now going to insure intentional actions, that
22 precedent would go well beyond the workplace and would
23 expand liability dramatically in society, and I just ask
24 that that point be known. From an insurance standpoint,
25 we will, you know, oppose any action I think to require

1 insurability at least of an intentional action, but, you
2 know, outside the insurance mechanism, there may be a need
3 to look at some of these matters.

4 REPRESENTATIVE McHALE: And that hits the
5 point right on the head. I think you raise a very good
6 issue in terms of insurability. I, for, one would be
7 satisfied if we simply returned Pennsylvania law to the
8 state that most of us thought that it was in prior to the
9 Poyser decision. So we're not talking about creating
10 dramatic new avenues of liability. I would simply like to
11 go back to the intentional tort exception that most of us
12 believed existed under Pennsylvania law prior to the
13 Poyser decision in March of 1987. That's not a dramatic
14 change. It simply says that when an employer
15 intentionally hurts his employee, that employee should
16 have redress in the courts.

17 Thank you, Mr. Chairman.

18 CHAIRMAN COHEN: Thank you, Representative
19 McHale.

20 I would just like to ask that the analysis
21 that you're going to be prepared be sent to the members of
22 both committees, both Labor Relations and Judiciary.

23 MR. ROUCH: Could I forward it to the two
24 chairmen and ask that they circulate it to the members?

25 CHAIRMAN COHEN: That would be fine.

1 MR. ROUCH: Thank you.

2 CHAIRMAN COHEN: Representative Pressmann.

3 REPRESENTATIVE PRESSMANN: Thank you, Mr.

4 Chairman.

5 Gentlemen, I'm somewhat dismayed at your
6 testimony, to say the least. The case that Representative
7 McHale referred to, Poyser, has a very interesting twist
8 to it that you should be aware of, and these are the facts
9 of the case. The machine in the plant that was considered
10 unsafe by the employees, the employees reported the
11 machine to OSHA. OSHA informed the employer that they
12 were going to do an inspection. The machine was removed
13 from the plant so when OSHA did their inspection there was
14 no unsafe machine. After OSHA left, the machine was
15 brought out again. Now, sir, that is intentional. That
16 is intentionally putting a machine to cause harm and did
17 cause harm and caused a man part of his hands.

18 Now, under Pennsylvania law, there was a
19 remedy, workers' compensation. I think it's up to 66
20 percent of your -- of some kind of salary or something
21 like that. This person who was put in a position of
22 working with an unsafe machine will get 66 percent of
23 something towards disability and will not be able to
24 provide for his family in the same way that he was able to
25 before.

1 The issue of workplace safety is not just
2 rhetoric, it's not just some bill dreamed up by the
3 unions, it's reality. Myself, a person who has been in
4 the workforce and the blue collar workforce, who until I
5 was a legislator never wore one of these things in my life
6 (pointing to his necktie), has been in the situation where
7 a ladder has collapsed beneath him and was almost killed,
8 and was gassed sometime when I went into an improperly
9 ventilated tank, and worked in a place where a man was
10 killed before I was an employee there because there was
11 not a backup safety mechanism on a steam vent and a man
12 was literally broiled to death, and where another
13 gentleman almost died from inhalation of grain fumes
14 because there were not proper safety devices installed.
15 These are real things about real people, and I am deeply
16 disturbed that you treat it as something that there is no
17 remedy to. And I am particularly concerned when you sit
18 here today and you say that maybe there ought to be a
19 criminal action, and I think the words you used was "of a
20 heinous nature." And you're sitting there today saying
21 that something could be so heinous that there should be a
22 criminal action but there should not be a civil action.

23 MR. OXFELD: I agree with most of what you
24 said, and let me make clear that I do, if there is a
25 deliberate injury and it rises to criminal intent to

1 injure and in the judgment of public policymakers in the
2 State that should give rise to criminal sanctions. I
3 don't think that we could take exception to it. Nor as I
4 tried to articulate before would we take exception to
5 providing a tort remedy when there is a deliberate injury,
6 when an employer deliberately injures a worker, and I am
7 trying to make a distinction, which I realize is a
8 difficult one to make, between a deliberate action which
9 could result in an injury and a deliberate injury. I
10 would -- there are employers who intend their workers to
11 be hurt, to be sure, and I don't condone that conduct, and
12 should they violate that standard of conduct, I do not
13 believe, in my judgment, that it could be held properly to
14 be an injury that arises out of in the course of
15 employment because it is not a risk of employment to be
16 subject to be intentionally hurt by your employer.

17 But intentional conduct, however bad, which
18 doesn't rise to that standard, removal of a safety device
19 is not defensible, and if you want to impose criminal
20 sanctions for removing safety devices, that's your
21 judgment. But in our view, the fact that you've removed
22 the safety device isn't in and of itself proof that you
23 intended somebody to be hurt as a result.

24 REPRESENTATIVE PRESSMANN: Often in the
25 performance of negligent behavior people are hurt

1 unintentionally. If I were to walk out this door today
2 and discharge a firearm in the city of Harrisburg because
3 it was the Fourth of July and I was negligent and someone
4 was harmed, there would be both a civil and a criminal
5 action taken against me. If the same thing, I do
6 something negligent within a shop, I put a machine out
7 that's unsafe, under Pennsylvania law, the only remedy is
8 the workers' compensation law. I didn't deliberately mean
9 to hurt somebody, but by putting a dangerous machine out,
10 I created a situation where I deliberately did place a
11 machine, knowing fully well that it was dangerous, I have
12 created a negligent situation and a situation where
13 someone could get hurt. And I think it's just outrageous
14 under Pennsylvania law in the Supreme Court decision that
15 there is no remedy for that. And I agree with you that
16 accidents should be handled through a workers' comp
17 situation. I don't think we should change that and I
18 think the workers' comp law in this country was designed
19 for that. But I am greatly concerned that when an
20 employer is deliberately negligent, that there is no
21 remedy in the courts.

22 It is also my understanding, and maybe you
23 would want to clarify this, is that in other States where
24 -- in some States where it does not specifically say that
25 there is a tort remedy but that the workers' compensation

1 law has been interpreted that workers do have a civil
2 remedy in deliberate action.

3 MR. OXFELD: In a deliberate action, in a
4 deliberate action where the injury was deliberate, where
5 the employer intended that worker to be hurt, I'd like to
6 submit for the record, perhaps it will help the committee
7 in considering this issue, to look at the discussion on
8 this issue in Arthur Larson's Workers' Compensation
9 Treatise, the standard treatise of workers' compensation
10 law, and you'll see exactly the state of the law. When
11 workers' compensation programs were established, it was
12 part of the quid pro quo that negligent behavior would not
13 give rise to tort liability, no matter how far it went.
14 If it's intentional injury, that's not negligent, and in
15 our view it's not inappropriate where there is a
16 deliberate injury, not a deliberate action that could
17 result in an injury.

18 REPRESENTATIVE PRESSMANN: What about
19 deliberate negligence as opposed to negligence?

20 MR. OXFELD: Well, I'm not sure that that
21 intent -- that that amounts to deliberate injury.

22 REPRESENTATIVE PRESSMANN: All right, I
23 think you and I are just going to disagree on this whole
24 thing, so.

25 MR. OXFELD: We have a difference of

1 philosophy.

2 REPRESENTATIVE PRESSMANN: The one last
3 question for Mr. Rouch, and this is slightly off the
4 subject and it goes on the other bills of these committees
5 in addressing it, and that's 916, the product liability
6 bill, just one brief question. Have you examined that
7 bill? I imagine you have.

8 MR. ROUCH: We have reviewed it, yes.

9 REPRESENTATIVE PRESSMAN: Right. What
10 intent -- what will be the effect on insurance regs in
11 Pennsylvania if that bill were to go into effect?

12 MR. ROUCH: Well, initially the effect would
13 be minimal, if any. There are two main reasons for that.
14 The first is the question of whether the -- if it would be
15 enacted, whether the provisions of that law would be
16 upheld by the courts. And it does take some time to work
17 through the court system. Until you know how the courts
18 are going to interpret the law, you don't know whether
19 there has in fact been a reduction in liability or not.

20 The second reason is that the way that
21 workers' compensation is -- or, I'm sorry, that products
22 liability is rated, there are two bases that are used.
23 One of them is experience within the State and
24 specifically experience by the employer. But the more
25 predominant base is that of national experience. And the

1 reason for that is that in order to rate that product,
2 products liability accurately, in most of the areas that
3 the people purchase it need the coverage, you don't have a
4 large enough statistical base with just Pennsylvania
5 employers and just Pennsylvania businesses. Moreover,
6 many times there is an interstate effect on products that
7 are being sold.

8 REPRESENTATIVE PRESSMANN: Such as a big
9 employer in my area is Mack Trucks. They sell them all
10 over the United States and all over the world. So would
11 their basis be national more than Pennsylvania based?
12 Would their rate be based on a national experience or
13 Pennsylvania experience? Hypothetically.

14 MR. ROUCH: Well, you're going to have
15 national experience primarily with then some weight based
16 on Pennsylvania's specific experience. But remember that
17 that employer, when they go to -- Mack Truck, we'll say,
18 when they go to purchase their products liability
19 coverage, their product is going to be available in other
20 States as well. And the exposure of that company is, to
21 some degree, dependent upon the exposure in each of the
22 locales where their product may be available and where an
23 action may arise. Moreover, State courts are not the
24 single remedy for someone who feels they have a product
25 liability case. They can also take them to Federal court.

1 So when an employer is purchasing or when a business is
2 purchasing products liability, their exposure, number one,
3 can go beyond Pennsylvania and Pennsylvania State courts;
4 number two, could be affected in the Federal courts; and
5 number three, you don't have a huge statistical base of
6 different types of employers in Pennsylvania, different
7 types of manufacturers in Pennsylvania that you would be
8 able to develop a true actuarial rate. For many, many
9 types of businesses.

10 Now, in the long-term, in the long-term,
11 Pennsylvania's experience, if the courts, Pennsylvania
12 courts, uphold the law, Pennsylvania experience will be
13 weighted more to a greater degree for Pennsylvania
14 businesses. One of the factors that would come in at that
15 point is where are the products marketed? Is it primarily
16 marketed -- is this business primarily a Pennsylvania
17 business or is it a business that has ties and business
18 dealings outside this Commonwealth, and to what extent?
19 Because your liability is going to be, to a large degree,
20 a function of where you're doing business as much as what
21 type of business you're in.

22 REPRESENTATIVE PRESSMANN: How long would it
23 take you to, after the passage of this law, and I realize
24 it might take several years to go through the courts to
25 decide whether or not this is -- so say we take two or

1 three years for the courts that people feel comfortable
2 that this law is the law, how long would it take you then
3 to develop an experience table based on the law?

4 MR. ROUCH: Well, your experience table
5 would begin really when the law goes into effect. While
6 you'd still be taking a premium, you should have some
7 changes in your loss cost in the number of claims and the
8 severity of the claims, et cetera. So that from the time
9 the law goes into effect you could start to gain your
10 experience there and each company would have that
11 experience. Now, once the courts, say the various
12 provisions have gone through the court system up to the
13 State Supreme Court, et cetera, been upheld, at that point
14 a company would take a serious look at the Pennsylvania
15 experience and see what extent they could adjust, raise
16 accordingly. But it would not be until that occurred.

17 REPRESENTATIVE PRESSMANN: In a person's
18 product liability insurance or insurance that they would
19 have because of product liability, say the person's not
20 even a manufacturer. Say they're a supplier. Say the
21 supplier of Mack Trucks, say. What percentage of their
22 insurance to protect them in case of a product liability
23 suit is based on Pennsylvania experience and what is based
24 on national? I mean, if that question makes any sense to
25 you.

1 MR. ROUCH: It does. I would not have that
2 right here. I'd have to check on that and try to get back
3 to you with it, Mr. Pressmann. I don't have that kind of
4 percentage. You want to know the percentage of
5 Pennsylvania experience as--

6 REPRESENTATIVE PRESSMANN: If I'm paying
7 \$100 for product liability insurance and I'm paying, say,
8 \$50 for it because my product is has gone national, it's a
9 national product and I'm paying \$50 because of
10 Pennsylvania experience, I mean, \$50 because of Federal
11 experience and \$50 because of Pennsylvania experience,
12 now, if this law passes, then obviously only my
13 Pennsylvania experience dollars is going to go down. What
14 kind of reduction then are we talking about in terms of
15 Pennsylvania based product liability insurance? To me,
16 that hits the crux of a lot of this issue because the
17 people I'm hearing from that are in support of this bill,
18 and I'm hearing mainly from small businesses that are
19 concerned, and I think their biggest concern is some day
20 they are going to be sued, and the second thing is I'm
21 hearing from MBA's, the cost of their insurance, and if
22 what you're saying is that based on -- that a lot of this
23 is going to be based on the national experience anyway,
24 then I'm not sure, you know, what we will accomplish in
25 916 if it were to become law and if the savings under

1 Pennsylvania were to be a small amount, then I'm
2 questioning what would be -- what we would actually solve
3 by enacting a law, and that's my concern. You know, what
4 is the bottom line in this, really? What is the bottom
5 line?

6 MR. ROUCH: And I appreciate that concern.
7 I think it's probably the most shared concern of all the
8 members of this committee and ultimately of the
9 legislature. I think one of the problems is this: First,
10 I would, you know -- I came to testify on workplace
11 safety--

12 REPRESENTATIVE PRESSMANN: I realize that.

13 MR. ROUCH: But I realize that this
14 committee has been taking up all these issues and that
15 you've got some of these questions and I'd be glad to
16 either try to answer them here or get you an answer. I
17 think the one thing to remember on this is that while many
18 people may try to put the products liability issue from in
19 the context of an insurance issue and they do so because
20 maybe when they hear from local business who have to pay
21 products liability premiums, when they express their
22 concern, they express it from the standpoint of the cost
23 of insurance. So it's maybe somewhat natural to feel that
24 it's an insurance problem. But I think the cost of the
25 insurance is really more of a symptom. It reflects really

1 more of a base problem, that the cost of insurance is
2 affected by the things that insurance is paying for. And
3 as you have products suits, et cetera, and you have not
4 only a higher frequency but higher severity when you go to
5 pay the claims, that's going to increase the costs.

6 When this committee and when the legislature
7 looks at the products liability issue, I think the matter
8 before you really should be the issue of are these changes
9 fair, not will they result in savings or not. I believe
10 this committee, these committees have had self-insured
11 businesses come in and testify and note that this is
12 really not an insurance problem. They have the same
13 concerns and they're self-insured. And their concerns are
14 not based purely on the economics of it. Their concerns
15 are based on the fairness of it and on trying to provide a
16 predictable environment to do business in, and I simply
17 ask that the committee remember the fairness and the
18 predictability sides as well as the cost of insurance. I
19 will do my best to get you those percentage breakdowns, et
20 cetera, you know, for Pennsylvania versus U.S., to what
21 degree Pennsylvania is mixed into the U.S. or separated
22 from it. But I do ask that this committee please try to
23 consider the products issue as a fairness issue and not
24 simply as an economic or insurance issue.

25 REPRESENTATIVE PRESSMANN: Thank you.

1 CHAIRMAN COHEN: Thank you.

2 Representative Heckler.

3 REPRESENTATIVE HECKLER: Thank you, Mr.

4 Chairman.

5 It's probably more of in the way of an
6 observation prompted by some of Representative McHale's
7 questions. Hard cases make bad law. Now, we're all
8 familiar in varying degrees with the Poyser case.
9 Representative McHale described the facts accurately. He
10 referred to or characterized that conduct as intentional
11 conduct. I think that caused some confusion on the part
12 of the members of the panel. He has assured me at sidebar
13 that the confusion was created by Justice Nix and not him,
14 and I have no difficulty whatsoever believing that. When
15 we select our appellate judges by merit, hopefully we'll
16 do a little better with the product we achieve.

17 But in any event, I think that this
18 underscores, and I'll invite a comment, that this
19 underscores the problem that this legislation presents.
20 We're all shocked and defended by Poyser. We all agree
21 that Newman or whoever owns Newman, whatever the company
22 is, should have gotten waxed in some way for that
23 obviously egregious conduct. I think it's clear that it
24 was not intentional conduct, although apparently Justice
25 Nix refers to it that way, in the sense that Newman wanted

1 Poyser to get his fingers cut. It was plainly intentional
2 conduct, the employer plainly engaged in intentional
3 conduct in creating the hazard to begin with and in
4 concealing that hazard from the authorities who were
5 charged to prevent such hazards from existing. That
6 conduct goes way beyond negligence.

7 The problem that is presented to these
8 committees and the legislature in taking up such
9 legislation is framing a standard that would get at the
10 Poyser situation without opening a Pandora's box of
11 litigation. And I think that's a very substantial
12 challenge. The only point that I would make is that
13 plainly these bills don't do it. No "knew or should have
14 known," which is the standard in these two bills, goes
15 vastly, vastly beyond the conduct that is demonstrated in
16 Poyser, and I'm ready to stand corrected. It would have
17 been my understanding that truly intentional conduct,
18 slapping a secretary, shooting an employee, whatever, is
19 not covered within the workers' comp prohibition, but
20 again, I'll defer to Paul. I would have voted for him for
21 the appellate courts, since that's the flawed system we
22 have, and it may be that that's the mistaken way that the
23 Supreme Court characterized those facts.

24 So I don't know that you can focus that
25 issue for us any better, but I just wanted to make sure

1 that that distinction was made, and I'd invite any
2 comments now that I have made my little dissertation.

3 MR. OXFELD: Well, I believe you've exactly
4 hit the nail on the head. The question is at what point
5 does intentional conduct amount to a deliberate injury to
6 a worker? That's sometimes a very difficult line to draw,
7 which may be why it's better left to courts than to
8 interpretation of legislation to try and determine under
9 any given determination as a matter of fact.

10 REPRESENTATIVE HECKLER: If I may, Mr.
11 Chairman, perhaps some arrangement that would have
12 particularly critical cases for Pennsylvania decided by a
13 panel of jurors from other jurisdictions might solve our
14 problems.

15 Thank you.

16 CHAIRMAN COHEN: To offer a suggestion,
17 Representative Bortner.

18 REPRESENTATIVE BORTNER: Thank you.

19 I'm not going to dwell on the Poyser case.
20 I intended to ask some questions, but we pretty much
21 covered that field. I would only point out in response to
22 your last comments about letting that to the courts is
23 that in one part of the Poyser case Justice Nix, in his
24 opinion, does say, in referring to the issue, is that "it
25 is one that must be resolved by the General Assembly, and

1 not this court," and I guess I would suggest to you that
2 that's why we're here today and that's why we're
3 considering these bills. And frankly, I read that as sort
4 of a direct challenge to the General Assembly to deal with
5 this issue since our Workmen's Compensation Act itself
6 does not. He also points out that there are some States
7 that have allowed the direct tort action for intentional
8 conduct but finds that their statute is somewhat different
9 because it talks about intentional conduct.

10 BY REPRESENTATIVE BORTNER: (Of Mr. Oxfeld)

11 Q. I just have one other question or comment.
12 I'm somewhat interested in your view, I guess, of
13 deliberate conduct and what amounts to deliberate conduct
14 and would pose a question to you in this way: Would you
15 find that a person who becomes voluntarily intoxicated,
16 drives an automobile and kills somebody in the process,
17 would that meet your standard of deliberate conduct?

18 A. What my personal standard is is not really,
19 I think, a matter of importance to the committee. The
20 question is, in the judgment of a court, does that amount
21 to a deliberate injury, and I think I would leave it to
22 the trier of facts and the appropriate decisionmaking body
23 to hear all the facts.

24 Q. Well, I'm obviously trying to make a point,
25 and the point is this: In this State, and I think in most

1 States, we have no difficulty at all in imposing criminal
2 liability for that kind of conduct, and we have a much
3 stricter standard in determining what is intent in the
4 criminal area, and I guess it seems to me that, you know,
5 having made that determination, you know, there is some
6 precedent for imposing consequences for what I would
7 consider to be deliberate conduct short of actually going
8 out and putting the gun up to somebody's head and pulling
9 the trigger, which I got the impression that you were
10 determining or defining as deliberate conduct?

11 A. I would agree with you. I wouldn't say that
12 it's impossible to have facts short of that. I would say
13 that it's a very difficult question of fact to sort when
14 it's conduct less than that, but I would concede for the
15 record that there may be circumstances where you could
16 justifiably reach that conclusion.

17 Q. Do you have any information on how many
18 other States, and I don't know the answer to this, it's
19 not a trick question, except that there are some that do
20 permit direct tort actions in cases of willful,
21 deliberate, intentional types of conduct.

22 A. To my knowledge, there are none.

23 Q. Well, I can tell you right now--

24 A. Where there is deliberate injury, courts may
25 find that that is outside the Workers' Compensation Act

1 because it doesn't arise out of it in the course of
2 employment. There are a few States which, as a result of
3 judicial opinions, which found intent where we wouldn't
4 normally expect to see intent, West Virginia and Ohio both
5 had judicial decisions which were rejected by the weight
6 of workers' compensation law and where the legislature
7 acted to overrule a court opinion creating liability under
8 circumstances that we would not regard as a deliberate
9 injury. But with those exceptions, I'm not aware, but I
10 will give you, for the record, the discussion of Larson
11 where he discusses those States which do have laws that
12 are directly on the point, and I would defer to Professor
13 Larson as a greater authority than I.

14 Q. The West Virginia and Ohio statutes, are
15 they similar to these statutes?

16 A. No. No. The West Virginia law lays out a
17 standard of what is deliberate injury, which is very
18 exacting and far more exacting than the level of conduct
19 which these bills would propose, and I'd be happy to
20 supply you a copy for the record.

21 Q. I'd like that. The only other thing I'd say
22 is it's my understanding, and I can't give you a citation,
23 is that the New Jersey Supreme Court decided a case very
24 similar to Poyser and reached an opposite result or an
25 opposite conclusion allowing a direct court action under

1 very similar circumstances, and perhaps somebody else
2 either here or your staff may know a little more about
3 that. I can't give you a citation.

4 A. If you're referring to the -- there's a du
5 Pont decision which took years and years. Are you
6 referring to a case this year? The facts in that case, to
7 my understanding, and I have reviewed that decision, are
8 somewhat different from the facts as you describe them in
9 Poyser, which I haven't had the chance to review. In that
10 case, the employer failed to tell the employee that they
11 had been exposed and in fact were being made sick by
12 exposure to asbestos, and I think that's a completely
13 different kind of circumstance.

14 Q. Well, it is different, but let me also tell
15 you that we've got that case too, and that's going to be
16 coming up a little later. That one's called Blouse vs.
17 Superior Mold, and that is the chemical or the toxic
18 equivalent of the Poyser case. So we've got one just like
19 that as well.

20 A. The weight of the judicial opinion on those
21 kinds of facts are that where an employer deliberately
22 conceals from an employee the knowledge that they have
23 been exposed and now sick, the courts seem to have found,
24 and probably justifiably, that that is conduct outside the
25 Workers' Compensation Act.

1 Q. You would support that result?

2 A. On the facts -- wouldn't defend it if that
3 resulted.

4 Q. All right, thank you very much.

5 CHAIRMAN COHEN: Thank you.

6 Representative Chadwick.

7 REPRESENTATIVE CHADWICK: Thank you, Mr.

8 Chairman.

9 BY REPRESENTATIVE CHADWICK: (Of Mr. Rouch)

10 Q. Jeff, I'm just not as familiar with workers'
11 compensation insurance as I am with some other forms, and
12 I have a couple of questions that would help clarify some
13 things in my mind.

14 A. Okay.

15 Q. If I push someone down the stairs in my
16 house, my homeowner's carrier, liability carrier, is
17 probably going to deny me coverage based on the fact that
18 that was an intentional act, isn't that correct?

19 A. Probably, yes. It would depend on, you
20 know, all the circumstances.

21 Q. Granted, but as a general principle, there's
22 usually an exclusion for intentional acts, isn't that
23 correct?

24 A. (Indicating in the affirmative.)

25 Q. All right. In workers' compensation

1 insurance, if I, as an employer, deliberately push my
2 employee into a machine to hurt him, will the workers'
3 comp carrier deny coverage to the employer in those
4 circumstances?

5 A. No. No. They will pay the medical bills,
6 they'll provide compensation for wage loss, et cetera. So
7 they would treat that claim the same as any act, you know,
8 truly accidental claim.

9 Q. Would there be any recourse for the company
10 against the employer for an intentional act like that?

11 A. I'm sure that they could, you know, call him
12 in and have some sort of board of review of that
13 individual, but no. I mean, other than in the workers'
14 comp system? No.

15 Q. So for an absolutely intentional act, the
16 coverage is still there?

17 A. That's correct.

18 Q. And there's no denial like there would be
19 for a homeowner's policy?

20 A. That's correct.

21 REPRESENTATIVE KOSINSKI: Mr. Chairman? if
22 I may just add a little bit to what the question was just
23 submitted.

24 CHAIRMAN COHEN: Yes, Representative
25 Kosinski.

1 REPRESENTATIVE KOSINSKI: Representative
2 Chadwick, the easiest way around that would be if this law
3 becomes law, if the statute and this bill becomes law in
4 Pennsylvania, all the workmen's comp insurance companies
5 have to do is add a same clause as in the homeowner's
6 clause that they will not be responsible for intentional
7 or tortious conduct. There would be no problem there with
8 having the workmen's comp insurance company then go after
9 the employer who did the tortious act. Is that true?

10 MR. ROUCH: First of all, we don't know
11 whether that would be permitted. Secondly, I think that
12 there is that--

13 REPRESENTATIVE KOSINSKI: Why wouldn't that
14 be permitted, first of all?

15 MR. ROUCH: Well, because it could very
16 easily be interpreted as this is the will of the
17 legislature and for some reason we have to incorporate
18 that into our workers' comp system.

19 REPRESENTATIVE KOSINSKI: Then we amend the
20 bill.

21 MR. ROUCH: That could be. But,
22 Representative Kosinski, I think the issue is not that cut
23 and dry whether you include a restriction in there or not.
24 You would still have, consistently, you would still have
25 litigation as to whether the action was an intentional

1 action or not. Whether it was a defensible action or not.

2 Q. Oh, that's granted. That's true. And
3 that's why we bring it in the court because they would be
4 the ultimate people to define what the intentional conduct
5 was.

6 REPRESENTATIVE PICCOLA: Mr. Chairman, point
7 of order.

8 CHAIRMAN COHEN: Representative Piccola.

9 REPRESENTATIVE PICCOLA: It was my
10 understanding that Representative Chadwick had the floor
11 and was directing a line of questioning.

12 CHAIRMAN CALTAGIRONE: Representative
13 Chadwick had the floor and was directing a line of
14 questioning. Representative Kosinski wished to interject
15 something in the line of questioning.

16 REPRESENTATIVE PICCOLA: Well, he's delving
17 into his own line of questioning. I'm my understanding
18 that the member continues to ask questions until he
19 surrenders the floor, and I don't think Representative
20 Chadwick has done that.

21 REPRESENTATIVE KOSINSKI: Point of order,
22 Mr. Chairman.

23 CHAIRMAN COHEN: Representative Kosinski.

24 REPRESENTATIVE KOSINSKI: I am still in my
25 line of questioning. I believe I had a proper yield from

1 the Chairman in this line of questioning, and it's being
2 directed specifically to the intentionally tortious
3 conduct that this bill would represent.

4 CHAIRMAN COHEN: Representative Chadwick.

5 REPRESENTATIVE CHADWICK: Mr. Chairman, I
6 yield to the gentleman, Mr. Kosinski, with the
7 understanding that when he concludes his questioning I can
8 have the floor.

9 CHAIRMAN COHEN: Representative Chadwick
10 will certainly regain the floor.

11 Representative Kosinski.

12 REPRESENTATIVE KOSINSKI: Thank you,
13 Representative Chadwick.

14 Now, where were we?

15 MR. ROUCH: I think the first question is
16 whether the legislature would permit that, and I think in
17 their infinite wisdom they have consistently shown not
18 only a willingness but I think a real incentive to make
19 sure that there is adequate compensation in every
20 instance, and I'm not sure that the legislature would want
21 to leave injured workers in a questionable situation as to
22 whether this is going to be something that is insurable or
23 not insurable. In fact, it goes against the tenets of the
24 workers' comp system, which was to provide for a quick and
25 complete compensation to an injured party regardless of

1 fault.

2 REPRESENTATIVE KOSINSKI: I just wish you
3 lived up to that.

4 MR. ROUCH: Excuse me?

5 REPRESENTATIVE KOSINSKI: I just wished you
6 lived up to that. I could give you a ton of workmen's
7 compensation cases that flow through my office where the
8 payment is neither quick nor adequate, but that's another
9 question for another day.

10 MR. ROUCH: I think that some of those
11 problems, Representative, are due to the administrative
12 system and not simply due to the insurer. There are
13 instances where I admit there are some consumer
14 complaints, but I think by and large the problems out
15 there are administrative problems.

16 REPRESENTATIVE KOSINSKI: Now, let's get
17 back to the intentionally tortious conduct. I think
18 you're throwing up a number of red herrings, and this will
19 be my last comment since Representative Chadwick was so
20 kind to let me interject into his comments, that you're
21 putting up all these roadblocks yet the bottom line here
22 is you're letting people, employers, who intentionally
23 injure their employees get away scot-free, and the funny
24 part of it is you still pay the freight and other
25 employers still pay the freight. Now, I hear in these

1 hearings in a number of different times that joint several
2 liability lets hold if the person is responsible for the
3 act, so on and so forth. Now in this bill you argue the
4 entirely different argument, that here we have a
5 tort-feasor who intentionally causes damages to an
6 employee and we're letting that person get away scot-free
7 and spreading the risks out among good employers who are
8 safe, who do not remove safety features from a workplace,
9 who do not expose their people to hazardous materials
10 unlawfully, and I'm just surprised that you do a complete
11 about-face on this issue when it comes to the workplace
12 safety bills.

13 MR. ROUCH: I don't think it's a complete
14 about-face. I think it's entirely consistent. The
15 insurance industry, on behalf of our policyholders, tries
16 to hold down claim costs and tries to provide a
17 predictable environment in which we are going to be doing
18 business and hopefully in which our policyholders are
19 going to be able to be purchase coverage. Whether you're
20 talking about other tort restrictions or you're talking
21 about workers' compensation and the expansion of
22 liability, et cetera, is totally consistent that the
23 insurance industry is trying to provide for predictability
24 and stability which aids us but more importantly aids our
25 policyholders. I don't see any inconsistency there.

1 REPRESENTATIVE KOSINSKI: I was very
2 predictable with my 25-percent cut in auto insurance and
3 yet you argued against that. Very predictable.

4 MR. ROUCH: Well.

5 CHAIRMAN COHEN: Some kinds of
6 predictability are favored over other kinds of
7 predictability.

8 REPRESENTATIVE KOSINSKI: Thank you,
9 Representative Chadwick.

10 Thank you, Mr. Chairman

11 CHAIRMAN COHEN: The Chair also thanks
12 Representative Chadwick for his graciousness.
13 Representative Chadwick is in order now.

14 REPRESENTATIVE CHADWICK: Thank you, Mr.
15 Chairman.

16 Jeff, I was frankly surprised when you said
17 that there's no right on the part of a workers' comp
18 carrier to add coverage for an intentional act. I just
19 would assume that that was the case. Do you represent
20 companies that just do workers' comp in Pennsylvania?

21 MR. OXFELD: I'm not certain that that's
22 absolutely correct. If an injury was not considered a
23 workplace injury because it was a deliberate injury, I'm
24 not sure the carrier might not have license to declare
25 that that was not covered by the workers' compensation

1 policy. Fortunately, there don't seem to be many
2 instances where those facts come up and these cases get
3 tested in the courts as coverage issues, and I'm certain
4 that neither you nor the other Representative who's left
5 the room intend that insurance companies not pay the
6 injured worker when there's maybe a dispute over whether
7 the circumstances of the injury were deliberate or not.
8 But at minimum, there's always the remedy that they should
9 be receiving the workers' compensation benefits if there
10 is an arguable workplace injury. But the insurance
11 carrier is also on the claim because of the Part B
12 coverage, his employer's liability covers liability that
13 the employer incurs for other kinds of liability. Even
14 where it's a deliberate liability there's a duty to
15 defend, and so on. So it's very murky. But I think that
16 the social objective of providing prompt medical care and
17 compensation where except in the clearest circumstances
18 that it was a case that didn't arise in the normal course
19 of employment, we would want to see benefits paid to the
20 injured worker.

21 BY REPRESENTATIVE CHADWICK: (Of Mr. Oxfeld)

22 Q. Thank you. I recognize that there are
23 probably very few circumstances where you have an
24 absolutely blatantly intentional act, but what I'm trying
25 to do is lay a foundation for a question I'm going to ask

1 in a couple of minutes. Is the company that provides the
2 workers' comp coverage generally the same company that
3 provides the liability coverage that dovetails with it, as
4 Jeff indicated in his testimony?

5 A. It's possible but not necessarily the case.

6 Q. All right. Then what you're telling me is
7 that it may well be the case that for an intentional
8 injury, deliberate intentional injury, there may be a
9 right on the part of the workers' comp carrier to deny
10 coverage, is that what you're saying?

11 A. If the circumstances of the injury were such
12 that the carrier could, in good faith, make a judgment
13 that it didn't arise out of in the course of employment,
14 which is the standard under any workers' compensation law,
15 they might have license to refuse, because the policy
16 doesn't cover injuries which do not arise under other
17 circumstances. A deliberate injury, an assault, normally
18 is hard to imagine as something that one expects to be at
19 risk for in the normal course of employment. At least
20 assault by your employer.

21 Q. All right. Let's suppose that I have a
22 memorandum in my hand from an efficiency expert who's
23 toured the plant and that memorandum indicates that if a
24 safeguard was removed from a machine, the machine would
25 operate 40 percent more efficiently, but there's also an

1 87 percent likelihood that in the next three years someone
2 will lose a hand in the machine if that occurs. Is that
3 the kind of thing for which an insurance company, if that
4 sort of thing results in an injury, should be required to
5 defend and pay for it?

6 A. But that's a judgment. Not everyone will
7 agree, first of all, with the judgment of that efficiency
8 expert, first of all. Second of all, the underwriting
9 department of the insurance carrier in the safety and
10 engineering inspection they do when they decide to accept
11 that employer as a risk that they write may very well
12 refuse to provide insurance coverage to them, but under
13 all State workers' compensation laws there's a residual
14 market and even that employer, by virtue of your law, is
15 going to be entitled to get some level, to obtain
16 insurance coverage. So it can be a problem, but most
17 likely the carriers would be very reluctant to insure that
18 employer.

19 Q. Thank you. I see we're running behind
20 schedule. I'll end my questioning here.

21 REPRESENTATIVE CHADWICK: Thank you, Mr.
22 Chairman.

23 CHAIRMAN COHEN: Mr. Mindlin.

24 BY MR. MINDLIN: (Of Mr. Oxfeld)

25 Q. You're familiar with the Chicago Wire case

1 involving criminal application?

2 A. I'm familiar with it, yes.

3 Q. All right. The question I have is, given
4 that other courts, and by inference the denial by the
5 Supreme Court to review the case, have determined that
6 normal criminal law applies to workplace situations where
7 deliberate harm is involved, is there, in your opinion, a
8 need for House Bill 1030?

9 A. I'm not sure I am qualified to answer your
10 question, with all due respect. I haven't examined that
11 closely the -- I knew there was a split in the Federal
12 circuit courts on whether the OSHA Act preempted State
13 criminal prosecution, and I'm not, since workers'
14 compensation is my area rather than I think occupational
15 safety and health law, I'm not that -- I really honestly
16 do not know the effect of those courts declining to hear
17 the appeal whether the law is still confused as to whether
18 OSHA preempts or doesn't preempt. If it does preempt,
19 then it might very well not be enforceable.

20 Q. We'll set that one aside. I'd like to go
21 then to House Bills 1012 and 1013. In Poyser, the
22 question of other States was raised. And the court
23 indicated that they took recognition of that and they
24 indicated, it says, "It must be noted, however, that those
25 cases rested on provisions in the state workmen's

1 compensation statutes which expressly preserved the right
2 of an employee to sue in court where his injury," et
3 cetera, is intentional.

4 If the issue of intentional misconduct on
5 the part of an employer is to be dealt with, is it -- is
6 the court accurate in its assessment? I'm aware that
7 there are at least 23 other States that deal with this
8 through the workers' compensation program as an out to
9 workers' compensation. Is it more appropriate for us to
10 deal with this issue within the workers' compensation law
11 than outside of it?

12 A. In the view of the AIA, generally we would
13 like to see workplace injuries compensated through the
14 workers' compensation system because generally it
15 provides--

16 Q. I understand that. I'm talking about the
17 exception to it for intentional law. The Federal
18 government, in its workers' compensation office, has
19 indicated, listed at least 23 other States that deal with
20 the issue of intentional law. They deal with it all
21 through workers' compensation law, double or 1 1/2 times
22 damages or an exception, but stated within workers'
23 compensation law, and that, in fact, is what the
24 Pennsylvania court indicated, that in other State it's
25 dealt with within the context of workers' compensation.

1 What I'm asking you is if we're to do this, is that the
2 more appropriate approach to take, do it within the
3 context of workers' compensation?

4 A. That is certainly an approach that a few
5 States have taken. There are a few States that provide in
6 their law an increased workers' compensation award as a
7 result of some level of misconduct by -- what you might
8 regard as misconduct by the employer. That's correct. We
9 wouldn't necessarily be opposed to handling it that way.
10 On the other hand, we would be very concerned about
11 whether the standard that you create would encourage even
12 more litigation than you have now to claim workers'
13 compensation benefits. If the standard of how intentional
14 is interpreted is too far to one extreme, no one will ever
15 avail themselves of those extra benefits, even under
16 circumstances where you would like them to. If it's drawn
17 to the other extreme or interpreted to the other extreme,
18 what all you'll wind up doing is the garden variety cases
19 where the members of this committee would probably not
20 find intent to hurt, intentional injury would be alleged
21 as a way of driving up the settlement value of the claim
22 with a resulting award that defeats the level of benefits
23 which is designed to maintain an incentive to return to
24 work and so on. So we would prefer that generally we're
25 not, we don't encourage States to provide as part of an

1 administrative remedy an additional amount of workers'
2 compensation benefits.

3 Q. In other words, what you're saying is if you
4 do it, do it within workers' comp. And if you do it
5 within workers' comp, you need to be aware of what
6 occurred in Ohio and West Virginia, essentially?

7 A. Well, that's right. The decisions in both
8 the Supreme Courts in Ohio and West Virginia found
9 deliberate injury where no deliberate injury actually
10 occurred.

11 Q. And the General Assembly essentially
12 reversed those?

13 A. They reversed those decisions almost within
14 several years because of the disruption to the number of
15 claims--

16 CHAIRMAN COHEN: Excuse me, Nevin, I don't
17 think you summarized his testimony accurately. Are you
18 saying -- first, you're against us doing it to begin with.
19 But is it your preference that if we did do it over your
20 objections, the lesser evil would be in the workers'
21 compensation system?

22 MR. OXFELD: I'm not sure that I can really
23 give you an informed answer to that question. There are
24 problems either way.

25 CHAIRMAN COHEN: Okay, thank you.

1 MR. MINDLIN: That's fine.

2 BY MR. MINDLIN: (Of Mr. Oxfeld)

3 Q. Having just heard a matter of information on
4 the question, there's been some confusion over the use of
5 "accident" versus "injury." Workers' compensation in
6 Pennsylvania uses "injury," doesn't use the term
7 "accident". And secondly, it interestingly enough uses
8 the term "arising in the course of employment," not
9 "arising out of in the course of employment." So
10 consequently, it could very well be that application of
11 Pennsylvania law of workers' comp, because the use of
12 those terms may be different, then may be applied as an
13 exception for intentional wrongdoing, as in other States
14 when arising out of and in the course of is the operative
15 language.

16 A. We could look into it.

17 CHAIRMAN COHEN: Okay. Lunch. It's the
18 bipartisan bi-committee's consensus for lunch. We will
19 resume here at 1:20.

20 Representative Caltagirone and I received a
21 letter from the Pennzoil Company which will be entered
22 into the official record.

23 (See Appendix for a copy of the exhibit.)

24 CHAIRMAN COHEN: The joint committees will
25 resume the meeting at 1:20.

1 (Whereupon, a recess was taken at 12:35 p.m.
2 The hearing was resumed at 1:30 p.m.)

3 CHAIRMAN COHEN: The hour of 1:20 having
4 arrived, I would like to call this meeting of the Labor
5 Relations and Judiciary Committee to order.

6 Our first witness this afternoon will be
7 William Poole. Mr. Poole is going to discuss the Superior
8 Mold case, the toxic exposure case. Mr. Poole has been in
9 practice with Representative Michael Bortner.

10 Mr. Poole, we're pleased to have you.

11 MR. POOLE: Thank you.

12 I would like to introduce myself. My name
13 is William H. Poole, Jr. I am an attorney. I practice in
14 York, Pennsylvania, and the reason I am here, I guess
15 maybe there are two reasons I'm here, one of which I'd
16 like to give you a little bit of my background to tell
17 what you my area of practice has been.

18 I graduated from Dickinson College in 1973,
19 and from 1973 until I entered law school in 1975 I worked
20 in several factories, both as a union factory worker and
21 then as a technician. I put the colored dots on
22 television picture tubes. Then I entered the University
23 of Pittsburgh School of Law in September 1975 and
24 graduated in 1978. From 1978 to 1979 I was a law clerk
25 for Judge David Craig of the Commonwealth Court of

1 Pennsylvania, and of course as you know, Commonwealth here
2 is the appellate court that hears all administrative
3 appeals including, as it relates to the interest of this
4 committee, workmen's compensation appeals. In August of
5 1979 I went to York and became an associate in a
6 six-attorney law firm which I continued to do until I went
7 out as a solo practitioner in March of 1982. In July of
8 1983 I partnered with another gentleman in York and I have
9 been with him or the successor of that firm ever since.
10 About 70 percent to have 75 percent of my practice
11 presently is split between workmen's compensation
12 claimants work and personal injury plaintiffs work, I
13 would say about evenly split between the two of them.

14 But the other reason I'm here is that I and
15 my one partner, John Miller, represented Olive Blouse and
16 her husband, Peggy Fulton and her husband, and Sandra
17 Alloway and her husband in a suit that we brought on their
18 half against Superior Mold, which is a case that at least
19 from Mr. Cohen's remarks you are familiar with.

20 I do want to apologize first early on by
21 saying that I understand that my client Peggy Fulton, one
22 of our clients, was listed as one of the scheduled
23 witnesses and was very anxious to be here but
24 unfortunately in the last two days she has taken very ill
25 and cannot be here. So I'm going to try and fill you in

1 on her situation and the situation of the other two ladies
2 as it relates to the issues before you.

3 I represented Peggy Fulton in several claims
4 she had, workmen's compensation claims, and John Miller,
5 who I was not associated with at the time, represented
6 Olive Blouse, and the two of those ladies put us together
7 so that we joined in a united front on this case, in a
8 united effort. We filed a suit on behalf of those six
9 people, the three ladies and their husbands, because we
10 claimed and we felt and we alleged that they were
11 intentionally and maliciously exposed to toxic chemicals
12 during their employment at Superior Mold. And we lost
13 that case and we lost it on preliminary objections in the
14 nature of a demur, and I'd like to take one second or so
15 to explain to you what that means because it's very
16 important, with apologies to those of you or all of you if
17 you know.

18 We filed a complaint and the next step,
19 procedural step, is that the defendant is entitled to file
20 preliminary objections before anything else is done. And
21 a preliminary objection in the nature of a demur means
22 that for purposes of that issue, all facts in the
23 complaint are admitted as true and all reasonable
24 implications of that are admitted as true. And as someone
25 once said, a demur is sort of like a so what? Yeah.

1 Everything you say is true, but so what? And that's a
2 pretty good explanation. And with that background, I'd
3 like to read you just, and I'll do this as quickly and as
4 briefly as I can, about eight or nine paragraphs from our
5 complaint so you understand the posture factually of this
6 case.

7 We alleged that "At all times pertinent
8 hereto and during the times of employment of the
9 respective Plaintiffs, the Defendant used, in its
10 operation and manufacturing process, certain toxic and
11 inherently dangerous materials and chemicals, including
12 but not limited to," then we list about 22 chemicals, and
13 I won't read them.

14 Next, "That Plaintiffs, individually, work
15 with, in and around said toxic and inherently dangerous
16 chemicals and materials, at times, submerging portions of
17 their bodies, more specifically, hands and arms, in the
18 same toxic and inherently dangerous chemicals and
19 materials.

20 "That plaintiffs, individually, while
21 carrying forth the duties of their employment, and at the
22 direction of the Defendant, were exposed to the toxic and
23 inherently dangerous chemicals, and materials set out in
24 paragraph five (5) and were additionally exposed to the
25 fumes and by-products of the toxic and inherently

1 dangerous chemicals and materials."

2 I'll summarize the next paragraph, which is
3 paragraph eight of our complaint. We alleged certain
4 physical harm that those chemicals had wrought on our
5 plaintiffs and we have alleged A through N, which I think
6 is about 14, including kidney problems, loss of hair,
7 dizziness, depression, skin problems, intermittent loss of
8 consciousness, and things of that nature, and I won't take
9 the time to read all of them.

10 Then we next alleged a count of fraudulent
11 concealment and deceit against the defendant. And the
12 basis for that was that the plaintiffs, individually and
13 collectively as employees, were assured by the defendant
14 from time to time that said chemicals were safe and would
15 not harm human beings.

16 We further alleged that the "Defendant
17 through its agents, servants or employees, acting in the
18 scope of their employment, repeatedly removed labels from
19 the aforesaid chemicals and materials containers, said
20 labels warning users of harmful consequence to contact
21 with said chemicals and materials."

22 We then alleged that "Defendant's
23 assurances, by their employees and agents, induced the
24 Plaintiffs to continue working in contact with said toxic
25 and inherently dangerous chemicals and materials, all to

1 the Plaintiff's detriment."

2 Then we filed a count for intentional
3 infliction of emotional distress, and without reading any
4 of those, basically we reaffirmed in that count that these
5 actions were intentional and malicious and willful by the
6 employer.

7 I took the time, and I'm sorry if I took too
8 much time reading that so that you would understand that
9 this case was dismissed even though all of those
10 allegations were admitted by the employer for purposes of
11 the demur. The basis on which it was dismissed in the
12 local court and in the Superior Court was one basis and
13 one basis only. Whatever the conduct of the employer, the
14 Workmen's Compensation Act is the exclusive remedy for
15 them to pursue. Which means in this case and in all cases
16 like it, that means that our clients never had a chance to
17 find out precisely what other chemicals they were exposed
18 to, what effects those chemicals might have on them, and
19 that's because we never even were permitted to get into
20 discovery. They never had a chance to let someone decide
21 whether they were harmed or not.

22 I'm not here because we lost the case. Any
23 lawyer on either side of the table loses cases, and that's
24 life. I'm here because we had a case we believed and we
25 didn't get a chance to have someone tell us or tell the

1 employer they were right or we were right, and I thought
2 and think that that is an outrage.

3 The court, in Poyser, which is the case in
4 which the Superior Court based its decision in this case,
5 has invited the legislature to remedy that problem if in
6 fact it is a problem. I am sure that you have heard and
7 will hear that it is not a problem. But I submit to you
8 in assessing that, I would ask you to remember the
9 allegations that were made in this case, remember the fact
10 that they were admitted but the employer said, so what?

11 Why I think it's important, and by the way,
12 I also have been told, I understand that there were some
13 people who have said that toxic chemical exposure, in
14 every case that has been brought involving toxic chemical
15 exposure, the plaintiffs have been allowed to pursue their
16 remedies in court. Well, it ain't so, and I am standing
17 here and I can give you a copy of this decision if you
18 wish, but I'm sitting here to tell you it is not so in
19 Pennsylvania.

20 I really have trouble understanding why
21 anybody opposes these bills. I've read the bills and it
22 is clear to me that the bills before you, the Toxic-Free
23 Workplace Act, the Hazard-Free Workplace Act and the
24 Crimes Against Workplace Safety -- well, I can understand
25 why people are opposed to crimes against workplace safety,

1 that's crimes and corporate defendants don't like to think
2 of themselves as committing crimes, but they're not --
3 those bills do not say to an employee, if the company was
4 negligent, you can sue. They say, if the company
5 intentionally harmed you, and it's not even negligently
6 harmed you, intentionally, willfully and maliciously
7 harmed you, you can sue. And I cannot imagine how anybody
8 can be opposed to that. Most employers don't do that, and
9 the very people who are in here opposing that, I would
10 suspect if you asked them what is your view of someone who
11 puts a gun to someone's head and pulls the trigger they
12 would say punish him, and I guess depending on their view
13 of the death penalty would probably say fry them, and I
14 don't have a dispute with that. But I don't see the
15 difference. I really don't. How can you oppose a law
16 that says we're not going to let you intentionally harm
17 your workers? Not negligently harm but intentionally
18 harm.

19 I understand the insurance industry has
20 offered testimony here this morning and I really don't
21 understand why the insurance industry opposes this bill,
22 because if I were an insurance company, what I would do
23 would be to exclude from my policies these kind of
24 intentional acts. And what impact does that have on an
25 insurance company? The bills, the way they are written,

1 allow the claimant or the victim to make an election of
2 remedies. And if that victim gets a large award under
3 these acts against an intentional tort-feasor, the
4 employer, then the insurance company doesn't have to pay
5 that. And by choosing -- by the victim choosing that
6 remedy, then they have also precluded the workmen's
7 compensation remedies and the insurance company would not
8 have to pay that either. So the insurance company is
9 going to walk away from this kind of a case without having
10 to pay anything except possibly a cost of defense, and
11 that's something that is a matter of policy between the
12 insurance company and the employer. It just is no basis
13 for, as I see it, no rational basis for opposing this.

14 Let me tell you why the Workmen's Comp Act
15 does not cover all situations, too, because I think that's
16 important. The Workmen's Compensation Act, and I do know
17 my way around that act pretty well. It's part of what I
18 do well and when I went out on my own it's what I lived
19 on, it's what I supported my family with. For about two
20 years I did almost exclusively that. The example I use to
21 clients for workmen's compensation is, I'm a lawyer and I
22 sit behind a desk. You, client, are a truck driver. If I
23 fall and break my leg and am in a cast, I am injured. If
24 you fall and break your leg in exactly the same way you
25 have precisely the same injury. But I go back to work the

1 next day. I am not disabled. You don't go back to work
2 the next day, you're disabled. It is not our injury that
3 entitles us to compensation, it's your disability.
4 Disability means, as defined in the act, loss of earnings.
5 I get no workmen's compensation because I've lost no
6 earnings. Though I'm injured, I am not disabled. You get
7 workmen's compensation, truck driver, because you are both
8 injured and that injury has caused you disability.

9 Particularly in the field of toxic exposure,
10 1-1-1 trichloroetnane, and by the way, I'm sure you don't
11 need to see these, but I have here labels from actual
12 chemicals taken by my clients, were obtained by my clients
13 from the chemicals they were exposed to on a daily basis.
14 And I have attached to each of them the material safety
15 data sheets both from -- in some cases from the New York
16 Department of Health and in some cases from NIOSH,
17 National Institute of Occupational Safety and Health. I
18 also have one, I don't have the label for this, but 1-1-1
19 trichloroetnane, that is a murderer. That is a chemical
20 that murders. It's a solvent. It's a cleaner.

21 I brought these with me because I wanted to
22 stress to you, and I have copies here of some, I wanted to
23 stress to you that they have symptoms, they have physical
24 symptoms of exposure to these chemicals, and I can tell
25 you though we never got a chance to prove it, that

1 particularly Peggy Fulton, who was the most seriously
2 affected by these chemicals, has almost every one of the
3 symptoms that these chemicals set forth as side effects as
4 exposure to these chemicals. But 1-1-1 trichloroethane,
5 one of the things that they believe, and they're doing
6 studies, one of the things they believe that is a
7 carcinogen. My client became aware of her exposure to
8 that on day one, whatever that was, but my client may not
9 develop symptoms of that, or any client may not develop
10 symptoms of that for 5 or 10 years. Workmen's
11 compensation law says you cannot collect workmen's
12 compensation unless you are both injured and disabled, and
13 you must make that claim within three years of the date
14 you knew of your injury. Not disability, injury. The
15 date -- in this case, the date you knew you were exposed
16 to that, you must make your claim. So if this doesn't
17 surface for five years, you simply have no remedy at all.

18 Now, these bills, what they would permit you
19 to do, you may not know about your full side effects even
20 by the time you've gone to trial under these bills before
21 you. However, you can tell a jury, we believe that these
22 are reasonably expected side effects and we think you
23 should compensate this employee for that potential and
24 also, and quite frankly, you should punish the employer
25 for exposing that person to those chemicals. And that is

1 why these bills, I think, are critical to worker safety
2 and that is why these bills, in my mind, have no rational
3 basis, there can be no rational basis for opposing these
4 bills.

5 Thank you. It's not a prepared statement,
6 but that's all that I have to tell you. I certainly am
7 prepared to respond to any questioned either on the
8 specifics of this case or on the generalities of the
9 issues.

10 CHAIRMAN COHEN: Thank you very much.

11 Are there any questions for Mr. Poole?

12 Mr. Mindlin.

13 BY MR. MINDLIN: (Of Mr. Poole)

14 Q. In your professional judgment, are you
15 suggesting that the standard of "knew or should have
16 known" rises to the level of intentional tort?

17 A. Not necessarily, but I am suggesting that
18 removal of labels, that telling employees that they do not
19 have -- that there is no harmful side effect of these
20 chemicals certainly does rise to the level of intentional.

21 Q. But the question I asked was whether "knew
22 or should have known," under the normal parlance of legal
23 standards, does that define what is generally termed in
24 the legal profession as intentional?

25 A. No. "Knew or should have known" is an

1 element of intentional, but, I mean, knew or should have
2 known what? I guess that's the problem I have. Knew or
3 should have known that the chemicals were harmful or knew
4 or should have known that they were harmfully exposing
5 their--

6 Q. Well, we're talking about the bills.

7 A. Well, if you can point me to a section of
8 it. I have, I think, all three of them in front of me.

9 Q. Well, one could look at House Bill 1013.

10 A. Okay.

11 Q. And page 2, line 16.

12 A. Under burden of proof it deals with the
13 question of "knew or should have known of the removal of
14 the warning, guard or...safety device." Is that an
15 intentional standard of burden of proof?

16 A. Yeah. The removal is the intentional act.
17 It's not the knew or should have known. The knew or
18 should have known is the culpability issue. In other
19 words, certainly they can't be held accountable if they
20 didn't know, but it's not the knowing that's the
21 culpability, it's the removal that's the culpability. If
22 I--

23 Q. Any act that we do, regardless of whether
24 we knew the result of it was an intentional act is what
25 you're saying?

1 A. As I read this bill, the "knew or should
2 have known" doesn't address the result, the effect of that
3 act. It deals with the act itself, the removal. All
4 that's saying, as I read it, in my professional judgment
5 and having dealt with these kinds of acts, all I read that
6 to be is that it's a mens rea. You must have known it was
7 done. If I go home and my wife has shot the mailman, if I
8 didn't know she was doing it, I can't be held accountable
9 for that. It's the mens rea. We're not going to hold
10 people accountable for something that they didn't know
11 about. But it's not the knowledge that we're holding them
12 accountable for, it's the act that was taken that you're
13 holding accountable for.

14 Q. We won't pursue it. I'm curious about the
15 case in which you've been involved. The woman that you
16 were discussing, how long was she employed and exposed to
17 those chemicals?

18 A. Boy, I'll tell you, when I first got
19 involved in this back in 1983, she had worked there --
20 it's a matter of years. I'm trying to see from my notes
21 how many years. My notes indicate that in 1977 she began
22 having problems and she was employed at that time. I
23 can't tell you specifically, but it was a period of in
24 excess of five or six years.

25 Q. Okay. The other question I was curious

1 about is has there been any -- did you perceive what
2 occurred as being criminal in some fashion?

3 A. It proved to the extent that we alleged I
4 think that it -- I don't think there's any criminal
5 statutes that would cover it today, but I think it clearly
6 would come under is it House Bill 1030? I don't believe
7 there are any criminal -- I do also some, I do not do so
8 much anymore but I have done some criminal defense work
9 and I'm not aware of any criminal statutes either that
10 would cover it or more importantly that any district
11 attorney in any county in this State would feel was
12 sufficiently of merit to prosecute, and that there is a
13 difference and it's an important difference.

14 Q. The reason I ask is because apparently in
15 other cases criminal law has been applied to situations
16 somewhat similar.

17 A. In other States it has.

18 Q. In other States, and it's been viewed as
19 applicable and you may be correct that it's a question of
20 whether it would be pursued by the DA's office but not a
21 question of whether or not it's applicable or not.

22 A. Well, you have to understand--

23 Q. Did you pursue that at all?

24 A. No. The cases that I've been aware of that
25 it has been applied, I know Chicago was probably the most

1 notable one about what, about a half a dozen years ago
2 where two corporate officers and I think a supervisor were
3 convicted of various degrees of homicide, but those were
4 deaths from exposure to toxic chemicals. And I think
5 deaths, if someone had died in this case, I think we very
6 well may have pursued that with the district attorney and
7 I think the district attorney would have taken it fairly
8 seriously, but I think nobody died here, fortunately, and
9 nobody's injuries at the time were of--

10 Q. But there are Criminal Code applications
11 that deal with injury not simply with death, aren't there?

12 A. Sure. Assault and battery. We, by the way,
13 did file a civil assault and battery claim in this case as
14 one of our counts.

15 Q. Did you try to pursue the question of
16 criminality at all?

17 A. We did not and I, even after you having
18 asked the question, do not feel there's any basis for it.
19 One of the things that you have to remember is it is very
20 difficult to prove these kind of exposures, and we had
21 some toxicologists that we had been talking to and we felt
22 that we could have overcome the preponderance of evidence
23 standard, but I, as a prosecutor -- I've never been a
24 prosecutor but were I a prosecutor, I would not prosecute
25 a case like this because there is no way that I, as a

1 prosecutor, could prove beyond a reasonable doubt, which
2 is a substantially sterner test, that these chemicals
3 caused these problems with these women. So I wouldn't
4 prosecute it as a prosecutor, and I have done a lot of
5 criminal defense work, and I wouldn't prosecute it.

6 Q. Thank you.

7 CHAIRMAN CALTAGIRONE: Thank you.

8 Representative Heckler.

9 REPRESENTATIVE HECKLER: Just a couple of
10 questions to follow up on Mr. Mindlin's.

11 BY REPRESENTATIVE HECKLER: (Of Mr. Poole)

12 Q. First, I suggest that for what it's worth
13 you take a look at the recklessly endangering statute.
14 This may not be the case for it, but I would certainly
15 think that that conduct could be sufficiently egregious to
16 fall into the scope of that statute, and knowingly
17 encouraging someone to expose themselves to materials that
18 are hazardous, whether or not they have produced a
19 negative effect on that person, and removing labels and
20 that sort of thing strikes me as making out the elements
21 of that statute of that crime, as I recall.

22 A. In perhaps 5 to 10 percent of the cases, but
23 not in the other 90 to 95 percent of the cases, you may be
24 right.

25 Q. Well, I just offer that for what it's worth.

1 A. This is about as an egregious set of
2 allegations as I've seen in my practice and I still would
3 not prosecute this as a criminal prosecutor.

4 Q. Well, you're a defense attorney. As a
5 former prosecutor, I find that aspect a bit more
6 interesting, but specifically what I wanted to direct your
7 attention to, just so that we try and hone in as closely
8 as we can on the bill that would most directly deal with
9 the situation you've encountered, I direct your attention
10 to House Bill 1012, which is the Toxic-Free Workplace Act,
11 which is the bill that presumably would specifically
12 address the problem that your client encountered. As I
13 read that, and as I say, I direct your attention I guess
14 to the first two active sections of that bill, there's a
15 general principle that "It shall be unlawful to
16 unreasonably expose an employee to any toxic substance,"
17 and then establishes levels of toxicity above whatever
18 applicable government standard may be as a per se
19 violation, then goes on to specifically authorize a civil
20 cause of action with a standard of conduct which seems to
21 be articulated in the burden of proof section that the
22 plaintiff has to demonstrate that the possessor, I assume
23 that's essentially the employer or the person who controls
24 the workplace, knew or should have known of the existence
25 of the toxic substance at unreasonably dangerous levels.

1 Now, wouldn't you agree that that
2 combination of standards falls well short of the kind of
3 egregious intentional conduct, or at least intentional in
4 the sense that a risk was intentionally created, that
5 you're talking about in your particular facts of the case?

6 A. In other words, you're saying it is more
7 expansive than my facts?

8 Q. That's certainly my conclusion, and, you
9 know, I'm not trying to put words in your mouth, but
10 obviously you have a distinguished enough background and
11 I'm not going to succeed in doing that. I'm saying look
12 at that and wouldn't you agree that we can draw a much,
13 much tighter statute and still get at the kind of conduct
14 that you're, I think justifiably, lamenting that you can't
15 get into court with?

16 A. The conduct in the case that I have told you
17 about, the Superior Mold case was, as I said before, I
18 think the most egregious civil conduct, and again, at this
19 point it's only allegation, but it is allegedly the most
20 egregious civil conduct that I have ever seen in my
21 practice. But if you're asking me do I think that they
22 are the only circumstances that should be protected, I
23 think they are not, and I do not think this act is unduly
24 wrong. I don't think this is the only kind of situation
25 that should be protected, but I do think it should be

1 intentional. I mean, clearly, we might as well do away
2 with the Workmen's Comp Act if we're going to make it mere
3 negligence, and I don't think anybody is propounding that,
4 and I don't think this act does that.

5 Q. Well, could you point out to me where, and
6 again, staying in focus with the toxic workplace bill,
7 where the intentional conduct standard, even just
8 intentional conduct in creating the risk, is articulated?

9 A. Sure. Section 8372(a) sets forth the
10 general rule which says it's unlawful to unreasonably
11 expose an employee to toxic substance in the workplace. I
12 would perhaps expand that, but that's not what I'm being
13 asked to do, so leave it at that. Then the section that
14 you just referred to, the burden of proof section, says
15 that they knew or must have known of the existence of the
16 toxic substance at unreasonably dangerous levels. That's
17 an intentional standard, it seems to me. It's intentional
18 in that they have allowed a condition to exist that they
19 know to be harmful, and that's an intentional act or
20 perhaps an intentional failure to act, but it's the same
21 thing.

22 Q. No. No. It says "should have known," so
23 that it's entirely possible, at least it's not required,
24 that there would be proof of actual knowledge.

25 A. Well, and that's a standard civil

1 requirement. For example, if I own a company and then
2 move to Florida and never look into my company, yes, I
3 think that I should have some responsibility if those
4 things are around and I should have known that they were
5 around, and that's a standard civil requirement. And the
6 courts, the case law has dealt with that quite adequately
7 dealing with what is required of "should have known." I
8 mean, if someone comes up to me and tells me that and I
9 choose not to investigate, that certainly is in the
10 "should have known" category or it should be, in my view.

11 Q. Okay. Well, you've been using the term
12 "intentional," so you're saying in your fact, one of the
13 examples you just gave, I own a company, purchase a
14 company, I move to Florida, I really pay no attention to
15 its management and somebody is exposed because of improper
16 conduct of my managers, that's intentional conduct on my
17 part?

18 A. Well, it's conduct that I think, arguably,
19 should be actionable. Perhaps that's the best way to say
20 it.

21 Q. Thanks. I don't have any more.

22 CHAIRMAN COHEN: Okay. Is there any other
23 questions?

24 (No response.)

25 CHAIRMAN COHEN: Thank you very much for

1 your testimony, Mr. Poole.

2 MR. POOLE: Thank you.

3 CHAIRMAN COHEN: Next panel will be the
4 Pennsylvania Chamber of Business and Industry men.

5 MR. WHITE: Chairman Caltagirone, Chairman
6 Cohen, members of the House Judiciary and Labor Relations
7 Committees. I am Norman I. White, partner in the
8 Harrisburg law firm of McNeese, Wallace & Nurick. As a
9 veteran of over 20 years in the representation of
10 management client in all phases of employment law, I am
11 here today as a representative of the Pennsylvania Chamber
12 of Business and Industry to discuss House Bills 1012, 1013
13 and 1030.

14 The State Chamber represents over 3,600
15 employers who employ well over 1 million Pennsylvania
16 workers and account for over \$200 billion in annual gross
17 sales. These employers, our members, are concerned about
18 the prospect of all three of these bills. With me today
19 are James Mackie, Director of Risk Administration, Acme
20 Markets, Inc.; Kip Brown, Safety Director of Dana
21 Corporation; Don Fiorito, Manager of Insurance, PP&L; and
22 Thomas R. Bond, Esquire, Supervisory Attorney, Workers
23 Compensation Department, Marshall, Dennehey, Warner
24 Coleman & Goggin of Philadelphia.

25 These bills will wreck a system of

1 compensation that has served the interests of business,
2 labor and the public well for over 70 years. Our workers'
3 compensation system embodies no-fault and exclusive remedy
4 concepts and have proven to be the bedrock of economic
5 stability and economic development. We do not believe
6 that it overstates the case to suggest that the enactment
7 of these bills will dramatically stunt the growth of our
8 State economy.

9 In the Poyser case decided by our Supreme
10 Court in 1987 and again in the Barber case of 1989, the
11 no-fault and exclusive remedy concepts of our Workers'
12 Compensation and Occupational Disease Act were reaffirmed.
13 These cases both dealt with allegations of intentional
14 actions by the employer that led to injuries to
15 Pennsylvania workers. These decisions raise legitimate
16 concerns for business, labor and the public. We do not
17 believe that these bills are the solution to those
18 concerns. While creating a new tort action, 1012 and 1013
19 deprive the employer of the legitimate defense that the
20 employee knew of the danger and worked with it despite
21 that knowledge. It is an exercise in cynicism to subject
22 an employer to litigation with its hands tied behind its
23 back, as these bills do. Section 8373(c) of 1012, the
24 Toxic-Free Workplace Bill, makes inadmissible the
25 knowledge of the employee that the substance he was

1 working with had unreasonable levels of toxicity. Section
2 8372(c) of 1013, the Hazard-Free Workplace Bill, makes
3 inadmissible the knowledge of the employee that he knew he
4 was working without a warning device, guard, or other
5 safety device. Thus, the balance of our workers'
6 compensation law is removed in these bills. The employee
7 may well be at fault, contributing to and perhaps causing
8 his own injury, but the employer is not permitted to
9 introduce that evidence. Instead, the employer is subject
10 to two suits - one under the workers' compensation laws
11 and a second for damages under these proposed laws. Quite
12 obviously, the employee and his attorney will profit
13 handsomely from this new equation. The employer community
14 will suffer and the public will suffer even more because
15 the employer may seek additional insurance coverage and
16 raise his price to the public to cover the premium if
17 coverage can be found. If not, the employer will simply
18 leave his community and the State or go out of business.
19 The public, the community, will remain behind, deprived of
20 its economic stability.

21 One other observation about these bills
22 cannot be overlooked. 1012 and 1013 apply only to
23 employers of 25 or more employees. All employers are
24 concerned about safety or should be. All employees have a
25 legitimate right to a safe workplace. It is immoral to

1 suggest that the life and safety of a worker for a small
2 employer is less important to this State than one working
3 for a larger employer? Indeed, we suggest that large
4 employers do put their money where their mouth is when it
5 comes to worker safety and exposure to recognized hazards.
6 These large companies do employ the safety engineers, hire
7 the consultants to assure workplace safety. This does not
8 mean that they are perfect, but it does mean that they
9 try.

10 All of these comments we are sure have been
11 anticipated by the proponents of these bills. We are
12 certain that they are convinced that business is crying
13 wolf yet again. We are certain that they are also
14 convinced that serious and lasting injuries have occurred
15 to workers with the full knowledge of their employers, and
16 that this alleged egregious, flagrant failure to show
17 concern for workplace safety requires a far more severe
18 remedy than just another workers' compensation claim.

19 We suggest that no one in his right mind can
20 argue with the general rule of House Bill 1012 stated at
21 8372(a), quote: "It shall be unlawful to unreasonably
22 expose an employee to any toxic substance in the
23 workplace," end of quote. Further, fair-minded persons
24 could not argue with 8371 of House Bill 1013, quote, "It
25 shall be unlawful to remove, disconnect, alter or cause to

1 have removed, disconnected or altered a warning, guard or
2 other safety device from any machine, tool or other
3 implement located in the workplace," end of quote.

4 Indeed, both of these concepts are part of and enforced
5 under provisions of the Federal Occupational Safety and
6 Health Act, OSHA, and the National Labor Relations Act.
7 Responsible employers have not and do not condone the
8 intentional infliction of the types of harm described in
9 these bills. What we do argue with in the most vigorous
10 terms are the remedies proposed by 1012, 1013 and 1030.

11 We urge you, Chairman Caltagirone and
12 Chairman Cohen, to convene a select group of business and
13 labor leaders to discuss these issues and propose
14 solutions that business, labor and the public can live
15 with. When this State found itself in an unemployment
16 compensation crisis, just such a procedure was used. It
17 worked. In fact, business and labor began discussing
18 workers' compensation at Linden Hall last year. The areas
19 of agreement were far more numerous than those of
20 disagreement. In our view, these discussions proved that
21 the business community is ready and willing to confront
22 the issues raised by these bills responsibly and not turn
23 its back. The State of Wisconsin and our neighboring
24 State of West Virginia have dealt with these issues in
25 ways which preserve their economic development potential.

1 With good will, we believe that Pennsylvania can find its
2 solution as well.

3 We strongly urge you to consider our
4 suggestion to convene a select committee. Thank you.

5 CHAIRMAN COHEN: Thank you.

6 We would appreciate copies of that
7 legislation--

8 MR. WHITE: Sure.

9 CHAIRMAN COHEN: --that you referred to from
10 the States of West Virginia and Wisconsin, was it?

11 MR. WHITE: Yes, and there will be some
12 comments on it now.

13 CHAIRMAN COHEN: Okay.

14 MR. WHITE: Tom Bond will have the next
15 statement from the Chamber.

16 MR. BOND: Good afternoon, Chairman
17 Caltagirone, Chairman Cohen, members of the House
18 Judiciary and Labor Relations Committees. I am Thomas R.
19 Bond, a partner in the Philadelphia based law firm of
20 Marshall, Dennehey, Warner, Coleman & Goggin. I have
21 concentrated my legal practice in the area of Pennsylvania
22 worker's compensation matters primarily representing
23 insurance carriers and self-insureds for approximately 15
24 years. I am here today as a representative of the
25 Pennsylvania Chamber of Business and Industry to discuss

1 HBs 1012, 1013 and 1030.

2 My primary focus will be on the
3 ramifications of a worker who opts out of the workers'
4 compensation system in favor of a tort recovery, as would
5 be permitted under HBs 1012 and 1013. While it is
6 arguable that there are certain drawbacks to limiting
7 recovery by injured workers to those remedies available
8 under the Pennsylvania Workmen's Compensation Act, it is
9 our position that there are many beneficial aspects of the
10 act that should not be cast aside lightly in favor of a
11 seemingly attractive tort recovery. Permit me to discuss
12 just briefly the most important of the rights that are
13 vested in Pennsylvania workers under the act.

14 Any successful tort action to be initiated
15 under the authority of either House Bill 1012 or 1013
16 would be given finality either through a judicial order or
17 reflected in the terms of a general release. A recovery
18 under the Workmen's Compensation Act, however, has no such
19 finality. For example, should a worker return to work
20 following a work-related injury and sign a suspension
21 agreement, he or she would have the right to file a
22 petition for reinstatement of compensation benefits within
23 500 weeks. That's a little over 9 1/2 years from the
24 effective date of suspension. Even if a worker signs a
25 final receipt of compensation, believing that he has fully

1 recovered, a petition to set aside the final receipt of
2 compensation may be filed within three years of the date
3 to which compensation benefits had been paid. Section 413
4 of the Workers' Compensation Act provides injured workers
5 and employers with the right to file a petition to modify,
6 suspend or terminate or review in response to changes in
7 the earning power being manifested by the injured worker.
8 It is very significant to note that recent case law
9 insures that a worker who returns to his pre-injury job
10 with residuals of his injury is entitled to a
11 reinstatement of benefits should that pre-injury job
12 become no longer available due to changing economic
13 conditions if he is laid off. By not authorizing the use
14 of a general release in the workers' compensation area, I
15 believe and submit to you that our legislature fully
16 anticipated that injured workers would, through time,
17 experience changes in their disability and accordingly
18 designed the act to provide compensation benefits to
19 workers experiencing changes in their disability status,
20 even for as long as 500 weeks. This protection is not
21 available, would not be available to workers or employers
22 in the tort area.

23 Next, I would respectfully like to direct
24 your attention to the fact that the Pennsylvania Workmen's
25 Compensation Act provides for continuing medical benefits

1 in order to insure that injured workers receive at all
2 times any reasonable and necessary medical care required.
3 It has been held that these medical benefits are lifetime
4 in nature, as was indicated in the case of Fuhrman vs.
5 Workmen's Compensation Appeal Board. Again, we see no
6 parallel for this benefit in the tort system. The
7 importance of these benefits is underscored by the
8 continuing escalation of medical costs we have seen in
9 recent years and probably will continue to see in the
10 years ahead.

11 The Pennsylvania Workmen's Compensation Act
12 also provides for death benefits in the event that an
13 injured worker dies as a result of a work-related injury
14 or disease even though he had received compensation for
15 that injury or disease during his lifetime. A prime
16 example of such a case would be that of Bush Coal Company
17 and State Workmen's Insurance Fund vs. Workmen's
18 Compensation Appeal Board, and Adams, a case decided by
19 the Commonwealth Court of Pennsylvania in 1985. Briefly,
20 the claimant had sustained a work injury and was receiving
21 compensation for a myocardial infarction. As a result of
22 this injury, the claimant had developed an enlarged and
23 dilated heart. There was a finding that as a result of
24 the work-related injury, the claimant developed a limited
25 cardiac reserve prior to his death. At the time of his

1 death, the decedent was receiving temporary total
2 disability benefits. He found himself involved in an
3 altercation having to do with one of his children and the
4 child of another family. The stress associated with this
5 altercation was shortly followed by his death due to a
6 fatal heart attack. Death benefits were provided to the
7 surviving widow and the children with the finding that the
8 initial work-related injury was the underlying disease
9 process that resulted in death with the altercation
10 constituting only a precipitating factor leading to his
11 death.

12 I'd like to add to the written text by
13 pointing out that I believe that this light burden of
14 proof regarding causation as seen in this case would not
15 be paralleled in a tort action where proximate cause is
16 required, the showing of proximate cause.

17 It is respectfully submitted that the value
18 of any recovery system being contemplated for the benefit
19 of injured workers have as its focus the extent of
20 recovery realized by the worker. I should like to refer
21 to the costs associated with the initiation and pursuit of
22 recovery, whether that be under a tort concept or the
23 workers' compensation scheme as transaction costs. The
24 chief of these costs would be the sums of moneys flowing
25 to attorneys representing the injured workers. Section

1 442 of the Pennsylvania Workmen's Compensation Act, with
2 few exceptions, limits the extent of attorneys fees to 20
3 percent of the amount of compensation awarded. In the
4 tort system, however, the contingent fees would typically
5 run from a minimum of 25 percent to as high as 50 percent.
6 Probably the most typical attorney's fees charged in tort
7 litigation would amount to 40 percent.

8 It is instructive to refer to several recent
9 studies of the efficacy of the Federal Employers Liability
10 Act as contrasted to several State workers' compensation
11 systems. The Federal Employers Liability Act, and I'm
12 digressing somewhat from the written text, covers
13 interstate railway workers and does require for -- it does
14 require a showing of negligence, although it is a slight
15 degree of negligence that must be shown in order for
16 recovery to be obtained under the act. In 1986, the
17 Office of General Accounting submitted the results of a
18 study comparing recoveries realized under FELA versus
19 probable recoveries within the jurisdictions of
20 Connecticut, a high benefit State, and Indiana, a low
21 benefit State. An analysis of the information gathered
22 leads to an important finding. The benefits received by
23 workers recovering under FELA were so significantly
24 reduced by attorney's fees and other transaction costs
25 that the actual recovery, that is the amount received by

1 the employees, was no different than the recoveries that
2 would have been realized in the high benefit State of
3 Connecticut.

4 In 1987, a study was reported serving to
5 compare recoveries under FELA to the probable recoveries
6 that would have been realized within the jurisdictions of
7 Maryland, and more significantly Pennsylvania. It was
8 reported that the transaction costs involved in pursuing
9 recoveries under FELA greatly exceeded those costs that
10 would have been incurred in pursuing a workers'
11 compensation recovery. This study clearly showed that
12 once the transaction costs were factored out, the extent
13 of recovery under the Pennsylvania Workmen's Compensation
14 Act would have exceeded the recoveries realized under
15 FELA.

16 The authors of the study also point out
17 quite significantly that the need to show negligence to
18 qualify for recovery under FELA increased the likelihood
19 of the injured worker retaining an attorney. This would
20 also be true with respect to pursuits of recovery under
21 House Bills 1012 or 1013. It is conceivable that cases
22 would arise where the worker claiming a work injury or
23 disease would incur double attorney's fees obligations,
24 owing a fee to his workers' compensation attorney and an
25 additional fee to his tort attorney. Frequently they are

1 not one in the same.

2 The trigger, as I see it, for the obligation
3 to pay the workers' compensation attorney would be the
4 Referee's award. The decision by the claimant to opt for
5 the tort recovery would not release him, in my judgment,
6 from the obligation to pay his compensation attorney.
7 Were the claimant able to pursue simultaneously a possible
8 tort recovery as well as a workers' compensation recovery,
9 the employers in our State would be exposed to extremely
10 high transaction costs. Chiefly, defense representation
11 costs. These costs are high now but would be times two if
12 the bills under discussion were to be enacted.

13 An added benefit that flows to workers
14 receiving benefits under the act is that having the power
15 of the Bureau of Workers' Compensation available to them
16 to enforce the various provisions of the act, the power of
17 this agency has been harnessed on a number of occasions to
18 protect and exert the workers' compensation rights of the
19 little guy against any of the corporate giants who try to
20 escape their responsibilities under the act. This
21 protection would be available to the injured worker for as
22 long as he or she is eligible to receive benefits under
23 the act. In cases of temporary total disability, that
24 right would continue for the lifetime of the claimant,
25 conceivably it could have a duration of his lifetime.

1 This right to receive total disability benefits for a
2 worker's lifetime can, in actuality, prove to involve more
3 money flowing to the claimant than he would have realized
4 in a tort recovery. For example, the Office of General
5 Accounting in 1987 in studying the FELA system as compared
6 to several workers' compensation statutes, Connecticut and
7 Indiana, found that under the Connecticut workers'
8 compensation statute, the claimants would have realized
9 more in temporary total disability benefits than they had
10 recovered under FELA by some \$3.2 million. The presence
11 of the bureau to protect this important right and the
12 other rights afforded workers under the Pennsylvania
13 Workmen's Compensation Act cannot be emphasized enough.
14 It is also significant to note that the continued receipt
15 of compensation benefits is assured through what may prove
16 to be many years of disability by the presence of the
17 security fund should the workers' compensation carrier
18 become insolvent.

19 The Pennsylvania Workmen's Compensation Act
20 presents an interesting framework within which the goals
21 of adequate compensation and deterrence can be achieved.
22 Section 320 of the act provides that employment of a minor
23 in violation of the child labor laws will result in an
24 obligation on the part of the employer to pay 150
25 percentum of the amount that would be payable to such

1 minor if legally employed. The additional 50 percent,
2 continues the statutory section, is payable by the
3 employer and not by the insurance carrier. In fact, it is
4 provided that any provision in an insurance policy
5 undertaking to relieve the employer from such liability
6 shall be void.

7 Professor Larson, in his frequently cited
8 treatise to workers' compensation, reports that the States
9 of Arkansas, Kentucky, Mississippi, New Mexico, North
10 Carolina, Ohio, South Carolina, Utah and Wisconsin have
11 provided for penalties in the form of increased
12 compensation benefits for failure of employers to provide
13 safety devices, obey safety regulations, or failure to
14 comply with duties imposed upon them by the various
15 statutes and regulations pertaining to safety. Professor
16 Larson comments, and I quote, "The entire subject of
17 employer and employee misconduct would be improved and
18 simplified if the penalty system became universal wherever
19 it was desirable to interpose a deterrent against
20 misconduct. The provisions of such deterrence is not
21 inconsistent with the general nonfault character of the
22 compensation law, as long as the basic applicability of
23 the Act is undisturbed."

24 It is submitted, respectfully, that the
25 adoption of a penalty approach would be beneficial to

1 employees and employers alike. The penalty provision
2 would ensure the payment of a specified amount for
3 violations of safety standards and statutes and
4 regulations pertaining to safety as opposed to a
5 lottery-like system which is present in the tort area.
6 Employers would benefit in that they would continue to be
7 able to secure sufficient insurance coverage to meet their
8 obligations under the no-fault system inherent in the
9 Pennsylvania Workmen's Compensation Act. The employees
10 would also benefit in that recovery of any justified
11 penalties would, without question, take place well before
12 a recovery would be realized under a tort approach.

13 It is significant to note that of the States
14 who have decided to take measures to insure that employers
15 adhere to safety standards and laws, the great majority of
16 them have decided to go the penalty route. To be sure,
17 certain other States - Kentucky, Oregon, Washington, West
18 Virginia and Texas - have decided to expose employers to
19 tort litigation but only when there is in fact an
20 intentional injury. As Professor Larson points out, this
21 must result from a real and deliberate intent to cause
22 harm. It is submitted that the statutory language
23 contained within the two bills under consideration do not
24 require the showing of a real and deliberate intent to
25 injure the workers. In fact, if I may digress for a

1 moment, I do not believe that either pieces of the
2 proposed legislation contain the word "intent" or make
3 reference to an intentional injury. The statutory
4 language in these bills is conspicuously devoid of any
5 retirement of a showing that the employer had formed a
6 real, deliberate intent to cause the worker bodily injury
7 or death, or that the employer was substantially certain
8 that this harm would result.

9 The fact of the matter is, however, that
10 responsible employers within the Commonwealth of
11 Pennsylvania abhor activities on the part of other
12 employers within the Commonwealth who are evidencing a
13 lack of concern for the safety of our workers. Such
14 conduct should not be tolerated when that disregard is
15 indeed pronounced as opposed to general negligence. It
16 strikes me that there is a need for further discussion as
17 to how this problem can be best rectified without
18 adversely impacting on the integrity of the Pennsylvania
19 Workmen's Compensation Act, which has vested some very
20 important rights in our workers. There is apprehension
21 that the allure of an apparent high tort recovery will
22 cause many workers to abandon the important rights and
23 benefits they have under the Pennsylvania Workmen's
24 Compensation Act, thereby throwing themselves and their
25 employers into very dangerous and unpredictable waters as

1 opposed to the known and chartered waters of the
2 Pennsylvania Workmen's Compensation Act.

3 I thank you very much for considering my
4 views as expressed on behalf of the Chamber.

5 MR. WHITE: I would next like to introduce
6 Jim Mackie of Acme Markets.

7 MR. MACKIE: Chairman Caltagirone, Chairman
8 Cohen, members of the House Judiciary and Labor Relations
9 Committees, I am James W. Mackie, Chairman of the Workers'
10 Compensation Committee of the Chamber of Business and
11 Industry and Director of Risk Administration for Acme
12 Markets.

13 The question of how to properly address the
14 problems of intentional injury to an employee is a serious
15 concern to the business community. To intentionally
16 injure an employee cannot be condoned by an employer,
17 whether the employer be large or small. The issues of
18 workplace injury and the current workers' compensation
19 system is a concern to both business and labor in the
20 Commonwealth of Pennsylvania. This was evidenced by a
21 meeting held in April of 1988 where 60 individuals from
22 business and labor met for 2 days in a think-tank seminar
23 held at Linden Hall, the steelworkers' conference center
24 in Dawson, Pennsylvania. The group of approximately 30
25 business and 30 labor representatives met at the request

1 of the Secretary of Labor and Industry, Harris Wofford, to
2 discuss and identify problems existing in the current
3 workers' compensation law and the administration of that
4 law. Secretary Wofford, Assistant Secretary Frank Beal,
5 Workers' Compensation Director Tom Cook, Cliff Jones,
6 President of the Chamber of Business and Industry, and
7 Julius Uehlein, President of the Pennsylvania AFL-CIO,
8 were in attendance at this meeting.

9 The subjects discussed were wide ranging,
10 with a consensus gained on about 90 percent of the
11 concerns of both parties. The high degree of agreement
12 indicates that both the business and labor communities
13 perceive significant common problems in the current
14 workers' compensation system.

15 Out of the Linden Hall meeting arose further
16 discussions between the representatives of business,
17 Department of Labor and Industry, labor, and the
18 legislature as to the steps to be taken to improve the
19 current workers' compensation law and its administration.
20 Unfortunately, these discussions abruptly ended for
21 reasons that have nothing to do with the matters that were
22 under discussion at the table. The business community
23 stands ready, willing and able to meet when the Secretary
24 of Labor and Industry can convene the parties to the
25 discussions.

1 The business community believes that the
2 solution of the questions raised by House Bills 1012 and
3 1013 can best be dealt with by the appointment of a small
4 select committee of representatives of business, labor,
5 and the legislature. Once a consensus is reached, the
6 suggested solution can then be included in the discussions
7 of the overall workers' compensation legislation when the
8 group reconvenes under the leadership of the Secretary of
9 Labor and Industry.

10 The business community fervently believes in
11 workplace safety. We believe that a great impetus for
12 workplace safety can be better achieved through the use of
13 the current workers' compensation system rather than the
14 remedies contained in the bills under consideration. We
15 ask for the opportunity to resolve these very important
16 concerns in a manner that will produce the appropriate
17 reward for the injured employee while imposing the proper
18 penalty on the employer involved. To do otherwise is not
19 living up to the responsibility we have for our fellow
20 employees in Pennsylvania.

21 Thank you very much.

22 MR. WHITE: Don FioRito of PP&L is our next
23 witness.

24 MR. FIORITO: Thank you.

25 Chairman Cohen, members of the House

1 Judiciary and Labor Relations Committees, I am Don
2 Fiorito, Manager of Insurance at Pennsylvania Power &
3 Light Company where I have been employed for the past 16
4 years. I also serve as Vice Chairman of the Pennsylvania
5 Chamber of Business and Industry Workers' Compensation
6 Committee, and I am a member of the Workers' Compensation
7 Advisory Council to the Bureau of Workers' Compensation.
8 I am here today as a representative of the Chamber to
9 testify regarding safe work practices at PP&L.

10 At the Pennsylvania Power & Light Company,
11 we strive to create a safe working environment for our
12 employees and the general public, and we have consistently
13 achieved a safety record that is among the best for
14 comparable electric utility companies. We understand the
15 concerns with respect to workplace safety and emphasize
16 that safety is an issue that labor and management must
17 jointly address in a non-confrontational environment.
18 Every PP&L employee makes a personal commitment to prevent
19 accidents and avoid injuries. This commitment receives
20 support from both labor and management. These bills, 1012
21 and 1013, however, could undermine the purpose of the
22 workers' compensation statutes as a remedy without regard
23 to fault by allowing litigation and creating an
24 adversarial atmosphere. We are concerned, therefore, that
25 the tort changes suggested in House Bills 1012 and 1013

1 could create a confrontational environment which could
2 serve to hinder management and labor's efforts to achieve
3 safety in the workplace.

4 Workers' compensation laws are as a result
5 of an agreement that labor and management forged many
6 years ago to compensate the injured employee. The
7 prevention of injuries, thus eliminating the need for
8 workers' compensation, will ultimately not be achieved by
9 tort and law changes that are part of the House Bills that
10 we are discussing here today. I feel we must continue to
11 support worker's compensation statutes as the exclusive
12 remedy for workplace injury and achieve workplace safety
13 via joint labor and management conference.

14 Thank you for allowing me to give you these
15 remarks today.

16 MR. WHITE: We have one more witness.

17 CHAIRMAN COHEN: One more witness?

18 MR. WHITE: Yes. Kip Brown of the Dana
19 Corporation. Brief witness.

20 MR. BROWN: Chairman Cohen, members of the
21 House Judiciary and Labor Relations Committees, I am Kip
22 Brown, Safety and Loss Control Administrator for the Dana
23 Corporation, Parish Division, in Reading Pennsylvania. I
24 have asked the Pennsylvania Chamber of Business and
25 Industry to allow me to testify before the joint

1 committees to emphasize the impact that these three bills
2 would have on business and industry in Pennsylvania.

3 Dana has five separate facilities in
4 Pennsylvania ranging in size from 110 employees up to
5 2,800 employees. Each facility is different from the
6 other in both the manner in which they are managed and the
7 services or products they produce. I have worked in two
8 of these facilities. In the past, I have been a labor
9 president of a Dana United Automobile Workers' Local and
10 currently with management responsible for safety and loss
11 control. This has allowed my to see both viewpoints of
12 employee safety and compensation problems, and believe me,
13 there are many areas of agreements. No one wants to see
14 an employee exposed to hazards or receive injuries. In
15 our facilities, we have dedicated safety programs and
16 full-time safety employees in both labor and management.
17 They investigate accidents, they try to eliminate injuries
18 before they happen. We have workers' compensation
19 committees that meet biweekly to try and resolve the
20 problems, to insure that the injured employees receive all
21 benefits that they are entitled to and that we can return
22 them to work as soon as possible. Labor and business do
23 have the capabilities to work together and progress if
24 they are allowed to. They know better than anyone the
25 need for cooperation of providing a safe and healthful

1 work environment.

2 There is a need for workers' compensation
3 changes. This has become a very costly part of doing
4 business in Pennsylvania. These changes should not be
5 made at the sole discretion of either business or labor
6 but as a joint venture. As Mr. Mackie has already stated
7 the success of Linden Hall, I am in complete agreement
8 with that spirit and his proposal.

9 Over the past three years I have been asked
10 to compare several States and their workers' compensation
11 laws.

12 CHAIRMAN COHEN: Excuse me, sir. I have to
13 leave now. I'm going to turn the Chair over to
14 Representative Freeman and then there will be questions
15 from members, including Representative Hayden, who will be
16 first.

17 Thank you very much.

18 (Whereupon, Representative Freeman assumed
19 the Chair.)

20 ACTING CHAIRMAN FREEMAN: You may proceed.

21 MR. BROWN: Over the past three years I have
22 been asked to compare several States and their workers'
23 compensation laws. The reason was that one of our plants
24 was planning to build several new facilities nearer to our
25 customers. One of the areas that was considered prior to

1 choosing an actual plant site was that of workers'
2 compensation. Naturally, this was not the only area that
3 was considered but it was one. To date, we have built two
4 new facilities in other States. This only demonstrates
5 that industry does look at the compensation laws and how
6 they will affect its business.

7 I hope that the legislature of Pennsylvania
8 is progressive enough to allow our State to move in the
9 right direction. House Bills 1012 and 1013 are not the
10 answers that are needed for a good industrial atmosphere.
11 Allow business, labor and the legislature to propose these
12 answers. We do this all the time when we negotiate our
13 contracts. Use our abilities, our experiences. We can
14 reach the needed solutions that will lead to resolving the
15 problems of the Pennsylvania Workers' Compensation Act and
16 create the safest working conditions for all employees.

17 Gentlemen, I thank you for allowing me to
18 appear before your committee today.

19 MR. WHITE: We are prepared for your
20 questions.

21 ACTING CHAIRMAN FREEMAN: Okay, thank you
22 for your testimony, gentlemen.

23 At this time, I'd like to recognize
24 Representative Hayden.

25 REPRESENTATIVE HAYDEN: Thank you, Mr.

1 Chairman.

2 BY REPRESENTATIVE HAYDEN: (Of Mr. Mackie)

3 Q. First, Mr. Mackie, in your role as Risk
4 Manager at Acme, Acme has facilities in the State of New
5 Jersey, I believe, in terms of stores and other--

6 A. Yes, sir.

7 Q. So then are you familiar with your own
8 company's workmen's comp insurance rates and experiences
9 in terms of claims in both Pennsylvania and New Jersey?

10 A. Representative, our situation is that we
11 have, we operate in seven States, and because of the
12 volume of premium that would be involved, our experience
13 is basically driven on our own experience rather than the
14 rating bureau's experience. We are self-insured for the
15 first \$250,000, so really when we look at a problem, it's
16 our money instead of an insurance company's money, so
17 we're looking at it a little differently than many
18 employers in Pennsylvania or New Jersey.

19 Q. So that actually puts you in a better
20 position to answer the question. For your New Jersey
21 employees who are obviously covered by the New Jersey
22 Employment Compensation Act--

23 A. Yes, sir.

24 Q. --what has your experience been there with
25 respect to comparing your -- not only your claims history

1 as it has been occurring in New Jersey but also the
2 predictability of the kind of reserves that you put aside
3 to pay for these claims versus Pennsylvania?

4 A. Well, in New Jersey there are several
5 significant differences from Pennsylvania. One is--

6 Q. We'll get into the substantive differences
7 in the law, but my concern for the most part is from the
8 cost perspective, and I'll speak to the gentleman from
9 Dana who mentioned that indeed companies such as yours do
10 consider the workmen's compensation systems in making
11 decisions as to where they're going to locate.

12 A. Yes, sir.

13 Q. So do you notice any disparity in terms of
14 your experience or costs as they exist in New Jersey
15 versus Pennsylvania?

16 A. Well, there is a difference in cost. I
17 cannot give you the precise differences. As I said, they
18 are different systems, but once again, because we rate
19 ourselves, in other words, we charge our own locations
20 back, it really depends on the safety effort made by each
21 location because we work on the basis if they have the
22 injury they get charged for it, if they do not have the
23 injury they don't get a charge for the reserves that
24 you're talking about. And we find that where the effort
25 is made by management that the result can very easily be

1 shown that the costs go down. But I don't have a precise
2 figure for you, sir.

3 REPRESENTATIVE HAYDEN: Okay.

4 To Mr. Brown, do you have facilities in the
5 State of Ohio?

6 MR. BROWN: Yes, we do.

7 REPRESENTATIVE HAYDEN: I would ask the
8 similar kind of question to you, which is, do you notice
9 any difference, either a minor difference or dramatic
10 difference, in terms of cost of doing business from the
11 workmen's comp standpoint in Ohio versus Pennsylvania?

12 MR. BROWN: If you took notice during my
13 testimony, each one of Dana's plants is an individual
14 identity. Each one is handled differently. They are
15 managed different, their products are different. Just
16 because I, Kip Brown, in Dana of Reading do it this way
17 does not mean the same plant in Ohio would do it the same
18 way. They would do it differently. I only have the
19 responsibility for my plant in Reading. That's all.

20 REPRESENTATIVE HAYDEN: Okay. Well, you
21 guys aren't helping out. Let me go into the substantive
22 nature of the differences of New Jersey and Ohio's
23 workmen's comp laws as opposed to what we've got now in
24 Pennsylvania.

25 And this might be directed, Mr. Bond, maybe

1 you can help me. Please tell me you've done some practice
2 in New Jersey in workmen's comp.

3 MR. BOND: I have not, I'm afraid.

4 REPRESENTATIVE HAYDEN: Nobody has done
5 practice in New Jersey or Ohio?

6 MR. WHITE: After a quick survey here, I
7 don't think we established ourselves as experts in either
8 New Jersey or Ohio or are able to comment on distinctions
9 between the States.

10 REPRESENTATIVE HAYDEN: Okay, well, let me
11 try to draw some distinctions for you, because what we've
12 been spending a lot of time here doing today is grappling
13 with standards. People, for the most part, I think the
14 members of the joint committees seem to think that the
15 result achieved in the Poyser case was one that we need to
16 correct. The Supreme Court certainly has directed our
17 attention to it. You mentioned convening at Linden Hall,
18 but we don't have to go to Linden Hall. We can start the
19 discussion here today. And in New Jersey, the point that
20 I was trying to make in terms of comparing the different
21 systems is I just took two neighboring States, which I
22 think gives us a pretty good cross-section as to how
23 different States approach the workmen's comp issue and the
24 exclusivity argument.

25 In New Jersey there was a case called

1 Millison vs. du Pont, 1985 New Jersey Supreme Court case.
2 It was a case in which the plaintiffs were a group of
3 union members who worked in a du Pont plant over in New
4 Jersey who charged that the company deliberately exposed
5 them and continued to expose them to asbestos and
6 asbestos-related conditions, and that in addition they had
7 an annual doctor's exam which also would detect, through
8 the course of X-rays, and in fact in some cases some were
9 developing asbestos-related conditions, and that those
10 situations were not disclosed to the individual workers.
11 They filed first under workmen's comp, and then secondly
12 they filed under common law a tort action in New Jersey.

13 The defendant in that case, du Pont,
14 initially said that even if you look at that kind of
15 conduct, that that does not show an actual intent to
16 injure, and they asked for the exclusivity of workmen's
17 comp to bar the tort action. That, I think, takes us back
18 to the same kind of discussion on preliminary objection
19 that the first gentlemen raised. The Supreme Court in New
20 Jersey said that, no, we're not going to let the defendant
21 off on that exclusivity argument because, well, for a
22 number of reasons, New Jersey statute is a little bit
23 different, and New Jersey statute on workmen's comp, if I
24 can just read one paragraph, says "If an injury or death
25 is compensable under this article, a person shall not be

1 liable to anyone at common law or otherwise on account of
2 such injury or death for any act or omission occurring
3 while such person was in the same employ as the person
4 injured or killed, except for intentional wrong."

5 Now, it seems that we have this unanimity of
6 opinion, even among the insurance people who testified
7 earlier, that the notion of intentional -- some sort of
8 intentional conduct should be compensable. I'm of the
9 personal opinion that to talk about like to raise the du
10 Pont defense intentional injury isn't really going to
11 work, and I think New Jersey probably has a better answer
12 by talking about intentional wrong, because what you do
13 there is you focus on the conduct which gave rise to the
14 injury, not just whether obviously we have the
15 hypothetical of an employer slapping an employee. I think
16 that that, in most of these contexts, doesn't work. New
17 Jersey amended their statute in 1961 to include that
18 intentionally wrong exception.

19 So what the Supreme Court of New Jersey did
20 when they looked at that they said, well, let's examine
21 the conduct of the doctors who worked with du Pont, let's
22 examine du Pont's conduct and look and see if that meets
23 the standard. They mentioned -- they started citing the
24 restatement of torts and they said that "The mere
25 knowledge and appreciation of a risk - something short of

1 substantial certainty - is not intent." So then they
2 began to talk about adopting a substantial certainty
3 standard. And what they did was they said that the kind
4 of activity which the plaintiffs alleged in their
5 complaint wasn't going to be enough to bar an action
6 against du Pont. So subsequently, the case was remanded.
7 It's my understanding, from talking to attorneys involved
8 in that case, I think the eventual verdict was in excess
9 of a million dollars, I'm certain of that.

10 So what they did was they carved out -- they
11 didn't even have to carve out an exception. They took
12 language which was in their statute and then applied the
13 specific facts of that language, which gets us, I think,
14 to where most of us want to be. The prior witness'
15 testimony says give me a shot at the jury, and I think in
16 this particular case that's what the Supreme Court in New
17 Jersey was saying, give them a shot at the jury.

18 The other issues that you mentioned, and
19 some people seem to think that there's a real problem with
20 the election of remedies, and I think, Mr. Bond, you
21 talked about that. Even in that case, and in the New
22 Jersey case the Supreme Court also wrestled with the
23 election of remedies issue. And they came down on behalf
24 of the plaintiffs again. They said if a plaintiff should
25 prevail in this suit based on intentional wrong, he would

1 not be entitled to keep the entire amount of his
2 compensation award as well as his civil suit remedy,
3 meaning in effect there was a lien and he had to satisfy
4 the lien. So there wasn't a double recovery. And I guess
5 what would happen in that situation was that du Pont would
6 contest the workmen's comp action, and whatever happened
7 by the Referee in that case was whatever happened, and he
8 had a subsequent tort action.

9 One of the reasons I think you have to give
10 that kind of latitude, even if you look in the statute of
11 limitations in New Jersey as well as in Pennsylvania
12 there's a two-year statute. So it puts the plaintiff at
13 risk as saying, well, I think I have an intentional wrong
14 here, even in the State of New Jersey. But to hold the
15 plaintiff to the standard that he or she has to predict
16 success, in effect, and then therefore bar one remedy over
17 another, the court found to be too harsh of a remedy here.

18 And the notion -- let's talk about Ohio more
19 a bit. Everybody is talking about Professor Larson's
20 learned treatise on workmen's comp. He makes reference to
21 Ohio. He said in 1987 the Ohio statute was dramatically
22 amended because there had been problems about determining
23 what, in fact, rose to the level of intentional injury,
24 and Professor Larson says that intentional tort is now
25 redefined as an act committed with a belief that the

1 injury is substantially certain to occur. So once again,
2 we condemn using the substantial certainty test. And then
3 to reach, I think this Ohio situation reaches Poyser. It
4 says, "The amendment widely goes on to define
5 substantially certain to mean that the employer acted with
6 deliberate intent to cause an employer" -- they meant
7 employee, it's a misprint -- "to suffer injury, disease
8 and condition or death." And then it says, "However,
9 deliberate removal of safety guards or a misrepresentation
10 of hazardous substances would be evidence of an act
11 committed with the intent to injure, but this could be
12 rebutted by the employer." Once again, it gets him to the
13 jury and it doesn't bar them at the courthouse door.

14 Particularly the note on the safety guards
15 is exactly what the Poyser case is. The gentleman
16 discussing the prior case here about the hazardous
17 substance, that was his case. At least in a situation
18 like Ohio and I would submit New Jersey it gives us a
19 chance to look at that kind of conduct without saying that
20 the employer had to act with, you know, as high a standard
21 as malice, his intentionally wanting to injure. But there
22 are obviously solutions out there which I would agree, I
23 would submit are not in the bills that we have before us,
24 but I think there are other options that are out there,
25 and if you could help me with from an individual basis as

1 to simply how New Jersey's situation is. I haven't heard
2 anybody being overly critical of the Millison decision in
3 New Jersey. 1985 decision, New Jersey Supreme Court,
4 still the law. Ohio just passed through its legislature
5 those amendments to correct prior problems.

6 So I'd be interested at some point later on,
7 particularly from the Chamber of Business and Industry, a
8 position that -- I mean, everybody says, we don't know
9 what it is, we don't know what it is, but there are other
10 States that found it.

11 MR. WHITE: We believe that the very essence
12 of our presentation to you here today is not the end. The
13 end is a certain kind of an injury that deserves more,
14 more compensation, more money for the little guy, for the
15 guy who gets hurt. We have not argued with that premise.
16 We've argued vigorously with the means to that end. You
17 keep saying, give me a shot at the jury. Let me have my
18 chance before the jury. We concede that is one means to
19 the end of getting the guy some money. We believe that
20 Mr. Bond's testimony articulated that that is, at best,
21 illusory. The only studies we know deal with the FELA and
22 the one by the GAO, and we believe that is illusory.

23 What we have suggested to you has happened
24 in other cases and is embodied in the fabric of our
25 statute when it deals with injuries to children working in

1 violation. The employer has them working in violation of
2 the child labor laws. We have discussed with you the
3 penalty provisions. What that does is get significantly
4 more money into the hands of the injured person, it does
5 not wreck the compensation system. Frankly and bluntly,
6 coming from a lawyer, I will say this, it doesn't enrich
7 the lawyers. It puts the remedy where you want it, with
8 the injured person. That's the essence of what we're
9 saying. We believe that's the sensible solution for
10 Pennsylvania and that if people of good will get together,
11 they can arrive at that solution.

12 And frankly, I'm not and we're not concerned
13 about the comment by Mr. Poole about, well, it was three
14 years and what happens after three years? You could
15 adjust that, too. You can adjust a time period when
16 you're dealing with intentional harm. We think in the
17 framework of our system you can deliver the remedy to the
18 little guy without the vagaries of a jury, and we're
19 prepared to enter into those discussions.

20 REPRESENTATIVE HAYDEN: Thank you.

21 ACTING CHAIRMAN FREEMAN: Do any other
22 members have any questions?

23 Representative Bortner.

24 REPRESENTATIVE BORTNER: Just a couple,
25 because I do want to make sure I understand how you stand

1 in those cases.

2 I mean, you would agree then that the result
3 in Poyser and Barber and the Superior Mold case are
4 unacceptable?

5 MR. WHITE: Yes. You know, if someone lost
6 a finger, I think in Poyser the portion of a small finger,
7 workers were exposed to asbestos dust knowingly on the
8 part of the employer in Barber. We are not coming before
9 you to defend those situations. And we are not coming
10 before you to say that these people should be allowed to
11 hide behind our present workers' compensation. We are not
12 saying that. We are saying, these are people who were
13 harmed and in serious and significant situations, but we
14 think we have a rational solution.

15 REPRESENTATIVE BORTNER: How do you feel
16 about the bill that provides criminal penalties for
17 certain kinds of what I would characterize as egregious or
18 outrageous conduct?

19 MR. WHITE: Again, our position is, number
20 one, and that was one of the reasons that I had the
21 reference to OSHA. There is already a criminal provision
22 in OSHA. I understand the argument that it's not
23 sufficiently strong. I understand that. Secondly, we
24 note that in Illinois, and this was approved by our
25 Supreme Court of the United States when it refused to

1 grant circumstance -- there have been criminal
2 prosecutions against, I think the case was Chicago Magnet
3 Wire against corporate executives. I think the recklessly
4 endangering was specifically used in a New York case very
5 recently. OSHA was found not to preempt State criminal
6 prosecution, the name of that case is People vs. Pymm,
7 P-Y-M-M, an October 23, 1989 case.

8 We believe that within the framework of the
9 laws as we know them, 1030 is not necessary, and I've
10 never been prosecutor so I can't tell you the reticence
11 with which a local DA approaches the decision to
12 prosecute, but in Illinois and New York, it certainly
13 wasn't a case of reticence.

14 REPRESENTATIVE BORTNER: Well, the only
15 difficulty with that is that I don't know either, because
16 I don't know what their, you know, criminal statutes
17 change from State to State. I frankly don't know what
18 kind of statute those prosecutions took place under.
19 Apparently the one was, at least in Illinois, some kind of
20 a homicide statute, and I'm not sure what it was in New
21 York. But if I understand what you're saying, if I can
22 summarize, you believe that existing criminal law in
23 Pennsylvania, be it for aggravated assault or assault or
24 recklessly endangering, would cover those kinds of
25 situations where criminal penalties ought to be imposed on

1 employers based on exposing employees to risks?

2 MR. WHITE: Yes, we believe it, but we also
3 believe that the central thrust of these hearings is to
4 provide for an injured employee in a particular fact
5 pattern something more than he would have gotten under
6 workers' comp. Seeing his boss in jail is in the pound of
7 flesh category, but getting something to him and his
8 family is an issue we would be more than happy to address
9 for the select committee.

10 REPRESENTATIVE BORTNER: Well, I'm not sure
11 that I think that is a limit. I mean, I think the -- my
12 understanding as I read those cases is that there is a bad
13 result when you are limited in those kind of cases to
14 purely a workers' compensation remedy. It is a bad result
15 for the employee because you are limited as to what you
16 can recover. I think it's a bad result to society or to
17 all other employers because that one bad apple, I think,
18 has gotten away with something, and I know Representative
19 Hayden has referred to the New Jersey Supreme Court. I'd
20 just like to read very briefly from the Poyser dissent,
21 which cites the Montana Supreme Court. I'm not sure how
22 they get judges on their Supreme Court, but I find this to
23 be a very--

24 REPRESENTATIVE HECKLER: They have a rodeo.

25 REPRESENTATIVE BORTNER: I find this to be

1 very telling. I'll read very quickly.

2 "To allow an employer to commit an
3 intentional tort and hide behind the exclusivity clause of
4 the Workers' Compensation Act is to disregard the purpose
5 of the Act. Other employers would have to pay for his
6 protection. In effect, he would have bought the right to
7 intentionally harm his employees. That is not a quid pro
8 quo. The law does not allow a wrongdoer to benefit from
9 his wrongs."

10 And as I said, that says an awful lot to me
11 about the way I feel about these statutes. I'm looking
12 for something that is fair, I'm looking for something that
13 is balanced, but I clearly believe that the law as it
14 exists in Pennsylvania right now is out of balance as it
15 deals with these kinds of situations in the workplace.

16 MR. MACKIE: Representative Bortner, we
17 hopefully have not indicated to you that we want to hide
18 behind the workers' compensation statute in any way to
19 limit an employee who is intentionally injured to the
20 current system.

21 REPRESENTATIVE BORTNER: You have not done
22 that. What I'm suggesting is that Poyser, whoever he is,
23 or, excuse me, Newman and Company, whoever he is or they
24 are, was able to do that, I believe. Not that you were
25 defending that or suggesting that.

1 MR. MACKIE: No, no. Well, we don't suggest
2 to defend anyone who does an intentional tort. What we
3 are suggesting is that there are remedies right now, for
4 instance the employee, as Mr. Bond has stated, is entitled
5 to lifetime benefit, minimum would be 500 weeks, which is
6 9 1/2 years. If you're totally, permanently disabled,
7 it's lifetime benefits. If there's some multiple of the
8 weekly rate, certainly there is a continuity of income to
9 that family or their survivors over a period of time, and
10 as you do now with the underaged hiring and injury, that
11 is not insurable. That must come out of the employer's
12 funds. So there is a specific penalty to the employer.

13 So I think that what we're asking for is the
14 opportunity to have a dialogue within a small group to
15 come back and give some other options and suggestions that
16 could be workable for all parties and really remedy the
17 situation of inadequacy of moneys going to the injured and
18 proper penalty to those who are creating the intentional
19 tort and let the criminal system step in and OSHA step in
20 to provide the further penalties. But we think this would
21 be the best interest of all of the employees in
22 Pennsylvania and the employers.

23 REPRESENTATIVE BORTNER: Well, thank you,
24 and I can just speak for myself. I think it's been very
25 helpful to have the position of the business community

1 clarified because, you know, I certainly would hope and
2 believe that all those responsible corporate and business
3 citizens in Pennsylvania certainly are not -- would not be
4 in a position of defending, you know, the cases that we
5 have been talking about today, and I think that perhaps
6 today has helped clarify the position of the Chamber of
7 Commerce and some of the other groups that have some
8 difficulty with specific aspects of the legislation.

9 Thank you.

10 MR. MACKIE: Thank you, sir.

11 ACTING CHAIRMAN FREEMAN: We have another
12 question from Representative Heckler.

13 Before we recognize Representative Heckler,
14 though, I do have to leave. I thank you gentlemen for
15 your testimony. I'll turn the Chair over to
16 Representative Pressmann.

17 (Whereupon, Representative Pressmann assumed
18 the Chair.)

19 ACTING CHAIRMAN PRESSMANN: I move the
20 bills.

21 REPRESENTATIVE HECKLER: Thank you.

22 Very briefly, we come back again and again
23 to this issue of intent, and I confess to some misgivings
24 when we look to the traditional tort system as the savior,
25 as the system which is going to deliver us from new evils

1 which it has not had an opportunity to address in the
2 past. That, frankly, fills me with some misgivings not
3 because there is an appropriate place in the appropriate
4 case but because our appellate judiciary, for whatever
5 reasons, in particular has not shown the proper ability to
6 draw intelligent lines, and it strikes me that that has
7 been the case not only in Pennsylvania but in other
8 jurisdictions.

9 The Ohio language, statutory language which
10 Representative Hayden quoted and I'm just going to quote
11 in a moment in its complete context, was necessitated by
12 similar excesses or lapses on the part of the Ohio
13 judiciary, and I have been provided with some material
14 which includes that text but also includes the wonderful
15 quote from Oliver Wendell Holmes that even a dog knows the
16 difference between being intentionally kicked and
17 accidentally stepped on, and it's been amazing to me that
18 we've had so much trouble today with this issue of intent,
19 although I'm sure that if this gets turned over to the
20 tort system that there will be an awful lot of confusion
21 between being kicked and stepped on.

22 The language which Ohio now uses and which I
23 would suggest would get at the issue we're trying to get
24 at here as to its exclusivity is "The right to recovery of
25 benefits as provided in this act shall be the employee's

1 exclusive remedy against the employer for a personal
2 injury or occupational disease. The only exception to
3 this exclusive remedy is an intentional tort. An
4 intentional tort shall exist only when an employee is
5 injured as a result of a deliberate act of the employer
6 and the employer specifically intended the injury."

7 So now we have both the act which is
8 intended and the intent to bring about the injury. That
9 is then explained with the words, "an employer shall be
10 deemed to have intended to injure if the employer had
11 actual knowledge that an injury was certain to occur and
12 willfully disregarded that knowledge. The issue of
13 whether an act was an intentional tort shall be a question
14 of law for the court."

15 I think framed in that way we limit the
16 mischief that the court can make in these matters, and,
17 Mr. Chairman, I move the amendment.

18 Other than that, I forget my other
19 question, which is probably a blessing. Thank you.

20 MR. BOND: May I respond to that comment?

21 ACTING CHAIRMAN PRESSMANN: Yes.

22 MR. BOND: It would be our position and
23 suggestion for consideration that language clearly
24 defining what constitutes an intentional tort can be
25 engrafted within our Pennsylvania Workmen's Compensation

1 Act rather than taking it outside that structure that has
2 served us so well for so many years so that if in fact an
3 intentional tort has been committed, then the additional
4 compensation can be secured. We are not here representing
5 to this august body that a remedy is not necessary to
6 address the sort of -- the factual situation that occurred
7 in the Poyser case which, by the way, not only included
8 removing the machine when OSHA came but also the fact that
9 the employer had specifically forbidden the injured worker
10 to use a safety device known as a feeder. We are not
11 condoning actions like that but we are suggesting that any
12 window that is created to go outside the workers'
13 compensation system be a window that is well-defined and
14 one that properly balances the interests of employees and
15 employers here in the Commonwealth of Pennsylvania.

16 REPRESENTATIVE HECKLER: It came back to me,
17 thank you.

18 ACTING CHAIRMAN PRESSMANN: We're not
19 blessed.

20 REPRESENTATIVE HECKLER: It occurs to me,
21 and I think, I want to commend this whole panel on really
22 coming to grips with the issue in a way that I haven't
23 heard to this time, that we do have an opportunity,
24 particularly in the Labor Relations Committee, talking and
25 working with the administration and Secretary Wofford to

1 renew these discussions, to pursue this matter, and I say
2 that specifically because this is an issue on which
3 business on the one hand and labor on the other hand
4 should have a grasp from the standpoint of experience and
5 representing the legitimate interests that come into
6 conflict here to reach a solution that will really be
7 beneficial. I'm a lawyer, a number of the people on both
8 committees really are lawyers, and I think that the --
9 that we need to be sure that this issue gets resolved with
10 due regard for the potential impact of I guess transaction
11 costs, which was the term of art that was used, but
12 remembering that those transaction costs are to be avoided
13 where they can be avoided consistent with the interests of
14 the worker on the other hand and the legitimate interests
15 of the employer on the other hand. And it just strikes me
16 that it sounds like something good was proceeding forward
17 and that it may be a very appropriate role of the Labor
18 Relations Committee to try to get that going again either
19 within our committee or in conjunction with the
20 administration, because certainly those two parties coming
21 together represent the appropriate interests that need to
22 be addressed in this matter, and it's one of the
23 shortcomings, of course now nobody's left of the
24 chairmanship of these committees, it's been one of the
25 problems with lumping the general issue of tort reform

1 together with these specific concepts that don't involve
2 society as a whole to the same degree that other general
3 tort matters do.

4 Thank you.

5 ACTING CHAIRMAN PRESSMANN: Gentlemen, one
6 last question for myself and to get myself clear on what
7 you're saying. And I believe you're all familiar with the
8 Poyser case, is that correct? General nods. Okay.

9 The insurance guys didn't know anything
10 about this case.

11 MR. MACKIE: It wasn't their money.

12 ACTING CHAIRMAN PRESSMANN: I guess. And
13 under those circumstances, are you saying that you believe
14 that that should be a tort or do you think that still
15 should be handled under the workmen's compensation law?

16 MR. WHITE: We're suggesting that both
17 Poyser and Barber should be handled under workers'
18 compensation law. We are not saying and don't want to be
19 heard to say that we agree that a tort should be created.
20 We're saying that in an instance of intentional injury, we
21 don't quarrel with the definition from Ohio that was read
22 into the record, but we're saying that in the instance of
23 an intentional injury, it can be handled in the tort
24 system specifically, specifically through the penalty
25 structure that we already have in our bill under the child

1 labor. We presently have an extra 50 percent. You want
2 to penalize the employer? The 50 percent extra can't be
3 paid by the insurance carrier. It has to be paid by the
4 employer. Make it 100 percent, make it some other number.
5 Let it be negotiated. But you get the money into the
6 hands of the injured individual and not dissipated through
7 transaction costs and counsel fees.

8 ACTING CHAIRMAN PRESSMANN: But that assumes
9 then that workmen's compensation is an adequate
10 compensation.

11 MR. WHITE: We think we've demonstrated to
12 you that it is, and indeed it's better, even in its
13 present form, than a tort recovery.

14 ACTING CHAIRMAN PRESSMANN: The maximum --
15 wait a minute. I have to check my notes.

16 MR. MACKIE: The maximum says \$399 per week,
17 which is 66 2/3 percent of the average weekly wage of the
18 State.

19 ACTING CHAIRMAN PRESSMANN: And if tomorrow
20 I were to receive a workmen's compensation award of that,
21 the maximum rate, which is \$20,748 a year, what kind of
22 increases could I expect in that? During my lifetime.
23 Permanently disabled. Can't work again. Impossible for
24 me to work.

25 MR. BOND: Your temporary total disability

1 rate would remain at the present maximum of \$399 per week.
2 However, it is conceivable, assuming for a moment that
3 your injury was very, very serious, totally disabling you
4 for the rest of your life, that you would receive those
5 benefits including medical benefits for the rest of your
6 lifetime. And as I indicated in my presentation, it's
7 interesting, I believe, to note that one of the studies of
8 FELA recovery system as opposed to the Connecticut
9 workers' compensation system demonstrated that had the
10 FELA workers elected to come under Connecticut's worker's
11 compensation system, they would have, through their
12 lifetime, received more in workers' compensation benefits
13 than they had recovered from FELA, especially when the
14 transaction costs, the principle one of which is
15 attorney's fees, is factored out.

16 ACTING CHAIRMAN PRESSMANN: Sure. Okay.
17 There is always that risk.

18 MR. WHITE: But the issue is that our
19 approach, our suggestion, is not limited by today's limit
20 in the workers' comp law. We're saying that's not enough
21 for the person who was injured by the intentional act of
22 the employer. We're saying that's the area to explore.
23 Let's use some imagination. Let's use some cooperation.

24 ACTING CHAIRMAN PRESSMANN: Because I'm just
25 imagining if we went out and said that, or maybe under a

1 Poyser-type case that there should be 150 percent, 200
2 percent of the maximum for the rest of the life, put a
3 COLA based on something or other, I can just see your
4 bosses going crazy. I don't think they'd buy into it,
5 because my concern is, what I'm concerned about is some
6 people that are injured and a lot of times people that are
7 injured are injured very young. One thing is a lot of
8 young workers seem to take more chances and they also work
9 jobs that are more dangerous, too, because, well, when I
10 was younger I didn't think anything could happen to me,
11 and I guess that's probably one of the things that young
12 workers get hurt and that a workmen's compensation would
13 be based on, though we have a minimum which I think in
14 Pennsylvania is very good. It can be based on low rate,
15 and the idea that, you know, for the rest of my life I'm
16 stuck on this because, you know, because of something that
17 happened to me because of the negligence of someone else
18 and I have no remedy, and that's one of the real reasons
19 that I have a real concern about this law and that -- and
20 I understand what Representative Heckler is saying to you
21 when he says he doesn't like the idea of getting this
22 mixed up together, but for us, who are very concerned, as
23 I'm sure Representative Heckler is, about workplace
24 safety, this may be our only shot. And we're taking our
25 best shot.

1 One last question. Were any of you
2 gentlemen in the discussions at Linden Hall?

3 MR. MACKIE: Yes, sir, I was. And Mr. Brown
4 and Mr. Fiorito.

5 ACTING CHAIRMAN PRESSMANN: Good. Was the
6 issue of workplace safety as demonstrated in Poyser an
7 issue that was brought on the table in those discussions
8 in a substantive way?

9 MR. MACKIE: Well, I have some notes from
10 Linden Hall. We talked about number one item, this was
11 written down by the facilitator, areas for discussion,
12 issues which can be addressed without statutory change,
13 issues which would need legislative action. We tried to
14 divide it into two areas. We talked about prevention and
15 safety was the number one on the list, and then after that
16 was treatment rehabilitation, coverage costs, and then
17 administration. Those were the areas in general that we
18 covered. So safety and prevention were number one on the
19 list.

20 ACTING CHAIRMAN PRESSMANN: Um-hum. In
21 order to bring these issues to the table with the idea of
22 having a remedy of this through the workmen's compensation
23 system, what will you ask the workers of Pennsylvania to
24 give up in return?

25 MR. MACKIE: We're not prepared to ask the

1 workers to give anything up, sir. What we were discussing
2 here were what did we see as labor and management as
3 common problems? Now, when we get down to further
4 discussions we're not asking to give up anything as such,
5 we're looking at trying to find out what to do to make the
6 system most efficient and most beneficial for the injured
7 employee and the employer, because one without the other
8 is not really going to make a working economy here in the
9 Commonwealth.

10 ACTING CHAIRMAN PRESSMANN: Um-hum. All
11 right. Thank you, gentlemen.

12 Any other questions from -- Dave?

13 REPRESENTATIVE HECKLER: If I could just
14 make the point, and the Chair may be aware of it. My
15 understanding, at any rate, is that workers' compensation
16 payments are not taxable either for Federal or State
17 income tax purposes, so that the two-thirds rate, that's
18 how it was arrived at, as I understand it, and it does
19 represent, and maybe you gentlemen, I'm sure, know more
20 about this, but it's been my impression that it represents
21 a pretty close to a fair replacement of the pre-injury
22 loss to the extent that it's pegged at two-thirds of the
23 salary that was being collected.

24 ACTING CHAIRMAN PRESSMANN: Up to the
25 maximum.

1 MR. BOND: It is true that workers'
2 compensation benefits are tax-free, they are not subject
3 to Federal taxation. I think it's also significant to
4 note, just coming back to an earlier question concerning
5 your benefits under the Workers' Comp Act, if you assume
6 an approximate average weekly wage of a temporary total
7 disability rate of \$400 a week and you take that out
8 through 20 years, that actually amounts to \$400,000 which,
9 I think, is very significant, and if I can just have a
10 minute or two, I'd like to touch upon one additional point
11 which I think is very important in all this, and I'm
12 speaking from my perspective as a workers' compensation
13 attorney.

14 Let's take a case where an individual
15 sustains a serious hand injury and as a result of that
16 injury loses two fingers. We see cases like this all the
17 time. Now, let's assume for purposes of discussion that
18 that individual is entitled to receive under the
19 Pennsylvania Workmen's Compensation Act let's say \$15,000.
20 Let's further assume that he decides to pursue a tort
21 recovery and eventually there is a settlement in the gross
22 amount of \$100,000, and after the transaction costs are
23 taken out, he walks away with, let's say, \$55,000. Now,
24 once he has made that election to receive under the
25 legislation that is under consideration, my interpretation

1 would be that having made that election, he could not come
2 back at a later date within that 500-week period and
3 receive workmen's compensation benefits.

4 Let's further assume that this same
5 individual develops painful neuromas, which sometimes can
6 develop in areas of amputation. If he had chosen to
7 receive under the Workers' Compensation Act and these
8 neuromas had developed serving to totally disable him, and
9 there's a case directly on point decided by the
10 Commonwealth Court, if he had decided to stay within the
11 workers' compensation system with all the benefits that we
12 had discussed this morning, he would be entitled to
13 continuing disability benefits at this rate, assuming an
14 injury in this calendar year, of \$399 a week. However, he
15 had elected to receive the seemingly more attractive sum
16 under the tort approach, and I think this serves to
17 underscore and to address your question, what are the
18 benefits under the act? The benefits are not only the
19 benefits available now, but they are the benefits that are
20 available in the event that there is a recurrence of
21 disability, and I have many, many cases in my office where
22 the issue is whether the claimant has sustained a
23 recurrence. And I know that many, many cases are paid
24 voluntarily where there has been a recurrence, as
25 evidenced by the numerous supplemental agreements in the

1 cases, and I think it's a definite benefit, not to mention
2 the lifetime medical.

3 ACTING CHAIRMAN PRESSMANN: But one of the
4 things about workers' compensation, workers' compensation
5 though is only a compensation for lost wages, correct?

6 MR. BOND: That is correct.

7 ACTING CHAIRMAN PRESSMANN: It is not a
8 compensation for other things, lack of conjugal, you know.

9 MR. BOND: Correct. Correct. It is
10 strictly a wage loss system.

11 REPRESENTATIVE BORTNER: And medical.

12 MR. BOND: And medical. And the medical is
13 unlimited. The Pennsylvania Commonwealth Court held in
14 the Fuhrman case, which is contained within my written
15 report, held that that is a lifetime benefit, and that is
16 not available to the claimant if he had chosen, that same
17 claimant who had sustained finger injuries, if he had
18 chosen to receive under tort, he would not be able to turn
19 to his employer or his employer's carrier and say, I have
20 these neuromas, which are, from what I understand, very
21 painful. I need medical treatment. I don't have any of
22 that \$55,000 I walked away with from the tort recovery.
23 Who is going to pay my medical bills? Having made that
24 election, he's not going to be able to have those bills
25 paid by the comp carrier.

1 MR. MACKIE: Not to run this subject in the
2 ground, but not only does he have that medical, he also
3 has continuing disability payments, and if it were some
4 other issue that would have come up that would have caused
5 his or her death, then the surviving spouse and/or
6 dependents would have had a benefit also that would have
7 been distinguished by the general release of the tort
8 action.

9 REPRESENTATIVE HECKLER: Thank you, Mr.
10 Chairman.

11 ACTING CHAIRMAN PRESSMANN: Representative
12 Bortner.

13 REPRESENTATIVE BORTNER: Well, I don't want
14 to turn this into a debate, but I do think you're leaving
15 the impression that, and I know you believe what you're
16 saying, I mean, that all you've got to do is make that
17 allegation. I mean, all you've got to do is say, you
18 know, I'm permanently disabled and then insurance
19 companies write out checks and employers agree that, yeah,
20 that's the case. I mean, as a matter of fact, those kinds
21 of things are litigated before Referees all the time.
22 People that are on disability claiming that they are still
23 permanently disabled have employers tell them that they're
24 not anymore, that they've got to go back to work, and the
25 final receipts, while they can be set aside, is certainly

1 not an automatic process.

2 MR. WHITE: Neither is a tort recovery.

3 REPRESENTATIVE BORTNER: True. I wouldn't
4 argue that. I guess my point is that I think -- at least
5 I get the impression that by suggesting that you're
6 totally disabled, that you're totally disabled, that
7 automatically brings you into the system and gets you
8 benefits. I mean, those things are litigated just like
9 tort recoveries are litigated, is that not true?

10 MR. BOND: That is true, but it is my
11 understanding through my contacts in the insurance
12 industry that well over 90 percent, I believe the figure
13 is 95 percent, of all compensation cases are picked up on
14 a purely voluntary basis, and by statute those payments
15 have to begin, that \$399 a week, those payments have to
16 begin within 21 days after the date of notice or knowledge
17 of the injury or disability. And you certainly aren't
18 going to see that in the tort system. I do agree and I
19 apologize if I created the impression that all the waters
20 are smooth in the workers' comp area.

21 REPRESENTATIVE BORTNER: No, I wasn't
22 suggesting that.

23 MR. BOND: If they were, I would not be a
24 defense lawyer with--

25 REPRESENTATIVE BORTNER: We'd all be out of

1 business.

2 MR. BOND: But I firmly believe that if in
3 fact the injury is a severely disabling injury, that
4 looking at the big picture, compensation is being
5 delivered early and it's a continuing sort of thing. Yes,
6 we do get involved in a great deal of litigation where
7 there is a soft tissue injury and employers, just as
8 employees, have rights under the act, as I point out in my
9 presentation, within three years of the date of the last
10 payment of compensation benefits. Petitions can be filed
11 to change the status not only by employers but also by
12 employees. That fellow with the neuromas on his fingers,
13 he could have filed, had he not elected, had he not opted
14 out of the system. He could have filed, and if he were a
15 young man when this happened, it could be a very
16 devastating sort of thing, and that's why we would like to
17 keep everything within the framework of the act while at
18 the same time insuring that there be a deterrent and that
19 there be proper compensation to individuals who are
20 injured through conduct, reprehensible conduct on the part
21 of the employer.

22 ACTING CHAIRMAN PRESSMANN: Thank you,
23 gentlemen. Your testimony has been informative and raised
24 a few discussion points.

25 MR. WHITE: Thank you.

1 ACTING CHAIRMAN PRESSMANN: Thank you very
2 much for being here.

3 We'll call the next witness.

4 The next witness is Mr. Tim Lyden, State
5 Director of the Pennsylvania Chapter of the National
6 Federation of Independent Businesses. And, Mr. Lyden, we
7 thank you for waiting this long and I'll speak to the
8 Chairman and next time we're going to have a hearing and
9 if you're going to testify, we'll put you on first.
10 You've been very patient.

11 MR. LYDEN: I'd rather go last.

12 ACTING CHAIRMAN PRESSMANN: Oh, you like to
13 go last? Okay.

14 Okay, proceed.

15 MR. LYDEN: I appreciate the opportunity and
16 I realize the hour is quickly getting late, so I'll be
17 very brief and paraphrasing my remarks, if I can.

18 My name is Tim Lyden and I am the State
19 Director of NFIB of Pennsylvania. We are, as I'm sure you
20 know, the State's largest small business organization,
21 representing over 21,000 small business owners across the
22 Commonwealth. Our members are from all sectors of the
23 economy and our common tie is that they are all small
24 independent businesses. We appreciate this opportunity to
25 testify today on House Bills 1012, 1013, and 1030, the

1 proposed workplace safety bills. This legislation is of
2 great interest and concern to the small business
3 community.

4 As you may know, NFIB is unique among
5 business organizations in that we go directly to our
6 membership to establish positions on any given issue. To
7 this end we survey our membership, tally the responses,
8 and base our position on a majority of the responses we
9 receive. We are currently in the process of doing just
10 this on this issue and hope to have a position in the very
11 near future. However, in the interim we felt it necessary
12 to demonstrate that we do still care about this issue and
13 so we are here today.

14 Our concern, very basically, centers around
15 the possibility that these proposals may erode the basic
16 premise of the workers' compensation system, and that is
17 that it be the exclusive remedy for worker injuries. The
18 workers' compensation system was established as a means
19 for injured workers to obtain compensation for their
20 injuries regardless of fault. They removed the need for
21 workers to file lawsuits in order to gain compensation and
22 in its place provided a practical solution to the
23 provision of compensation for injured workers, even if the
24 injury was due to the worker's own negligence. The
25 workers' compensation system recognized then as it does

1 now that it is more important that an injured worker be
2 given a means to receive compensation than determining
3 which party was at fault for the injury. In addition,
4 there are other protections now in place, including OSHA,
5 which are safe workplace standards.

6 Small business owners, as any other
7 reasonable persons, are not disinterested about safety in
8 the workplace. We should all care about safety, and small
9 business owners are no exception to that rule. We feel
10 that those employers that do not provide safe workplaces
11 should be subject to penalty under the workplace
12 protections that are already in place. And we certainly
13 do not condone at any time an employer intentionally
14 trying to harm their employees.

15 We are concerned about the fact that the
16 workplace safety bills being considered will allow
17 employees to sue their employers and allow employees to
18 sue even if the employer did not intend to harm the
19 employee. Furthermore, these bills allow for an employee
20 to file a claim under the workers' compensation system and
21 simultaneously file suit against their employer. We are
22 concerned that civil lawsuits in this area may needlessly
23 duplicate effort and only serve to further tie up already
24 clogged court dockets. If an employee is legitimately
25 injured, even if the injury was the employee's fault, the

1 employee will receive compensation for his or her injury
2 from the workers' compensation system. Injuries will cost
3 the employer and increase worker's compensation premiums
4 and loss of productive employees.

5 In summary, we are very concerned that
6 allowing employee lawsuits may not only undermine the
7 original intent of the workers' compensation system but
8 may further increase the costs of doing business in
9 Pennsylvania without creating any additional deterrent
10 against unsafe workplaces.

11 In conclusion, I would just say today that
12 we wish we could have been here today with a position. We
13 are not prepared to give you that position at this time
14 but would just want to thank you again for the opportunity
15 to be here, and I'll end at this point and if you have any
16 questions you'd like to ask, I'll be happy to try and
17 answer them.

18 ACTING CHAIRMAN PRESSMANN: Would you like
19 to submit the rest of your remarks for the record?

20 MR. LYDEN: Yes, if I could.

21 (See Appendix for copy of Mr. Lyden's
22 statement.)

23 ACTING CHAIRMAN PRESSMANN: Any questions?

24 (No response.)

25 ACTING CHAIRMAN PRESSMANN: Thank you. Next

1 time we'll take you earlier in the day.

2 MR. LYDEN: Thank you.

3 ACTING CHAIRMAN PRESSMANN: We adjourn.

4 (Whereupon, the proceedings were concluded
5 at 3:30 p.m.)

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I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me during the hearing of the within cause, and that this is a true and correct transcript of the same.

Ann-Marie P. Sweeney

ANN-MARIE P. SWEENEY

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