TESTIMONY OF THOMAS R. BOND, ESQUIRE

before the

Joint House Judiciary and Labor Relations Committee

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Chairman Caltagirone, Chairman Cohen, Members of the House Judiciary and Labor Relations Committees, I am Thomas R. Bond, a partner in the Philadelphia based law firm of Marshall, Dennehey, Warner, Coleman & Goggin. I have concentrated my legal practice in the area of Pennsylvania worker's compensation matters, primarily representing insurance carriers and self-insureds, for approximately 15 years. I am here today as a representative of the Pennsylvania Chamber of Business and Industry to discuss House Bills 1012, 1013, and 1030. My primary focus will be on the ramifications of a worker who opts out of the workers' compensation system in favor of a tort recovery as would be permitted under House Bills 1012 and 1013. While it is arguable that there are certain drawbacks to limiting recovery by injured workers to those remedies available under the Pennsylvania Workmen's Compensation Act, it is our position that there are many beneficial aspects of the Act that should not be cast aside lightly in favor of a seemingly attractive tort recovery. Permit me to discuss, just briefly, the most important of the rights that are vested in our Pennsylvania workers under the Act.

Any successful tort action to be initiated under the authority of either H.B. 1012 or H.B. 1013 would be given <u>finality</u> either through a judicial Order or reflected within the

terms of a General Release. A recovery under the Workmen's Compensation Act, however, has no such finality. For example, should a worker return to work following a work-related injury and sign a Suspension Agreement, he or she would have the right to file a Petition for Reinstatement of Compensation benefits within 500 weeks (a little over 9 1/2 years) from the effective date of suspension. Even if a worker signs a Final Receipt of Compensation believing that he has fully recovered, a Petition to Set Aside the Final Receipt of Compensation may be filed within three years of the date to which compensation of benefits had been paid. Section 413 of the Act provides injured workers and employers with the right to file petition to modify, suspend, terminate, or review in response to changes in the earning power being manifested by the injured worker. It is very significant to note that recent case law ensures that a worker who returns to his pre-injury job with residuals of his injury is entitled to a reinstatement of benefits should that pre-injury job become no longer available due to changing economic conditions. By not authorizing the use of a General Release in the worker's compensation area, I believe that our Legislature fully anticipated that injured workers would, through time, experience changes in their disability and, accordingly, designed the Act to provide compensation benefits to workers experiencing changes in their disability status. This protection is not available to workers or employers in the tort arena.

Next, I would, respectfully, like to direct your attention to the fact that the Pennsylvania Workmen's Compensation Act provides for continuing medical benefits in order to ensure that injured workers receive, at all times, any reasonable and necessary medical care required. It has been held that these medical benefits are life-time in nature. Fuhrman v. Workmen's Compensation Appeal Board, 515 A.2d 331 (1986). Again, we see no parallel for this benefit in the tort system. The importance of this benefits is underscored by the continuing escalation of medical costs we have been seeing in recent years and probably will continue to see in the years ahead.

The Pennsylvania Workmen's Compensation Act also provides for death benefits in the event that an injured worker dies as a result of a work-related injury or disease even though he had received compensation for that injury or disease during his life time. A prime example of such a case would be that of Bush Coal Company and State Workmen's Insurance Fund v. Workmen's Compensation Appeal Board (Adams), a case decided by the Commonwealth Court of Pennsylvania in 1985. Briefly, the claimant had sustained a work injury in the form of a myocardial infarction. As a result of this injury, the claimant had developed an enlarged and dilated heart. There was a finding that the had a limited cardiac reserve prior to his death. At the time of his death, the decedent was receiving temporary total disability benefits under the Act. He found himself involved in an altercation having to do with one of his children and the child of

another family. The stress associated with this altercation was shortly followed by his death due to a fatal heart attack. Death benefits were provided to his surviving widow and their children with a finding that the initial work-related injury was the underlying disease process that resulted in death with the altercation constituting only a precipitating factor leading to his death.

It is, respectfully, submitted that the value of any recovery system being contemplated for the benefit of injury workers have as its focus the extent of actual recovery realized by the worker. I should like to refer to the costs associated with the initiation and pursuit of a recovery, whether that be under a tort concept or the worker's compensation scheme, as transaction costs. The chief of these costs would be the sums of monies flowing to the attorneys representing injured workers. Section 442 of the Act, with few exceptions, limits the extent of attorney's fees to 20 percent of the amount of compensation awarded. In the tort system, however, the contingent fees would typically run from a minimum of 25 percent up to as high as 50 percent. Probably the most typical attorney's fee charged, should litigation be required in a tort action, would be 40 percent. It is instructive to refer to several recent studies of the efficacy of the Federal Employers Liability Act as contrasted to several state workers' compensation systems. In 1986, the Office of General Accounting submitted the results of a study comparing recoveries realized under FELA versus probable recover-

ies within the jurisdictions of Connecticut, a high benefit state, and Indiana, a low benefit state. An analysis of the information gathered leads to an important finding. The benefits received by workers recovering under FELA were so significantly reduced by attorney's fees and other transaction costs that the actual recovery - i.e. the amount received by the employees - was no different than the recoveries that would have been realized in the high benefit state of Connecticut. In 1987, a study was reported serving to compare recoveries under FELA to the probable recoveries that would have been realized within the jurisdictions of Maryland and Pennsylvania. It was reported that the transaction costs involved in pursuing recoveries under FELA greatly exceeded those costs that would have been incurred in pursuing a worker's compensation recovery. This study clearly showed that, once the transaction costs were factored out, the extent of recovery under the Pennsylvania Workmen's Compensation Act would have exceeded the recoveries realized under FELA. The authors of this study also pointed out, quite significantly, that the need to show negligence to qualify for recovery under FELA increased the likelihood of an injured worker retaining an attorney. This would also be true with respect to pursuits of recovery under either H.B. 1012 or H.B. 1013. It is conceivable that cases would arise where the worker claiming a work injury or disease would incur double attorney's fee obligations, owing a fee to his compensation attorney and an additional fee to his tort attorney. Frequently, they are not one and the same. The "trigger" for the

obligation to pay the worker's compensation attorney would be the Referee's Award. The decision by the claimant to opt for the tort recovery would not release him from the obligation to pay his compensation attorney. With the claimant able to pursue simultaneously a possible tort recovery as well as a worker's compensation recovery, the employers in our state would be exposed to extremely high transaction costs, chiefly defense representation costs. These costs are high now but would be times two if the Bills under discussion were to be enacted.

An added benefit that flows to workers receiving benefits under the Act is that of having the power of the Bureau of Workers' Compensation available to enforce the various provisions of the Act. The power this agency has been harnessed on a number of occasions to protect and exert the workers' compensation rights of the "little guy" against any of the corporate giants who try to escape their responsibilities under the Act. This protection would be available to the injured worker for as long as he is eligible to receive benefits under the Act. In cases of temporary total disability, that right would continue for the life time of the claimant. This right to receive total disability benefits for a worker's life time can, in actuality, prove to involve more money flowing to the claimant than he would have realized in a tort recovery. For example, in the GAO 1987 study referred to above, it was shown that the recovery of those individuals permanently disabled under the Connecticut worker's compensation statute would have exceeded what those workers

received under FELA by some $3.2 million. The presence of the Bureau to protect this important right and the others rights afforded workers under the Pennsylvania Workmen's Compensation Act cannot be emphasized enough. It is also significant to note that the continued receipt of compensation benefits is assured through what may prove to be many years of disability by the presence of the Security Fund should the worker's compensation carrier become insolvent.

The Pennsylvania Workmen's Compensation Act presents an interesting framework within which the goals of adequate compensation for the harm done and deterrent goals can be achieved. Section 320 of the Act provides that employment of a minor in violation of the Child Labor Laws will result in an obligation on the part of the employer to pay 150 per centum of the amount that would be payable to such minor if legally employed. The additional 50 percent, continues this statutory section, is payable by the employer and not the insurance carrier. In fact, it is provided that any provision in an insurance policy undertaking to relieve an employer from such liability shall be void. Professor Larson, in his frequently cited treatise on workers' compensation, reports that the states of Arkansas, Kentucky, Mississippi, New Mexico, North Carolina, Ohio, South Carolina, Utah, and Wisconsin have provided for penalties in the form of increased compensation benefits for failure of employers to provide safety

devices, obey safety regulations, or failure to comply with the duties imposed upon them by the various statutes and regulations pertaining to safety. Professor Larson comments:

> The entire subject of employer and employee misconduct would be improved and simplified if the penalty system became universal wherever it was desirable to interpose a deterrent against misconduct. The provision of such deterrents is not inconsistent with the general nonfault character of compensation law, as long as the basic applicability of the Act is undisturbed.

It is submitted, respectfully, that the adoption of a penalty approach would be beneficial to employees and employer alike. The penalty provision would ensure the payment of a specified amount for violations of safety standards and statutes and regulations pertaining to safety as opposed to a lottery-like system which is present in the tort area. Employers would benefit in that they would continue to be able to secure sufficient insurance coverage to meet their obligations under the no-fault system inherent in the Pennsylvania Workmen's Compensation Act. The employees would also benefit in that recovery of any justified penalties would, without question, take place well before a recovery would be realized under a tort approach.

It is significant to note that, of those states who have decided to take measures to ensure that employers adhere to safety standards and laws, the great majority of them have decided to go the penalty route. To be sure, certain other states, Kentucky, Oregon, Washington, West Virginia, and Texas,

have decided to expose employers to tort litigation but only when there is, in fact, an intentional injury. As Professor Larson points out, this must result from a real and deliberate intent to cause harm. It is submitted that the statutory language contained within the two Bills under consideration do not require the showing of a real and deliberate attempt to injure workers.

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

Thank you for considering my views which are being expressed on behalf of the Chamber.