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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,
December 14, 1989
10:00 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. Anthony M. DeLuca	Hon. John F. Pressmann
Hon. Lois S. Hagarty	Hon. Karen A. Ritter
Hon. David W. Heckler	Hon. Michael R. Veon

Also Present:

Michael Cassidy, Maj. Executive Director, Labor Relations
Committee
David Krantz, Maj. Executive Director, Judiciary Comm.
Eric Fillman, Research Analyst, Labor Relations Comm.
Mary Beth Marschik, Research Analyst Judiciary Comm.

Reported by:
Ann-Marie P. Sweeney, Reporter

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1 CHAIRMAN CALTAGIRONE: I think we might as
2 well get started. We are a couple minutes behind the
3 schedule. Chairman Cohen will be here shortly.

4 If Joseph Lurie would please come forward.
5 The members of the committee that are present could
6 introduce themselves and staff.

7 I am Chairman Tom Caltagirone of the House
8 Judiciary Committee. Chairman Cohen of the House Labor
9 Relations Committee will be here shortly. And if we can
10 start from my left and have the introductions of the
11 members present and staff, please introduce yourself for
12 the record.

13 REPRESENTATIVE PRESSMANN: Representative
14 John Pressmann.

15 REPRESENTATIVE CHADWICK: I'm Representative
16 Scot Chadwick.

17 REPRESENTATIVE HAGARTY: Lois Hagarty,
18 Montgomery County.

19 REPRESENTATIVE HECKLER: Representative Dave
20 Heckler.

21 Sorry, Mr. Chairman. We're trying to solve
22 the insurance problem.

23 REPRESENTATIVE CARN: Representative Andrew
24 Carn from Philadelphia.

25 MR. FILLMAN: Eric Fillman, Research Analyst

1 for the House Labor Relations Committee.

2 MS. MARSCHIK: Mary Beth, Research Analyst
3 for the House Judiciary Committee.

4 MR. KRANTZ: David Krantz, Executive
5 Director for the House Judiciary Committee.

6 CHAIRMAN CALTAGIRONE: If you'd like to
7 start, please introduce yourself for the record.

8 MR. LURIE: Sure. Good morning. My name is
9 Joseph Lurie. I'm an attorney. I had been asked by the
10 AFL-CIO to the review House Bill 916, the "Products
11 Liability," quote, reform bill. We have prepared a review
12 which I hold in my hand, and I have other copies, but I
13 believe that we had distributed this review back in May of
14 this year when the bill was first introduced, or April of
15 this year, amongst all the House members, and if you
16 needed additional copies, we would be happy to provide you
17 with them.

18 Our concern, as set forth in our report, is
19 that this bill is a bill which is simply wrong-headed in
20 1990. We know from our statistics that today in America
21 as we're speaking there are workers who are dying and
22 being killed at the workplace. Last year and for the past
23 four years the statistics have been very consistent. More
24 than 10,000 people -- 10,700 people have died each year in
25 workplace injuries, and approximately 1,800,000 people

1 have been seriously injured in workplace injuries, and
2 that's injured enough to require them to lose time from
3 work. The National Safety Council tells us that about 15
4 percent of all workplace injuries or deaths are due to
5 products. They may not necessarily be unsafe products,
6 but we assume that a substantial portion of these products
7 are unsafe products.

8 We have, in Pennsylvania, like most States
9 throughout the country, changed our thinking throughout
10 the years as far as products liability. Prior to the
11 1950's, the law was "let the buyer beware," and that the
12 buyer had a responsibility under the law that if you were
13 going to use a product, you had to examine that product
14 when you bought that product, when you purchased that
15 product, in order to make sure that product was safe. And
16 if that product indeed was not safe, you had no cause of
17 action because it was your fault. As time went by, our
18 scientists and our designers decided that one of the
19 things that injure people in products is their own human
20 error. So today products are designed to prevent injury
21 from human error.

22 For example, you have a product in your
23 house which we all use, some of us use perhaps, called the
24 clothes dryer. A clothes dryer is a very typical product.
25 It's a product that we use, we throw our clothes in there,

1 and when they designed that product, they realized that
2 there was a hazard connected with that product and that
3 hazard was the rotating tumbler. And the manufacturer of
4 that product put a door on that rotating tumbler to tell
5 you to keep out of the rotating tumbler. And they
6 suggested, and they have even put in a handbook that is
7 sold with the product, never open the door when the
8 product is in service. Okay? Does anyone here have a
9 dryer that works like that? Of course not. Every dryer,
10 when you open it up, that door has an interlock switch on
11 it so when you open, that tumbler stops. Now, under this
12 products liability reform bill, on the question of misuse,
13 if the manual contains an instruction that you should not
14 use that -- open that door unless you shut off the
15 machine, it is a complete defense if all people who sell
16 dryers in Pennsylvania decide to eliminate the interlock
17 switch on the door and put a warning in their manual.

18 Okay, so what happens to your kid who is
19 playing in the basement and decides to open the door and
20 see what's going on in the dryer? He or she gets mangled
21 and the law says, well, you only have to give warnings to
22 people who you would normally give warnings to. What good
23 is giving a warning to some little kid? That kid can't
24 read anyway.

25 We live in a day today that we could put

1 people on the moon, we could do everything, we can make
2 every product that is used in the United States safe, and
3 one of the reasons that has been done, why industry has
4 done it, is because of the products liability bill. The
5 present law, and I had -- wasn't able to testify last
6 time, but the present law does not say that the product
7 manufacturer is responsible if their product injures
8 someone. That is not the law of Pennsylvania, although
9 the sponsors of the bill assume that that is the law of
10 Pennsylvania. The law of Pennsylvania is that a
11 manufacturer, seller of a product, is only responsible if
12 that product is indeed unsafe. This is a bill that
13 defends unsafe products. It's remarkable that the framers
14 of the bill say that as part of the policy of the
15 Commonwealth of Pennsylvania that no one who sells a
16 product in Pennsylvania guarantees the product is safe.
17 The bill actually says that.

18 In a day today where thousands of people are
19 being killed in accidents today, and work-related as well,
20 and I have the statistics which you could get, too, from
21 the National Safety Council that says over 4 million
22 people sustained accidental injuries in the United States
23 last year, and over 45,000 people were killed at work last
24 year, workers were killed last year, how can we afford, as
25 a matter of social policy, to relieve one of the safety

1 valves in our system that prevents people from being
2 injured and say that it's no longer necessary for a
3 manufacturer of a product to guarantee that that product
4 is safe?

5 Since 1950 this legislature has passed the
6 Uniform Commercial Code which said that a seller of a
7 product warrants that the product is safe. So when you go
8 to a store, a restaurant, have a meal and get food
9 poisoning, they warrant that that is a safe product. They
10 warrant that that food is safe. If you look at the law
11 that they've drafted now, you have to prove that that meal
12 that gave you food poisoning contained the poison in it.
13 That's a pretty hard thing to do. You weren't back in the
14 kitchen. You don't know what they put in it. But you got
15 sick and went to the hospital and the hospital said, well,
16 you got food poisoning. What happens to all those claims?

17 What happens to the claim where the person
18 who buys a boiler that they're told, I bought this boiler,
19 it's a great boiler, it's going to last for 30 years.
20 Wonderful boiler. It's going to last for 30 years because
21 this manufacturer has warranted that it's going to last
22 for 30 years, and you pass a bill that says after 15
23 years, all your rights are gone. Well, you're going to
24 have people and sellers in Pennsylvania warranting
25 anything that's going to last for 50 years, 100 years, you

1 just fill in the number because they make that warranty
2 without responsibility because this bill destroys your
3 action for breach of warranty, your action for
4 misrepresentation, your action for negligence, which has
5 existed since the founding of the United States. This is
6 some pretty heavy stuff.

7 And what is the factual basis for the bill?
8 We are told in the bill itself by the legislature, by the
9 framers, the legislature finds that there is a need for
10 remedial legislation to establish in statutory form
11 certain clear limitations with respect to the imposition
12 of liability. They find that the establishment of such
13 limitations is consistent with public policy on product
14 safety. What is the factual basis, the factual predicate
15 for that finding? We are told, and this is a recently --
16 I'm quoting from the New York Times, Monday, November 17,
17 1989, a study by the General Accounting Office, the damage
18 awards in five States were neither erratic nor excessive
19 but in general were consistent with the kinds of injury
20 suffered by plaintiffs. So we don't have this damage --
21 this crisis, and it is suggested in the same article that
22 a crisis was created by all the substantial advertising,
23 and they're quoting from, I think, the study which was
24 also written by -- in a study written by Theodore
25 Ellsberg, which appears in the February issue of UCLA

1 Rule, which says that there is no question that at
2 appellate levels there have been a winding down of
3 verdicts, plaintiffs don't walk over defendants anymore.
4 It's a different game now.

5 Lawyers looking for outcome of products
6 liability cases would now estimate their odds are slightly
7 lower than three years ago, and a professor Henderson, in
8 preparing an article examining the cause of the trend,
9 said he believed that the shift is a byproduct of the
10 sweeping marketing campaign by insurers and manufacturers
11 who have exaggerated the ill-effects of litigation. A day
12 does not go by without seeing advertisement in the area,
13 and judges read the papers as well as citizens and
14 legislators. If this advertising indeed is a factual
15 basis for this law, then that is certainly wrong. We look
16 to facts and we see facts every day. We see in a law
17 which says, well, we want to cut it off that back in 1922
18 there was a standard for safe presses and we see how the
19 standards have been manipulated by the National Machine
20 Builders Institute because in 1960, the power press
21 standards said that it was an unguarded -- that you should
22 sell a guarded -- all power presses should be guarded at
23 point of operation. This was what the standards said in
24 1960. So it was everyone's responsibility, the
25 manufacturer as well as the user's responsibility, to

1 guard a press. And then products liability lawsuits
2 began, and in 1972, the standard was changed and the
3 standard then said it shall be the employer's
4 responsibility to guard the power press, when safety
5 engineers and the people who are engaged in this safety
6 science know that it's always cheaper and more efficient
7 to have built-in guards.

8 This warning situation on misuse is just the
9 most ridiculous thing I've ever seen. If you go to buy a
10 car from General Motors, and General Motors wants to be
11 competitive with Hyundai, so General Motors eliminates
12 seatbelts, General Motors doesn't sell the car with two
13 sets of breaks, General Motors does not sell the car with
14 a spare tire. Instead, in your manual it says that this
15 car is not intended to be used as sold. Before you use
16 this car, please add rear breaks, seatbelts, a sideview
17 mirror and anything else that they wanted to take off the
18 car to make it competitive, because we, General Motors,
19 have intended that you use the car by adding the following
20 pieces of equipment.

21 Now, under this section here, it says that
22 it shall be an absolute defense if the product has been
23 misused in violations or warnings or instructions as given
24 by the producer. Again, this is so wrong-headed that you
25 wonder, did the people who drafted this piece of

1 legislation and introduced it actually read the
2 legislation? And just about every section of the
3 legislation talks about that. They talk about alterations
4 and modifications of products. Well, many products, the
5 manufacturer knows that they will have to be altered or
6 modified, or it's foreseeable that it will be altered and
7 modified, and as set forth in this exhibit, which sets
8 forth the policy of the Westinghouse Company, the
9 Westinghouse Corporation, in their product statement of
10 safety policy which is attached to this, reflects the
11 thinking of responsible corporations. And what they say
12 is that actions shall be taken to identify and minimize
13 potential product hazards during all phases of the
14 product's life, including the development, design,
15 manufacture, marketing, service, use, and disposal. All
16 reasonable measures shall be taken to minimize the risk of
17 injury to persons and damages to property and environment,
18 giving full regard to the application of Federal, local,
19 and State industry safety regulations.

20 Here's a responsible company that is
21 functioning and that company, following this policy, is in
22 compliance with the present products liability law of
23 Pennsylvania. And there seems to be some question as to
24 what that law is, and that law is very simply stayed by
25 our Supreme Court that, one, the manufacturer or seller of

1 a product guarantees that that product is safe. And they
2 say in fulfillment of that guarantee that product should
3 be equipped with anything necessary to make it safe and
4 should contain no condition that makes it unsafe. So if a
5 product is sold and presents a risk of serious injury to a
6 person, that product is defective. And if that dangerous
7 condition, that unsafe condition, causes the injury, the
8 manufacturer is responsible for that person. And the
9 court has also said in their statement of policy, which I
10 assume the framers and proponents of this bill are
11 familiar with, which makes clear sense the realities of
12 our economic society as it exists today, forces a
13 conclusion that "the risk of loss of injury resulting from
14 defective products" -- not products, defective products --
15 "should be borne by the suppliers principally because they
16 are in a position to absorb the loss by distributing it to
17 a cost of doing business."

18 Now, what does that one sentence mean? It
19 means that the person who is rendered -- who loses an arm
20 or is rendered a paraplegic or becomes totally disabled as
21 a result of a defective product, that that person and that
22 person's family and that person's friends and this State,
23 through its welfare system, should not bear that cost and
24 is more appropriate through insurance for that cost to be
25 distributed as part of the cost of manufacture. It goes

1 on to say, "In the era of giant corporate structure," and
2 I'm again quoting from the Azzarello case, which I assume
3 you're all familiar with, "In the era of giant corporate
4 structure, utilizing the national media for selling their
5 wares, the original concern of emerging manufacturing
6 industry has given way to the view that it is now the
7 consumer that must be protected. While this expansion of
8 the supplier's responsibility for injuries resulting from
9 defects in his product has placed the supplier in the role
10 of the guarantor of the safety of the product, it is not
11 intended to make him the insurer." So they're saying that
12 this person simply says that my product is safe. I am
13 convinced that our product is safe. I'm offering it to
14 the public because it's safe. Should that be against the
15 public policy of this great State?

16 "A guarantor of a product is responsible if
17 the user of the product is injured as a result of the
18 unsafe condition of a product." And that's all the law
19 says. That is the law. There's nothing magical about
20 that law. In a society that recognizes humanity, that
21 should be the law. And yet what this law does, in a very
22 clever way, incidentally, it says, well, we're not taking
23 away your right to sue, but we're going to make it near
24 impossible for you to collect. So the defense bar, you
25 know, these cases may still very well be brought, but if

1 you win them, it's going to be a minor miracle because we
2 know, for example, and we have this business of
3 responsibility, the products liability law says that if
4 you know that this product is unsafe and you use it and
5 injure yourself, you can't recover. But if you use this
6 product and this product is not properly designed to
7 prevent injury due to a mechanical failure or an
8 electrical failure or human error, and that human error,
9 which all products are really designed to protect against,
10 results in your injury, you are not barred from recovery.

11 Now what this law says, you are barred from
12 recovery. Well, today people are studying human factors
13 engineering and product safety engineering and thousands,
14 if not millions, of dollars are spent for this education
15 to teach product designers how to design products so
16 people will not be injured due to human error. And yet
17 this legislature says, no, that's okay. In Pennsylvania
18 we don't care about that because we're assuming that
19 everyone acts with 100 percent efficiency. And if you do
20 make an error, if your mind wanders, indeed some of you
21 aren't listening to me now, if you were operating a punch
22 press and were thinking about your pot roast at home or
23 what you're going to do after at the bar and you slip,
24 that's human error. And the guards on that punch press
25 are supposed to protect you against your moving parts.

1 And I make errors all the time, but if I'm a press
2 operator, it's going to take off my hand, and if I'm a
3 lawyer, I can blame it on my secretary, you know.

4 So that's the way it is. And we have to be
5 sensitive to that. And we can't be where science is not.
6 I mean, we would hope that the law would at least be
7 consistent with science, and where our law is now is we're
8 going -- you know "Back to the Future," we're going back
9 to the past and we're saying, let's have the law the way
10 it was in, you know, in the 1950's when our corporations
11 needed some help to emerge. Well, they've emerged and
12 they've figured out, hey, not only can we emerge but we
13 could take away from society the protections society has
14 given the people because of the fact that we're able to
15 influence minds through our mass psychology, through our
16 mass advertising, and by giving anecdotal stories about we
17 know of a case in which A and B and C happened.

18 I know all of us are concerned about the
19 hardware store in your particular districts that get sued
20 or you think get sued in these cases. I would suggest to
21 you if you speak to the hardware store, the hardware store
22 isn't complaining that it got sued. The hardware store is
23 complaining that their products liability insurance has
24 risen. And I'd like to see a case in Pennsylvania where
25 recovery was made against that hardware store on a

1 products liability theory. Indeed, the Uniform Commercial
2 Code prevents the hardware store from sustaining any
3 responsibility if it's sued because there is a doctrine of
4 vending out, so that if you have an off-the-shelf item and
5 someone buys it from your hardware store, you give notice
6 to the person you purchased it from, whatever company that
7 was, and they have the responsibility to pick up your
8 defense, and if they refuse to do that, to pay your legal
9 fees. So there is protection in the law right now for the
10 hardware store. But the hardware store isn't complaining
11 about being sued or paying a judgment, the hardware store
12 is complaining about its insurance premiums. And that's
13 why I'd like to know how, where we don't have lawsuits
14 that result in injuries in verdicts against hardware
15 stores and they haven't been exposed, why should their
16 insurance have jumped 10 and 20 percent in the last 10
17 years? That's a question that if there's facts we should
18 answer.

19 Generally speaking, looking over the bill,
20 we believe the bill is unnecessary. The proponents of the
21 bill claim that they need something to protect costs. In
22 light of the profits of the insurance industry, they ought
23 to look to insurers rather than to the public, which has
24 to be protected by this law. The law is unfair. Our
25 courts have gradually developed to a point where a

1 manufacturer and a consumer stand on equal footing in
2 resolving disputes over unsafe products. This measure
3 would tip the scales unfairly in the favor of the
4 manufacturer. It would impose arbitrary and absolute
5 limits to recovery where an injured person can prove the
6 injury was caused by the unsafe product.

7 The changes suggested by the bill would not
8 only jeopardize the rights of the victims but would also
9 remove our important incentive for the safe design and
10 distribution of the products. Manufacturers, as I said
11 before, are becoming increasingly aware that product
12 safety and liability prevention programs not only reduce
13 future liability but also reduce accidents, increase
14 safety, and result in more competitive products. Also,
15 insurance companies are often more willing to offer better
16 premium rates and liability coverages when their insureds
17 implement such a program. The bill would give
18 irresponsible manufacturers an advantage over other more
19 safety conscious firms and over the hapless consumer. I
20 mean, what this bill does is says to the manufacturer, if
21 we all banned together, as the press industry has done,
22 and say we're not going to put any guards on our point of
23 operation because of the fact that people might say that
24 it was now feasible for us to guard these presses, if we
25 all banned together, that will help us. So now no press

1 manufacturers put a guard on a press.

2 The lift truck companies used to do this.
3 Since the early '60's there were suits brought against the
4 lift truck companies after they had to put -- in 1972, all
5 lift truck companies started to put overhead guards on
6 their lift trucks so that when the forks were being risen
7 and the couple thousands of pounds of, you know, the lift
8 truck lifts up an object, and they're used in all industry
9 to carry objects for material handling, and they place
10 objects -- they lift and reach and they place objects on
11 high shelving and things like this, it became clear that
12 when the forks are being lifted a bundle might fall back
13 and land on the operator and either kill or seriously
14 injure them. So in 1972, lift truck companies, although
15 these accidents have been happening a long time, since the
16 '50s, they decided that they would put overhead guards on
17 all these lift trucks.

18 Now, that created another problem because a
19 lift truck is very susceptible to turnovers if it's going
20 more than 6 miles an hour and makes a turn. People
21 started to get their heads and arms and bodies amputated
22 when the lift truck turned over and they were ejected from
23 the seat and the overhead guard came down and acted as a
24 guillotine. Suits were brought against the lift truck
25 companies saying there should be some seat restraint, a

1 seatbelt, or even arms on these chairs so that when the
2 lift truck starts to go over, you could hold on and you
3 would not be ejected from the lift truck. These law suits
4 continued and plaintiffs won some of them and defendants
5 lost some of them, and finally the leading lift truck
6 company in the United States bit the bullet and Clark
7 Equipment, about two years ago, put on all their lift
8 trucks seatbelts when they sold them. They put on arms
9 and they even put a fan on the seat to further restrain
10 the worker, the operator, in the lift truck. And not only
11 that, they also offered free to all their prior customers,
12 under a recall program, which this bill, incidentally,
13 makes unnecessary, to retrofit all the Clark lift trucks
14 with these new seats.

15 Now, this was a great victory for working
16 people in the United States, it was a great victory for
17 Clark because it showed its own humanity as a company in
18 the United States, and this was great. But still there
19 are lift truck companies in the United States that don't
20 do this, because Clark broke out of the mold, decided to
21 break out of the mold. But there are safety conscious
22 companies that do advertise their products as being safe
23 and do take pride in their products as being safe and have
24 substantial design departments that employ safety
25 designers and human factors engineers who determine what

1 the foreseeable uses and misuses are of the product, what
2 the human errors the people find in the product, and
3 therefore design against that type of injury. And this
4 bill does nothing but discourage that. We believe that
5 those who favor the bill are the manufacturers and big
6 businesses who simply want to make it harder for consumers
7 to hold them accountable for making and selling unsafe and
8 unhealthy products. The products liability law has had
9 notable impact on the quality of the products themselves.
10 Products have become safer, manufacturing procedures have
11 improved, and labels and instructions have become more
12 clear and to the point.

13 The Conference Board, a business institute,
14 found that corporate risk managers agree that current
15 product liability laws have made America safer. More
16 responsible companies have reacted to the products
17 liability lawsuits by taking appropriate action to
18 identify and minimize potential product hazards during all
19 phases of the life of the product, and we had Westinghouse
20 as an example of a company that has indeed done this.

21 And finally, the bill is unjust. A
22 legislative bill should be just, and a bill is not just
23 unless it works for the benefits of all the citizens of
24 our State, and this bill takes rights away from our State,
25 aids sellers of products, most of whom are not in our

1 State. Makes no sense.

2 Thank you.

3 CHAIRMAN CALTAGIRONE: We'll recognize the
4 other members that have joined us, and of course our
5 Chairman of the House Labor Relations Committee, Mark
6 Cohen.

7 If the other members would just introduce
8 yourself for the record.

9 REPRESENTATIVE RITTER: Karen Ritter from
10 Allentown.

11 REPRESENTATIVE BLAUM: Kevin Blaum, city of
12 Wilkes-Barre, Judiciary Committee.

13 REPRESENTATIVE McHALE: Paul McHale from
14 Bethlehem.

15 REPRESENTATIVE LEE: Ken Lee, Labor
16 Relations Committee, Wyoming County.

17 REPRESENTATIVE CARLSON: Representative
18 Carlson, 68th District.

19 REPRESENTATIVE DeLUCA: Tony DeLuca from
20 Allegheny County, 32nd district.

21 REPRESENTATIVE BELFANTI: Bob Belfanti, Vice
22 Chairman of Labor Relations.

23 REPRESENTATIVE LASHINGER: Joe Lashinger,
24 Judiciary Committee, Montgomery County.

25 REPRESENTATIVE MARSICO: Ron Marsico,

1 Dauphin County.

2 REPRESENTATIVE MOEHLMANN: Nick Moehlmann,
3 Lebanon County, Minority Chairman of the Judiciary
4 Committee.

5 REPRESENTATIVE PICCOLA: Jeff Piccola,
6 Dauphin County.

7 CHAIRMAN CALTAGIRONE: Thank you.

8 We'll open it up for questions. I'm sure
9 there are going to be some.

10 (No response.)

11 CHAIRMAN CALTAGIRONE: I guess not.

12 REPRESENTATIVE HAGARTY: Four hearings and
13 we're questioned out.

14 CHAIRMAN CALTAGIRONE: Any questions at all?

15 (No response.)

16 CHAIRMAN COHEN: I would just like, Mr.
17 Chairman, to commend Mr. Lurie, who I've known well for a
18 good number of years, on a very excellent and very
19 comprehensive statement which I think will be very useful
20 to the members of the committee and to the legislature in
21 general.

22 MR. LURIE: Thank you for the opportunity to
23 appear.

24 CHAIRMAN CALTAGIRONE: Thank you, sir.

25 We'll next hear from the senior citizen

1 panel. If you'd come forward and just identify yourself
2 for the record.

3 MR. JEFFERSON: Thank you.

4 My name is Jim Jefferson. I'm President of
5 the Pennsylvania State Council of Senior Citizens. I
6 welcome the opportunity to address you on this issue
7 today. It's very close to the heart of seniors. I'll be
8 very brief.

9 Senior citizens of Pennsylvania would once
10 again like to express their strong opposition to the
11 proposed changes in our Commonwealth's product liability
12 laws. House Bill 916 would infringe upon our rapidly
13 diminishing individual rights, rights which we, as senior
14 members of this community, have cherished and value longer
15 than any other citizen in the State we call home.

16 Product liability affects us all. Product
17 liability lawsuits, in addition to providing compensation
18 to victims of defective products, offer vital protection
19 to the public by exposing the hazards of products on the
20 market, promoting manufacturers to redesign or recall
21 dangerously defective products, and creating incentives
22 for manufacturers to concern themselves with product
23 safety.

24 Of particular interest to the elderly
25 community is the case involving Icy Hot. A diabetic

1 Indiana man used Icy Hot on his foot to relieve pain,
2 wrapping the foot in a heating pad. The analgesic
3 desensitized his foot, which was already desensitized due
4 to the diabetes. His foot was severely burned and
5 ultimately amputated. The lawsuit that resulted from this
6 case forced the manufacturer of Icy Hot to place a warning
7 on its package, thereby providing the necessary
8 precautions to insure that this kind of needless tragedy
9 never happen again.

10 Another dangerous product which consumers
11 should be aware of is the anti-arthritis drug. A man who
12 took phenylbutazone, the anti-arthritis and
13 anti-inflammation drug, suffered an extreme reaction which
14 caused him to shed most of his skin and eventually killed
15 him. The manufacturer, Danbury Pharmacal, Inc., settled
16 the case by agreeing to pay his widow \$800,000 and to stop
17 the sister drug, called oxyphenylbutazone. In 1983,
18 experts claimed that these drugs, sold to an estimated 135
19 million persons, have caused over 10,500 deaths worldwide.
20 Internal memos from the drug's original manufacturer show
21 that the manufacturer knew of these fatalities and that
22 newer, less toxic and equally effective drugs were
23 available. Although the U.S. Department of Health and
24 Human Services refused to ban the drugs, Ciba-Geigy
25 Corporation ended worldwide distribution in 1985. Generic

1 drug companies, including Danbury Pharmacal, however
2 continued to market the products.

3 Senior citizens have worked a lifetime to
4 make Pennsylvania a better State for ourselves and our
5 children. We cannot stand idly by and watch our efforts
6 be in vain. Let's learn from all the horrible tragedies
7 which are a direct result of manufacturers placing profits
8 above safety.

9 Thank you.

10 MR. CARUTHERS: My name is William F.
11 Caruthers. I'm an attorney. I'm also old enough to be a
12 member of AARP, and I do belong, and for the past four
13 years I have been on the Pennsylvania State Legislative
14 Committee for AARP.

15 The Pennsylvania senior citizens and AARP
16 have vigorously opposed this type of bill as it was in the
17 last two or three sessions of the legislature. We are
18 very thankful to the legislature because as AARP and the
19 senior citizens, we went to the legislature and asked them
20 to give us single-line prescriptions. And we got that as
21 an aid to the PACE Fund, which, as you well know, spends
22 the Pennsylvania Lottery. We asked the doctors to give us
23 generic drugs whenever possible because this was such a
24 great savings to PACE. Now we find that the FDA and at
25 least two drug companies and possibly 12 more have gone

1 outside the pale, produced defective generic drugs and
2 sold them to the public. We are presently asking the
3 legislature to allow drugs accepted in the FDA's registry
4 to be used in Pennsylvania without the necessity of going
5 through the long process for our own drug registry. This
6 points out that without 402 A and without the liability of
7 manufacturers for defective products, there may not have
8 been a wide choice.

9 Now, Mr. Lurie is a very hard act for any
10 lawyer to follow. However, to make certain that you
11 thoroughly understand the Sections 402 A and 402 B which
12 are the law today, I've had a number of copies prepared of
13 the sections of the restatements of tort, 402 A, and they
14 will be distributed to you. These sections show you the
15 application of the law because they're not only the
16 sections which our Supreme Court has adopted but the
17 commentary from the different cases are there.

18 Now, in view of the fact that Mr. Lurie has
19 gone and Mr. Jefferson has gone so much into this problem,
20 I have got to tell you, well, you know you've seen these
21 speakers who come with a whole stack of stuff and say,
22 hey, I was going to talk and go through all of this but it
23 wasn't necessary, but I had intended to do that. I have
24 reams of paper here. You're lucky Mr. Lurie touched on a
25 lot of it.

1 But, you know, I would like to talk and
2 approach this from a Pennsylvania angle. Just some of the
3 things that I've seen and remembered happening in our
4 Commonwealth in the past year or two years. Now, I don't
5 want to beat your heads with this question of the Ford
6 Pinto. We don't know how many of those neat little fire
7 bombs were sold in Pennsylvania in the last five years.
8 And we didn't know how defective they were until a court
9 in California permitted into evidence the engineering
10 letter, the design engineer's letter to the corporate
11 management that said for \$4.50 you can protect that gas
12 tank, and Ford made a corporate decision, the heck with
13 the \$4.50, we're not going to spend it. That was one
14 place where the jury properly applied punitive damages,
15 which are practically prohibited by this new legislation.
16 They said, "Ford, you should have put that on." Compared
17 to the cost of a car, what is \$4.50? Suppose it had been
18 \$50. But it was \$4.50. What was your profit for the year
19 in which these girls were hurt and almost burned to death?
20 And that's what the punitive damages were.

21 Now, of course, the Manufacturers
22 Association will not tell you that the judge remitted most
23 of that award because it wasn't necessary. But it was a
24 deterrent to make a safe product. Now, a lot of people
25 scoff at Ralph Nader, but unjustifiably. Nader has seen

1 to the fact that the automobile manufacturers are much
2 more aware and much more likely to recall defective
3 products, and if you notice in your newspapers, every year
4 we have these defects and there are recalls. That's
5 responsible manufacturing. And that's what Section 402 A
6 brings about.

7 Let's look at some other places. I
8 understand, sir, that you're from Allegheny County?

9 REPRESENTATIVE DeLUCA: Yeah.

10 MR. CARUTHERS: About this time last year we
11 had the Ashland Oil spill, and it affected the water of
12 western Pennsylvania, West Virginia, and Ohio. It turned
13 out that Ashland bought an old tank, 40 years old, had it
14 shipped here from somewhere out in the midwest, I believe
15 Chicago. In the construction of the tank the wells were
16 improper. That product did not do what it was supposed to
17 do, and for 27 weeks or more in western Pennsylvania the
18 whole water supply of those communities was affected.

19 Let me say to you, understand that there are
20 public buildings down here that had asbestos in their
21 ceilings and in their heating and we had to get rid of
22 them. And how many and how much money has this
23 Commonwealth spent to protect our school children from
24 this? And shouldn't Johns-Manville and other asbestos
25 companies and those who sold asbestos products be

1 responsible for the illness that that caused?

2 Let me ask you this: Have you ever heard of
3 the A.E. Robins Company? Did you ever hear of the Dalkon
4 Shield? Now, some of you guys are still young enough to
5 worry about whether or not your wives or girlfriends might
6 use some sort of contraceptive device. But when they used
7 a Dalkon Shield, they were poisoned. And people started
8 to look under products liability backing to see what
9 happened. Some doctor started to make it and he developed
10 what he thought was a pretty good thing. He didn't have
11 the resources to test it and he couldn't stand the
12 financial burden of the testing over a period of years.
13 He sold it to A.E. Robins, they sold the product without
14 testing because they thought the doctor had done this.
15 What happened, eventually it was driven off the market by
16 402 A suits. Then what did A.E. Robins do with it? They
17 took it off our market and sent it to the underprivileged
18 third-world nations and sold them over there. There women
19 will be subject to the same problem.

20 And then there was also the tampon syndrome,
21 a defective product. It allowed the women who used that
22 product to be infected, to become infected, because of the
23 travel of germs up and down the little string by which it
24 was removed.

25 You know, this is a beautiful time of the

1 year. It's a time when all parents and grandparents want
2 to make a beautiful holiday for their children. And one
3 of the things that we always think about at Christmas time
4 is certainly toys for our children. And we look to
5 certain companies because we know that generally they
6 produce educational toys of fine quality. Now, there was
7 a lawyer up in the city of Boston who began to look at
8 these toys and he began to look at what harm children were
9 suffering from toys. It was very interesting. I have a
10 couple of them right here with me. There is a toy that
11 fits in a Fisher Price truck. It's a little figure, and
12 believe me, I know. I've seen my grandchildren with
13 these. They love them. And the only thing about it, when
14 you give this toy to your child or to your grandchild, you
15 better stay in the same room with them, and that might not
16 be enough, because this toy is of a size to go in their
17 mouth, and it may get part way down and it also gets wet
18 and it sticks and it blocks the air pipe. Now, if that
19 toy had a little hole the whole way through, and if any of
20 you know about manufacturing, you can look at this and see
21 that it was turned out on some kind of a wheel or a lathe,
22 if that hole had gone the whole way through, at these the
23 child could breathe until the object was removed. But how
24 long is it until a child with no oxygen is going to suffer
25 permanent brain damage?

1 We have to be particular about toys. You
2 know, and the thing about it, under this new bill, you
3 take the label off of these toys and they go into a store
4 and the store sells them without labeling, you're not
5 going to be able to find who sold you that defective toy.

6 The reaction of Fisher Price to all of this
7 was that, hey, you know, I guess the parents should have
8 taken better care of their children. They have should
9 have looked. It's not our fault. That was until the jury
10 told them that they were wrong. But the jury had a 402 A
11 statute to go on.

12 And one thing that I think Mr. Lurie
13 neglected to tell you, of the 48 States, 46 supreme courts
14 have said that 402 A is the way to travel. It requires
15 that people produce safe products.

16 I cited the application of the Ashland Oil
17 spill. Let me say this to you: I live in Westmoreland
18 County. In Westmoreland County, we found that an
19 interstate transmission company dumped PCBs out in the
20 Delmont area at their substation, and those infiltrated
21 into the water systems, the wells. People didn't know it.
22 Finally, the offending transporter told them. Now, that's
23 one of the things that AARP knew about and we got in touch
24 with the then Attorney General Roy Zimmerman. It was
25 months before we heard from him, but eventually,

1 eventually this oil company or this transmission line paid
2 fines to the Commonwealth for the dumping at 14 sites in
3 Pennsylvania.

4 Now, if you go up to Centre County, and you
5 know we have a great university there, I didn't go there
6 and we could beat them any time we play them in football,
7 but if you go up there, there's a lot of other things to
8 do besides play football and drink beer and the good
9 college life. Some of us like to go up there for fly
10 fishing. And if you go up there for fly fishing, Spruce
11 Creek is great, if you can get on it. It costs you 95
12 bucks a day, but Eisenhower could get on it and President
13 Carter could get on it. But then there's Spring Creek,
14 and I'm sure that most of you have at some time in your
15 lives heard of the Bellefonte Springs and seen the big
16 pools where they have the specimen trout up there. But
17 now, some irresponsible manufacturer of a poison dumped
18 his excess into Spring Creek. You can go there and you
19 can fish, but you can also ask the Pennsylvania Fish
20 Commission what their signs say. Don't eat the fish that
21 you take out of this stream. We advise you not to fish in
22 it.

23 And let's go up to Erie where industrial
24 waste, where industrial waste, has made the returning
25 salmon unfit to eat. Not only in Pennsylvania but also in

1 New York. Now, you might say, well, look, this isn't a
2 product liability issue. It really is, because in dumping
3 that into our streams so that other people or other
4 organisms get contaminated, they're going to affect us as
5 we use the bounty of our resources.

6 I'm sure that each and every one of you can
7 recount, I saw an interesting article the other day where
8 a newspaper covered up for GE which was putting, and they
9 didn't define it any further, shoddy nuts and bolts in
10 airplane engines they were building. It didn't say for
11 whom they were building the engines, it didn't say the
12 size of the planes that were going to get them, but in the
13 future, in the future, who knows when one of those planes
14 go down, particularly those commercial airliners, isn't
15 there a question, did GE produce this motor and did they
16 use shoddy parts? We saw what happened when, what is it,
17 Morton Thiokol took a shortcut in the production of some
18 rings and we will lost our fabulous astronauts.

19 You know, in my journey through life as a
20 lawyer, I also got on the board of a machine tool company
21 and I'm a secretary to that company so that I'm there on
22 occasion. And Mr. Lurie referred to the responsibility
23 that Westinghouse takes in its product. I know they do
24 because we have a quality testing lab in our little plant
25 which employs 100 people, and every Westinghouse order

1 that comes in, they send us the specs. We make it and we
2 test it. And we see to it that that is machined to a
3 fine, close tolerance. And we see to it that the material
4 that we machine is able to do what it is supposed to do.
5 We had a Congressman visit us not too long ago and we were
6 able to explain to him why good parts cost money because
7 we had a bolt that had to be tested outside our plant for
8 200 hours to make sure that it would work, and every one
9 of those bolts has a history.

10 Gentlemen, we're in a 402 A State. It
11 helps, it does not eliminate all unsafe products, but it
12 helps keep it safe, it makes manufacturers work. We
13 should try to keep it that way.

14 We know that the insurance industry has its
15 own problems with the cost of insurance. I would refer
16 you to a study done by the Honorable William Rybak within
17 the last five years which explains the insurance cycle,
18 and I'm sure some of you ladies and gentlemen on this
19 committee are aware of this. And the situation hasn't
20 changed any. Very frankly, if you want to go and cure the
21 insurance problems and you don't want to look at the
22 profits this industry makes in its year, then what you
23 should do is call together the Pennsylvania congressional
24 delegation and tell them to correct this problem in
25 Washington. This State is not big enough to handle it.

1 We see some odd unification here to pass
2 this bill. We see the tobacco industry, and heaven knows,
3 I'm looked on their product, but I don't think it's safe.
4 They're hooked together with the doctors. That's great.
5 And they're hooked together with the manufacturers,
6 particularly these drug manufacturers. Interesting.

7 I would strongly urge that again and again
8 and again you defeat the passage of House Bill 916 and
9 recommend to the Senate that they forget about 816.

10 Thank you.

11 MS. KAUFOLD: Good morning. I'm Katherine
12 Kaufold, Chair of the Central Pennsylvania Council of
13 Senior Citizens. I, like many others, spent a lifetime
14 working, 40 years to be exact, 40 years working so that
15 one day I would enjoy the rewards of my labor and enjoy
16 life in retirement. I haven't found retirement just that
17 free of labor because I have found many things that need
18 to be addressed on behalf of senior citizens, and I have
19 spent my retirement up to this point, and hope to do much
20 more at that, in working on behalf of senior citizens. I
21 did hope, however, that the time would be free from the
22 worries and the struggles of everyday life. I hoped they
23 would lessen. They have not lessened.

24 Now, unfortunately for the senior citizens
25 of Pennsylvania, this is not the case. We have many

1 worries. We have many struggles. And I appear here today
2 to express my concern about House Bill 916, the product
3 liability measure. This legislation would not help the
4 senior citizens nor any consumers of this Commonwealth.
5 It hurts them. We've heard ample examples of that from
6 our speakers up to this point. It's still another attempt
7 on the part of the manufacturers of unsafe products to get
8 off scot-free from anything they choose to manufacture and
9 sell to the public. Well, the Pennsylvania citizens have
10 to be afraid of these unsafe products. Every time that we
11 open a bottle, unwrap a package, take off a lid, we are
12 subject to the possibility of an unsafe product.

13 Now, for instance, who in the Commonwealth
14 of Pennsylvania takes more drugs than the senior citizens?
15 Many need to be on certain prescriptions for as long as 15
16 years. I am one of them, and my fellow senior citizens
17 can attest to that also. Now, if the proposed statute of
18 limitations were enacted, just tell us, what legal
19 resource would we have if one of these drugs were found to
20 be unsafe? What would we do?

21 The majority of senior citizens live on
22 fixed incomes, monthly incomes, with medication taking up
23 a large proportion of that income. And with the
24 continuing spiraling of health care costs, we need the
25 protection of what we should have in our present civil

1 justice system. We value that. Our present civil justice
2 system. We need simple assurance that the drugs and the
3 products that we buy and buy for others are as safe as
4 they can be.

5 Now, by letting manufacturers off the hook,
6 you, the legislators, would be the ones to enact 916. You
7 would be shifting the cost to victims, to employers, and
8 to taxpayers. Now, we are taxpayers and we expect that we
9 get something in return for the taxes that we pay. We
10 support this State, this Commonwealth of Pennsylvania. We
11 want to continue to do that, but we want to be sure that
12 we get something in return from our legislators or whoever
13 for the taxes that we pay. If you allow House Bill 960 to
14 pass, and it is in your hands, if you allow House Bill 916
15 to pass, you, I'm sorry to say, but you know it, you will
16 be turning your backs on approximately 2 million senior
17 citizens in this State, and you are placing a price tag on
18 the health and the safety of every man, woman, and child,
19 and I speak specifically for children as well as for
20 senior citizens because my life work has been with
21 children. I love them. We all love them. But we have
22 the right to protect them and to see that they are
23 protected. All right. So we would be placing a price tag
24 on all of the citizens of Pennsylvania. And we don't want
25 this State, this Commonwealth of Pennsylvania, to be one

1 who jeopardizes the safety of its citizens to favor the
2 whims and the persons and the purses of the manufacturers.

3 Thank you very much.

4 CHAIRMAN CALTAGIRONE: Thank you.

5 Are there any questions?

6 Representative Lee.

7 BY REPRESENTATIVE LEE: (Of Mr. Caruthers)

8 Q. Mr. Caruthers, I have a question concerning
9 the Pinto case because I've been fascinated by the whole
10 case to begin with, and first of all, let me say, I
11 totally agree with you, that's probably one of the
12 stupidest business decisions ever made when they decided
13 not to put that \$4.62 part in that car because it cost
14 them millions and millions and millions of dollars more
15 than it would have cost to put that part in there. But I
16 just have a hypothetical. Let's say that we could, by
17 some way, determine that there was a 1 in 20 million
18 chance that not putting the \$4.62 part or \$4 part in the
19 car would have caused a death. Okay? One in 20 million,
20 let's say. Do you think the parts should have still been
21 put in there?

22 A. Is that the test, the 1 in 20 million?
23 That's not the test. The test is whether the car is safe
24 without the part.

25 Q. Okay. But there is -- I'm saying that there

1 is a 1 in 20 million chance that if we don't put that part
2 in there, we are going to cause a death.

3 A. All right.

4 Q. So do you think the part should be put in
5 there, based on that fact?

6 A. Based on that fact, I would say to you that
7 it then becomes a question of whether the car was a safe
8 product without it. It would seem to me that 1 in 20
9 million, my common sense tells me, well, that had to be an
10 odd accident, except that other design engineers said that
11 a car built that way is a dangerous fire bomb.

12 Q. Okay, but not every--

13 A. Let me give you another example that's more
14 in line with what you're saying. You know what Liquid
15 Plummer is. Every once in a while a bathroom clogs up,
16 but there is an industrial strength Liquid Plummer, and it
17 is one of the most caustic poisons ever produced. It has
18 special containers. But those containers for industrial
19 Liquid Plummer did not have child protective caps. It
20 wasn't intended to be used by a child. But, they should
21 have been able to foresee that children could get near to
22 it. In this particular case, and it might be a 1 in a 200
23 million shot, it got somehow into the basement of the
24 child's grandmother. The child got over there, the cap
25 was loose, it made a nice addition to a set of plastic tea

1 service like kids, you know, make you a cup of tea.
2 Somehow it got there but there was the Liquid Plummer
3 still on it, which the child drank. Its whole stomach had
4 to be replaced, all of its esophagus. The bills for the
5 medical care amounted well over \$100,000. The cost of a
6 childproof cap out of plastic is how much? You know, like
7 I--

8 Q. Can I just interrupt there?

9 A. Go ahead.

10 Q. I wanted to use the Pinto example, but let
11 me use this example.

12 A. Yeah.

13 Q. Okay. What if there is -- let's say that
14 the cost of that cap is \$1, very inexpensive.

15 A. Right.

16 Q. But there's only a 1 in 100 million chance
17 of the lack of that cap being the cause for a child dying.
18 And I'm not saying -- in this case that's clearly a case
19 where they should have put the cap on, okay, but I'm just
20 saying, let's say that the risk is only 1 in a hundred
21 million. Should the company be required or should we as a
22 society pay \$100 million in order to save one life?

23 A. Do we pay that sum of money? Let me suggest
24 to you, you're substituting statistics for the legal
25 question. The test legally in Pennsylvania today is was

1 the product dangerous or defective? In one case, it was a
2 defective product. That's the Ford Pinto. It was
3 produced contrary to design standards. Yes, they should
4 have. They should have foreseen that that car would have
5 been rear-ended and become a fire bomb. And that wasn't
6 the only Ford Pinto case. There were lots of them.

7 Now, this other was the production of a
8 dangerous product, a product which in itself had to be
9 handled carefully because of its great danger, not only to
10 little children but to every user. You'll see a warning
11 on the label of those bottles, stand back when you pour it
12 down a drain because whatever is down that drain and that
13 caustic solution hits it, it may explode. So you have the
14 difference there. It is a dangerous product, there should
15 have been a cap on it. You know, it might protect some of
16 us who are a little younger than I am, say 22, but in a
17 hurry to do a job for our employer and clean this bathroom
18 out and we spill this stuff on it, it's going to burn us
19 outside our bodies as well as inside. Yes, caps should be
20 there. Whatever the possibility of that child getting it,
21 in as much as it was a dangerous product, they should be
22 liable.

23 Q. I mean, I'm not trying to contest that fact,
24 that case, on all those specifics. I'm certainly not
25 contesting the Ford Pinto case. All I'm trying to do is

1 question you, should there be any limit on the precautions
2 we should take to make every product safe? In other
3 words, should we spend, if it's only a 1 out of a hundred
4 million chance of it causing a death, should we spend that
5 \$1, and therefore \$100 million, to save the one life?
6 Should there be no limit on it?

7 A. I would say this: Now, let's say with Ford,
8 I don't know how many million cars they produce, so let's
9 say they produced 1 million cars. You could have
10 protected all of the Pintos, for \$4.50 a piece.

11 Q. Obvious case.

12 A. Right. Okay. They add that on to the price
13 of the car, and they also make a profit on adding it on,
14 and they are in competition and they have to sell that
15 car. But, their distribution -- the distribution of the
16 cost does not rest on the two girls that were burned, so
17 horribly burned, two young girls, that they would never,
18 they never considered themselves to be marriageable
19 anymore. Their bodies were reduced to a crisp. And they
20 can be kept alive if someone pours a saline solution on
21 their burns every day. Yes, that should be on there.

22 Like I said to you, we produce products for
23 aircraft carriers and for nuclear submarines. We don't
24 get a second chance to look at statistics 10 years down
25 the road and say, well, by God, we should have put that on

1 there. It's got to be a safe product when it leaves our
2 plant. And Ford, Chevy, and all of these people are
3 becoming more responsible. They do now look.

4 Do you remember the beautiful hood ornaments
5 on cars? They were great. They had eagles and wings and
6 everything like this. And if you were a little careless
7 coming down the street, you could spear a lot of people
8 with those hood ornaments, and they're no longer on cars.
9 But that's what product research engineering, safety
10 engineering, is all about.

11 Q. And all I'm saying is I don't think there's
12 any sponsor of this legislation that doesn't believe that
13 product liability, strict product liability, has not done
14 wonders for safety of products in America. I think the
15 question, though, is whether to what point are we going to
16 require manufacturers to go in order to save an individual
17 life. Is there absolutely no limit to what we are going
18 to require them to do or -- I'm just pointing out that I
19 think there is some limit. I'm not quite sure where it
20 is.

21 A. Would you tell me what your limit is,
22 please, sir?

23 Q. I couldn't put a monetary value on it.

24 A. Well, just give me a limit.

25 Q. I think if you spend \$200 million to save

1 one life, that \$200 million could be spent somewhere else
2 to save a lot more lives than that.

3 A. Let me ask you this: What did they spend to
4 save the three whales up in Alaska? You see what I mean?
5 It's a relative question. If it's done in the
6 manufacturing process, it's not expensive. But if the
7 correction has to be made later, then it is expensive.
8 And if you pass this proposed legislation, if you support
9 it and pass it, you're going to shift the burden, the
10 economic burden of the injuries and the death over to the
11 people of the Commonwealth. And I don't think you want to
12 do that.

13 Q. Thank you.

14 A. You're welcome, sir.

15 CHAIRMAN CALTAGIRONE: Any further
16 questions?

17 (No response.)

18 CHAIRMAN CALTAGIRONE: Thank you very much.

19 MR. CARUTHERS: Thank you very much for the
20 opportunity to be here.

21 CHAIRMAN CALTAGIRONE: We'll have the
22 insurance panel next. Would you please come forward and
23 state who you are and who you represent for the record?

24 REPRESENTATIVE KOSINSKI: Mr. Chairman, I'm
25 going to have to object to the fact that we're running

1 ahead of schedule.

2 REPRESENTATIVE HAGARTY: It's unprecedented.

3 CHAIRMAN CALTAGIRONE: We'll have you home
4 before the snow starts.

5 MR. MAURER: Chairman Caltagirone, Chairman
6 Cohen, and members, my name is Robert H. Maurer. I'm an
7 attorney in Harrisburg, and I'm privileged to represent,
8 and have for a number of years, the Alliance of American
9 Insurers. With me this morning I'd like to introduce John
10 J. Doyle, who is the Regional Director for the Alliance,
11 with offices in Schomberg, Illinois, just outside of
12 Chicago.

13 MR. DOYLE: Chairmen of both committees and
14 members, the Alliance of American Insurers is a trade
15 association of about 170 insurance companies whose members
16 account for approximately 24 percent of all workers'
17 compensation premiums written by insurance companies in
18 the country today. In Pennsylvania, these same companies
19 are responsible for about 20 percent of the workers'
20 compensation premiums in force.

21 I am pleased to be allowed to comment on
22 House Bills 1012 and 1013 today and I have with me Mr.
23 Michael Frohman, an attorney from Milwaukee, and I will
24 explain his purpose for being here as part of my remarks.

25 My late little old Irish mother used to

1 admonish me as a child with a statement that "The road to
2 hell is paved with good intentions." Now, of course, her
3 admonishment was an attempt to get me to do something like
4 clean my room, get a job, or straighten out my character,
5 and that is not exactly the case here. However, I am sure
6 she would agree that even though the intent to do
7 something is commendable, perhaps not doing it the best
8 way could be equally questionable.

9 Now, I'm not saying that if the legislature
10 passes these bills you are all going to go to hell. You
11 all have to deal with your individual consciences on that
12 one. But I am saying that we have no argument with the
13 necessity for a safe place to work. All we workers have a
14 right to that without question. However, I am saying that
15 there is a way to accomplish the intent of these bills
16 without dismantling the workers' compensation system that
17 has served this State well since January 1, 1916.

18 Previous testifiers have given you the
19 history of workers' compensation, including the
20 employer-employee tradeoff, which is the exclusive remedy
21 in exchange for swift and sure compensation without the
22 question of fault, and have expressed opinions as to how
23 these bills would weaken the basic no-fault concept.
24 However, I don't believe that the no-fault concept ever
25 intended to excuse an employer, nor an employee for that

1 matter, from the responsibility for injury as a result of
2 willful actions. But I am afraid that in your zeal to get
3 at the bad guys in these bills you would sweep a lot of
4 good guys into that net, because we cannot predict the
5 decisions of a jury nor the interpretations that courts
6 put on words, phrases, or even ideas. Accidents don't
7 happen in a vacuum, and in the eyes of many they have to
8 be caused by someone, and there will be a constant hacking
9 away of the words and circumstances outlined in these
10 statutes. So I predict there will be a tremendous
11 proliferation of costly litigation as attorneys, as they
12 should, search to fit their clients' cases into these
13 statutory provisions.

14 Also, I believe the loss control aspect of
15 these bills have yet to be explored, and what I mean by
16 that is the actual problems of guarding machinery or
17 providing a safe place to work. The mechanics of that.
18 Previous testifiers have asked for further study and I am
19 therefore offering the services of the Alliance's Loss
20 Control Department to participate in this further study.
21 This would include the services of a loss control
22 specialist from Pennsylvania National Insurance Company,
23 an Alliance member right here in your town.
24 Unfortunately, he was unable to make it this morning.

25 Your State has just experienced a 27.03

1 percent workers' compensation premium increase, and this
2 type of legislation will be just another burden on the
3 employees if coverage for these types of claims are
4 provided under coverage B of the workers' compensation
5 policy. If not covered there, there will be a direct
6 burden on the employers. Now, I'm not saying that cost
7 per se should be a determining factor in providing a safe
8 workplace, but what I am saying is that unnecessary cost
9 is.

10 I also believe that the responsibility for a
11 safe workplace lies not only with the employer but also
12 with the employee, and it would appear to me that to be
13 fair, some type of penalty provision against a willfully
14 negligent employee should be imposed.

15 Therefore, this brings me to why I have Mr.
16 Frohman with me this morning. The problem of willful
17 action on the part of employers and employees which result
18 in injuries is not new. The State of Wisconsin recognized
19 this many years ago and have incorporated into their
20 statute penalty provisions which apply not only to the
21 employer but to the employee. Mr. Frohman is a practicing
22 workers' compensation attorney from Milwaukee and was
23 formally an administrative law judge in that State's
24 workers' compensation system. He understands and has
25 worked with these provisions successfully, and I've asked

1 him to provide the committee with a brief statement
2 regarding their concept just by way of explanation as
3 another way to address this problem without dismantling
4 the workers' compensation system. He is not an advocate
5 but merely here to provide information.

6 May I present Mr. Frohman.

7 MR. FROHMAN: Mr. Chairman, committee
8 members, my name is Michael Frohman. I practice with the
9 firm of Kasdorf, Lewis & Swietlik in Milwaukee, Wisconsin,
10 exclusively in the area of workers' compensation. I just
11 want to point out one aspect of the workers' compensation
12 act in that State that I think may be relevant to your own
13 situation here. In Wisconsin, the exclusive remedy
14 provision which prohibits private actions by employees
15 against employers has been guarded very closely over the
16 years. I am aware that in other States there have been
17 laws passed permitting actions and in certain
18 circumstances, for example, gross negligence on the part
19 of the employer or product liability. This has not been
20 permitted in Wisconsin, and situations where employees may
21 sue employers privately in court are just extremely rare.

22 Workers' compensation is a system of benefit
23 payments that was devised originally to avoid the kind of
24 prolonged litigation that tort suits involved. The whole
25 idea was to get away from the formal delayed structure and

1 to have immediate impact, money to the injured worker, and
2 that's why it's supposed to be an informal administrative
3 system.

4 Nevertheless, there's always been a
5 recognition in Wisconsin as well that workplace safety
6 should be encouraged, unsafe practices should be
7 discouraged, and there have been provisions in our act,
8 too, that have dealt with this. In the earlier days from
9 1911 to 1931, there were industrial commission rules about
10 what are safe place practices, and there were civil fines
11 imposed against employers who were shown to violate those.
12 1931, a new system, a different system, was devised, and
13 this is the system that remains in effect today in
14 Wisconsin. Basically, in this situation if there is a
15 workplace injury and it is shown that this injury was
16 caused by the employer's failure to comply with any
17 statute or with a Department of Industry safety
18 regulation, the benefits to the injured worker are
19 increased by 15 percent. This is a penalty applied
20 directly against the employer. It may not be insured
21 against by statute. So even if the employer has an
22 insurance company paying its benefits, it alone is
23 responsible for this penalty.

24 There have been maximum penalties enacted,
25 and the present maximum is \$15,000 per offense, so even

1 though the injury results in a permanent and total
2 disability situation, hundreds of thousands of dollars in
3 benefits do -- there's still a maximum penalty in
4 Wisconsin today of 15 percent of the violation. \$15,000,
5 for example.

6 At the same time in 1931, a provision was
7 enacted for the decrease of compensation by 15 percent if
8 it could be shown that the injury was caused by the
9 employee's own failure to abide by safety rules enforced
10 by the employer. And presently, that statute also calls
11 for a 15-percent reduction in benefits if it were shown
12 that the injury was caused by the employee's intoxication
13 or use of a controlled substance. Again, there's a
14 maximum reduction of \$15,000 also.

15 Maybe I can provide just an example of how
16 this might work. If the employer wanted to speed up
17 production by removing a machine guard that was required
18 by a State safety regulation and this caused an injury to
19 the worker, there would be a hearing before the
20 administrative law judges to decide first of all what
21 benefits are due, and then there would be a second hearing
22 to decide whether the penalties should be applied against
23 the employer. And these hearings would be conducted
24 within a matter of months after the injury, usually within
25 a year. It's a question of causation at that point.

1 Number one, did the employer violate a statute or a
2 department safety rule? And number two, did this
3 violation result in the injury? If so, the administrative
4 law judge issues a penalty against the employer which must
5 be paid within 10 days.

6 The Safe Place Statute in Wisconsin is
7 typically the basis for these claims. It's a general
8 statute requiring all employers to provide safe place of
9 employment for its employees and to furnish safeguards
10 that are reasonable in light of its own production or
11 manufacturing process.

12 The benefits I can see from this system, as
13 a former administrative law judge, are that it's fast,
14 it's informal, the penalty gets applied directly against
15 the employer and fairly quickly after the accident happens
16 so that there is a real motivation to change this
17 behavior.

18 I'd be happy to answer any questions. Thank
19 you for the opportunity to give testimony.

20 CHAIRMAN CALTAGIRONE: Thank you.

21 Questions from the members?

22 Mark.

23 BY CHAIRMAN COHEN: (Of Mr. Frohman)

24 Q. I would like to know how many people
25 actually are in the 15 percent rule either way?

1 A. How many people who -- of those who get hurt
2 every year, how many people who file a claim?

3 Q. Yes, how many people lose some benefits and
4 how many people gain extra benefits?

5 A. I don't have actual statistics for you. I
6 have impressions from my experience in working with the
7 department in Wisconsin. The allegation that an employer
8 has violated a safety rule is made much more frequently
9 than the allegation that the employee has violated some
10 rule. It's an allegation that is made frequently,
11 sometimes not carried through because it could be a
12 bargaining chip. We're going to claim that you violated
13 this penalty and we're going to hope for a settlement and
14 if you settle, then we'll dismiss our claim for the
15 penalty. So sometimes the issues are raised more for
16 administrative litigation purposes as an excellent card
17 against them, but I would say that of all those hearings
18 that result, all those cases that result in hearings in
19 Wisconsin, which I would say 15 to -- 15 percent -- I
20 would say, sorry, 5 to 10 percent of all the claims result
21 in some form of department involvement in litigation that
22 perhaps 10 to 15 percent of litigated cases will involve a
23 claim for a safety violation against employers.

24 Q. So it would be about 1 1/2 percent of the
25 total?

1 A. Of the total workplace injuries that occur.
2 These are the ones that are contested. Now, there are
3 those where the employer admits that there was a violation
4 and will pay the claim, the 15-percent penalty, without --
5 and then I, as an administrative law judge, would never
6 see it. It just happens. It just gets paid. It's
7 brought whenever -- most of the injured workers in
8 Wisconsin who proceed into the administrative litigation
9 are represented by counsel, and if counsel sees the
10 possibility of the penalty claim, it's raised. It's
11 something litigated very frequently. I, myself, have held
12 many, many hearings trying to figure out whether the
13 employer has violated a safety rule or the Safe Place
14 Statute.

15 Q. How long does it take to litigate the
16 average case in Wisconsin?

17 A. One to three hours, depending on the
18 complexity.

19 Q. And from the time the complaint is filed,
20 how long does that take?

21 A. Currently, there is about a 9- or 10-month
22 delay between filing for an application for a hearing and
23 when you get your hearing. There is a backlog in certain
24 cities. Milwaukee is a little bit more backed up than the
25 rest of the State.

1 Q. So you file the complaint and then there's a
2 9- or 10-month delay and then there's a 3-hour hearing and
3 then what's the delay by the time the decision is reached?

4 A. Sixty days.

5 Q. And then if the losing side appeals, how
6 long does it take the appeal to be heard by the courts?

7 A. The first appeal is an administrative appeal
8 to a Governor-appointed three-member commission and they
9 may -- it will take them a few months to reach a decision
10 whether to affirm or reverse the administrative law
11 judge's decision. And the appeal process can continue to
12 the Supreme Court through the trial court, the appeals
13 court, and the Supreme Court.

14 Q. So it could take like five, six, seven years
15 before this whole thing is litigated?

16 A. Conceptually, certainly. I did a little
17 research on this issue and I found actually not that many
18 trial court decisions on the 15-percent penalty. Few
19 people go beyond the administrative appeals because the
20 trial court's jurisdiction to review these decisions is
21 extremely limited in Wisconsin. They are not allowed to
22 find their own facts. They can only make determinations
23 based on questions of law. So it's not worth it to go to
24 even the circuit court or the court of appeals on these
25 cases, so it doesn't happen.

1 Q. So there are very few cases for Wisconsin?

2 A. That goes up. They are there. Especially in
3 the earlier years employers fought this penalty, and of
4 course you always have the factual disputes, you know,
5 whose fault was it that the injury happened? That's not
6 an issue in the granting or denying of the benefits in the
7 first place, but it is an issue of whether this 15-percent
8 penalty gets applied.

9 Q. What are the maximum rates in Wisconsin?

10 A. For current rates for weekly temporary total
11 disability are, I think, close to \$400 a week. \$360 to
12 \$400 is the current rate for temporary disability. For
13 permanent disability we have a lower rate, and the weekly
14 rate there is \$136 per week. The 15-percent penalty also
15 is applied against death benefits if a fatality should
16 occur. The 15-percent penalty is not applied against the
17 medical expense.

18 Q. And I assume therefore a majority of the
19 cases in Wisconsin are temporary disability?

20 A. Yes.

21 Q. So we're talking about a penalty therefore
22 in the majority of the cases of a maximum of \$136 a week,
23 and we're talking about a penalty for a temporary period
24 of time of \$21 a week?

25 A. Depending on how long the disability exists.

1 It's hard to talk about a typical claim, but a typical
2 back strain, or usually safety violations you're talking
3 about fingers lopped off, something like that, where a
4 guard is removed, and you have a schedule of benefits,
5 however long it takes a person to heal from an injury.
6 The seriousness of the injury has a direct relationship on
7 the size of the penalty.

8 Q. So it doesn't have to be 15 percent? It
9 could be less than 15 percent?

10 A. It's always 15 percent, but, I mean, if the
11 claim is worth \$5,000, the penalty would be 15 percent of
12 that, but if the claim extends for a long time and is
13 worth \$100,000, then the penalty is \$15,000. And that's
14 the current statutory maximum.

15 Q. When was the statutory maximum last raised?

16 A. 1967.

17 Q. And let me guess, the employer community is
18 against raising it?

19 A. Of course. They're always against raising
20 it. But you have political interests in Wisconsin on
21 these issues as well. But the 15-percent figure is, you
22 know, I'm not saying that this is something that
23 Pennsylvania must find. You know, you can choose whatever
24 percentage you think is appropriate, you can choose
25 whatever maximum dollar figure you think is appropriate.

1 Those things are not carved in stone.

2 Q. Is there any evidence that this has made the
3 workplace safer in Wisconsin?

4 A. I have seen personally, you know, employers
5 take a great deal of offense when it is alleged that their
6 practices have been unsafe and they come in and fight like
7 the devil to prove that they have a safe workplace, and
8 it's not only the 15-percent penalty under workers'
9 compensation that they're looking at, they're looking at
10 potential OSHA investigations, State Department of Safety
11 investigations. There are other fines available outside
12 the Workers' Compensation Act if suddenly it is known that
13 a certain employer is running an unsafe shop. But I can't
14 tell you that it has resulted in 15 percent fewer
15 accidents. The changing workplace, the changing job
16 structures in the State are all factors that make
17 quantification pretty difficult.

18 Q. Okay, thank you very much.

19 CHAIRMAN CALTAGIRONE: Representative
20 McHale.

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

23 BY REPRESENTATIVE McHALE: (Of Mr. Frohman)

24 Q. Mr. Frohman, I want to make sure that I
25 understand the Wisconsin statute clearly. As I understood

1 your testimony, the current situation is this: If an
2 employee in Wisconsin is totally and permanently disabled
3 as a result of the intentional misconduct of his employer,
4 the maximum penalty that would be paid by that employer is
5 \$15,000?

6 A. When you use the word "intentional," intent
7 is not a factor. Whether it's intentional or not
8 intentional, the question is, was there a violation of a
9 safety rule and did it cause the injury? If so, the
10 maximum penalty is \$15,000. Of course, in Wisconsin, the
11 maximum benefits for that situation you described,
12 permanent and total disability, are lifetime benefits at
13 approximately \$400 a week plus the death benefits should
14 the person die. And lifetime medical expenses. So it's
15 not that the employee only gets \$15,000, it's that the
16 penalty applied directly against the employer is limited
17 to that long.

18 Q. Let me move beyond the situation that you've
19 just described and I'll move over here. You indicate that
20 "intent" is not the key issue, it's a question of whether
21 or not there has been a factual violation of a safety
22 standard.

23 A. Yes.

24 Q. And that's been the case whether it was
25 intentional or not.

1 A. Yes.

2 Q. The maximum penalty, the maximum surcharge,
3 if I can use that term, would be \$15,000?

4 A. That's correct.

5 Q. I have great concern with that in the
6 situation where the employee is totally and permanently
7 disabled by a violation of the safety standard, but your
8 answer raised, I think, a more important point. Let's go
9 beyond the violation of the safety standard to other types
10 of intentional misconduct.

11 A. Yes.

12 Q. In Wisconsin, if an employer commits an
13 intentional tort against the employee, other than a
14 violation of the safety standard, what is the interplay
15 with the workmen's compensation system? If some other
16 intentional tort takes place other than the violation of
17 the safety standard, is the employee limited by the
18 exclusivity of the workmen's comp statute or can a common
19 law action be brought against the employer?

20 A. The exclusivity provision would bar a common
21 law action for intentional wrongdoing.

22 Q. So in that case there would be no penalty at
23 all?

24 A. Well, if the intentional wrongdoing violated
25 a safety--

1 Q. We're assuming it does not.

2 A. Well, it's hard for me to imagine an
3 intentional injury by an employer against an employee
4 which did not either violate the criminal statutes or--

5 Q. I assume that it does. Let's say the
6 employer strikes the employee and it obviously is a
7 criminal offense. What civil remedy is available to the
8 employee?

9 A. If the -- now, I assume if the man's foreman
10 pulls out a gun and shoots him, that a civil suit would
11 lie for damages because this would not be an action by the
12 employer. This is something totally outside the
13 employment relationship. Criminal sanctions would apply
14 and in that extreme situation, it's my understanding that
15 the exclusive remedy would not bar a private suit for
16 damages against the individual who has acted outside of
17 the employment relationship.

18 Q. And is there case law on that in Wisconsin?

19 A. I cannot tell you one way or another. I did
20 not actually research such an example.

21 Q. Let's take a less extreme example, and you
22 and I could sit here and list a hundred examples of
23 intentional torts, other than a violation of the safety
24 standard, which will fall short of the kind of egregious
25 conduct involving the employer shooting the employee. I'm

1 just wondering, when those kind of intentional wrongs take
2 place in the workplace, what kinds of civil remedy is
3 available to the employee? You've indicated where it's a
4 violation of the safety standard, the maximum penalty
5 above and beyond the normal workmen's compensation payment
6 is \$15,000, even if it's total and permanent disability.

7 A. Yes.

8 Q. What I'm wondering is if it's some other
9 kind of intentional misconduct not involving the violation
10 of a safety standard, where is the employee left? Where
11 does he or she redress of grievances, other than a
12 criminal prosecution?

13 A. As I said, if you're talking about something
14 that does not involve a violation of a safety standard,
15 then I assume you're talking about an intentional personal
16 violation of the man's, you know, an assault or something
17 like that. I'm conceptualizing certain examples. An
18 intentional removal of guarding equipment so that piece
19 workers could go faster in their jobs, something like
20 that, that's a sort of intentional behavior that would
21 come into play in the workers' compensation situation. A
22 worker gets hurt because of the intentional behavior by
23 the employer not to actually hurt the employee but to
24 streamline the production methods in an unsafe manner. I
25 know that's not what you asked me, but I'm having trouble

1 envisioning some--

2 Q. Intentional torts take place in the
3 workplace the same way they take place in the rest of the
4 world. Employers, in fortunately relatively few cases,
5 commit intentional torts against their employees.
6 Sometimes they are in violation of safety standards,
7 sometimes they are not. And it may be that we've explored
8 this line as far as we can go. You indicate to me you're
9 assuming without any reference to existing case law that
10 this would be beyond the scope of employment and that a
11 common law action would be preserved. I'm interested in
12 whether or not Wisconsin has in fact done that, either
13 statutorily or in case law, because we in Pennsylvania
14 have not.

15 A. I have seen no cases permitting employees to
16 sue employers for tortious behavior.

17 Q. That's really what I'm getting at.

18 A. Yes.

19 Q. And you're indicating that unless you can
20 show it's a violation of the safety standard, not only is
21 the employee bound by the exclusivity, the employee can't
22 even collect the \$15,000 which would be the maximum if he
23 could show that it were a violation of the safety
24 standard. I'm concerned that we are leaving victims of
25 intentional torts completely out in the cold other than to

1 apply for the normal workmen's compensation payments.

2 A. Fair.

3 Q. And that I find unconscionable.

4 A. I have done research in the area of the
5 exclusive remedy in preparation for this presentation and
6 I have seen no cases allowing such actions, so I can say
7 that the exclusive remedy provision is very tight in
8 Wisconsin.

9 Q. Which is to say that in terms of what the
10 employee is paid, or indeed the penalty paid by the
11 employer, in Wisconsin it really doesn't make much
12 difference whether the injury was caused by negligence or
13 intentional misconduct. They're both treated pretty much
14 the same.

15 A. That's correct.

16 Q. Well, I think that's an important point.

17 A. And, sir, that's part of the -- I guess
18 that's part of the workers' compensation bargain that's
19 been in existence for 70 some years.

20 Q. Wrong, and there are many commentators who
21 vigorously disagree with you on that, including your
22 client who spoke ahead of you. There are many
23 commentators particularly in this State but other
24 jurisdictions as well who think that you are absolutely
25 correct when you're talking about the bargain that has

1 historically been struck between the surrender of rights
2 to bring suit based on negligence in exchange for the
3 certainty and the ease of payment under an insurance
4 system such as workmen's compensation. That,
5 historically, has been the quid pro quo. But I'm not
6 aware of anyone, although I suppose there are other
7 commentators, anyone other than you who would argue that
8 that same bargain was struck with regard to intentional
9 misconduct. That, I can assure you, was not the law in
10 Pennsylvania, at least up until 1987, and we have had --
11 Judge Beck, for instance, wrote eloquently on this very
12 point arguing that where it is negligence, or even when it
13 is intentional misconduct giving rise to a severing of
14 fingers, for instance, the intentional violation of a
15 safety standard, that perhaps that fits within the
16 historical bargain that you have described. I think
17 there's some merit to your argument on that point. But
18 when you begin to include intentional torts in that
19 bargain, I think you're absolutely wrong.

20 A. I think that's probably the -- if there is a
21 misunderstanding between us, it's probably in the
22 description of the definition of "intentional misconduct,"
23 and what you mean by that and what I mean by that, as I
24 said, I do not think a worker who has been assaulted in
25 some way by an employer, Representative, is limited to

1 workers' compensation benefits and may not sue for damages
2 in private action, but these are actions that -- take the
3 foreman or the manager or whoever it is representing the
4 employer outside of the workplace scene.

5 Q. Are you familiar with the Poyser case in
6 Pennsylvania?

7 A. I've heard the name. I haven't read the
8 case. Sorry.

9 Q. You indicated that in Wisconsin historically
10 there has not been an intentional tort exception to the
11 exclusivity provision of your workmen's compensation
12 statute.

13 A. That's right.

14 Q. Are you aware that in Pennsylvania for many,
15 many years, indeed for decades, there was such an
16 exception up until the Poyser case decided in March of
17 1987? Were you aware of that?

18 A. I am not aware of Pennsylvania history and
19 its court decisions.

20 Q. All right, let me just read a paragraph to
21 you from a law review article that appeared in the
22 University of Pittsburgh Law Review last summer. It's
23 Volume 49, and I'm reading from page 1130. "After Poyser
24 and absent legislative action, an employer's immunity from
25 common law liability is now unqualified and absolute.

1 This result is incompatible with the intended scope and
2 underlying policy of the original workers' compensation
3 acts. The original bargain never contemplated
4 relinquishment of common law rights for intentionally
5 caused injuries which were, by legal definition,
6 unaffected by the common law defenses available to an
7 employer in a negligence action." Final sentence. "Thus,
8 the present status of Pennsylvania law on the issue of
9 intentionally caused workplace injuries needs to be
10 reformed so that traditional common law remedies will
11 again be available for intentionally injured employees."

12 That's a very different legal history from
13 the State of Wisconsin, and it's a very different
14 description of the bargain than that which you offered a
15 few moments ago.

16 A. I agree.

17 Q. Would you comment on that?

18 A. Oh, I agree entirely. In each State, after
19 the passage of the Workers' Compensation Act in the early
20 1900's, case law has been developed defining to what
21 extent the exclusive remedy provision should operate to
22 bar lawsuits, and in every State it has developed somewhat
23 differently, and I certainly do not mean to suggest that
24 Pennsylvania never allowed such actions. All I can say is
25 that in Wisconsin, they are not permitted.

1 Q. Well, I would close by simply reading one
2 more paragraph and indicate that I much prefer our legal
3 history to yours. Again, in that same law review article
4 which I commend to your review, on page 1145, "Although
5 not explicitly stated, the implicit assumption of the
6 Poyser decision is that an employee's common law right to
7 bring suit for more flagrantly tortious conduct was
8 similarly surrendered. At best, this assumption is
9 without historical support. At worst, based only with the
10 prospect of marginally increased workers' compensation
11 insurance premiums, employers can now intentionally
12 maintain working conditions which maximize business
13 efficiency at the expense of employee safety. The
14 Pennsylvania Supreme Court's decision in Poyser implicitly
15 urges the Pennsylvania legislature to take a stance."

16 And I think that's what has brought us here
17 today.

18 Thank you, Mr. Chairman.

19 CHAIRMAN CALTAGIRONE: Other questions?

20 REPRESENTATIVE HECKLER: Just one area of
21 questioning I'd like to pursue with Mr. Frohman briefly.

22 BY REPRESENTATIVE HECKLER: (Of Mr. Frohman)

23 Q. You were asked some questions or a question
24 about the theoretical length of time that one of these
25 cases could take if it went to your highest appellate

1 court. Could you compare in general the promptness with
2 which the system you've described to us in Wisconsin
3 disposes of cases as opposed to, I assume you're at least
4 generally familiar with the way the tort system works in
5 Wisconsin?

6 A. Yes. I practice in a firm of 35 lawyers and
7 we all do primarily insurance defense work, and our
8 administrative hearings come up and, you know, on a much
9 more frequent and regular basis. In 1989 I think I had
10 something like 50 to 55 workers' compensation hearings,
11 and my fellow associates have two or maybe three trials
12 that come up in that scope of time. I have not practiced
13 in the area of tort liability myself, that's not my
14 background, but I know just from my experience with the
15 firm and previously with the State of Wisconsin that the
16 litigation comes up much faster, in a period of months
17 rather than a period of years, and that these issues get
18 dealt with more summarily.

19 There is, just in problems of proof, for
20 example. In the penalty situation where there is a
21 violation of a safety department rule, a Department of
22 Industry inspector can go and make an inspection and issue
23 a report and give in his opinion whether or not another
24 violation exists. That report comes right into evidence
25 by statute in the workers' compensation proceeding to in

1 the course on a liability suit you would have to go
2 through a lot of maneuvering and hoops and expense to
3 bring in experts and to debate that very issue. Here the
4 report is stamped, it's marked in, and it provides a basis
5 for issuing a determination fairly quickly.

6 In answer to your question about comparison,
7 certainly much briefer and much shorter in the workers'
8 compensation litigation area, but again, in terms of
9 exactly how, it all depends on the cases.

10 Q. And during the time that this claim for
11 misconduct is pending, the worker is receiving the normal
12 level benefits?

13 A. Yes. The issue concerning the primary
14 benefits against the carrier is heard first.

15 Q. Um-hum.

16 A. And if that's successful, then the penalty
17 issue is set up and heard shortly thereafter.

18 Q. I don't know whether you pay attention to
19 what happens in the Wisconsin legislature, recent events
20 make we wonder if anybody should pay attention to what
21 happens here in Pennsylvania--

22 REPRESENTATIVE MCHALE: Or what doesn't
23 happen.

24 REPRESENTATIVE HECKLER: Or what doesn't
25 happen, yes.

1 BY REPRESENTATIVE HECKLER: (Of Mr. Frohman)

2 Q. Are you aware of whether there are attempts
3 pending to change this system, and if so, would those
4 attempts involve stepping outside of the system towards
5 the tort direction that these workplace safety bills do,
6 or is it in the direction of, for instance, taking the 15
7 percent and making it 50 percent and 100 percent in the
8 case of egregious conduct or something of that sort?

9 A. I do follow the legislative efforts in the
10 area of workers' compensation, industrial safety, and I
11 know that there is no attempt currently to change the
12 present situation. Wisconsin has somewhat of a unique
13 situation in drafting legislation for the Workers'
14 Compensation Act. It's all done by an advisory council
15 made up of members of labor and business and chaired by
16 the Department of Workers' Compensation head. And if the
17 proposals do not come out of this group, they do not get
18 passed.

19 Q. And so that group, at this point, is in
20 stasis?

21 A. This group is in agreement with the present
22 situation, that it seems to work to everyone's
23 satisfaction.

24 Q. Thank you.

25 A. Thank you.

1 CHAIRMAN CALTAGIRONE: Mike.

2 BY MR. CASSIDY: (Of Mr. Frohman)

3 Q. Very brief question. Is Wisconsin a State
4 plant State?

5 A. Pardon me?

6 Q. Are you a State plant State for OSHA? Do
7 you enforce OSHA?

8 A. Our Department of Industry, Labor and Human
9 Relations has adopted the OSHA regulations as part of its
10 own State regulatory format.

11 Q. You're a State plant State.

12 A. I haven't heard that term, but I assume that
13 that's correct.

14 Q. And so you have State inspectors which then
15 enforce industrial safety rules?

16 A. Absolutely.

17 Q. Okay. Pennsylvania does not. We are not.
18 So that would be a little different.

19 CHAIRMAN CALTAGIRONE: Gentlemen, thank you
20 very much for your testimony.

21 MR. FROHMAN: Thank you, Mr. Chairman.

22 CHAIRMAN CALTAGIRONE: We'll next hear from
23 Nancy Schroeder, National Association of Independent
24 Insurers.

25 If you'd just like to introduce yourself for

1 the record.

2 MS. SCHROADER: Sure. I am Nancy Schroader.
3 I'm Director of Workers' Compensation for the NAII.

4 MR. TIVE: My name Ralph Tive. I'm local
5 State counsel for Pennsylvania for the National
6 Association of Independent Insurers, NAII.

7 MS. SCHROADER: I have a statement. First
8 of all, I would like to thank the joint committee for
9 allowing us to testify today. I just want to hit some of
10 the brief points of my statement. If you have any
11 questions after that, then I'll take them.

12 The NAII wants to express its major concerns
13 over using the exclusive remedy clause to police and
14 weaken the exclusive remedy clause and the subsequent use
15 of tort actions to police safety in the workplace. We
16 think that the tradeoff of exclusive remedy is a key
17 component of the workers' compensation system. However,
18 in listening to the conversation this morning, we have no
19 real problem with provisions which allow tort suits in
20 true intentional tort situations. Most of the -- I've
21 done some extensive research into State laws on the issue
22 of intentional tort and the intentional tort exception.
23 Most States do allow an employee to sue in situations
24 where there is a direct and deliberate attempt to injure.
25 In most States, in almost all States, I should say, that

1 has been narrowly defined to the situation such as an
2 assault where the intent of the act is an employee injury.
3 It has not been broadened to include acts where there is a
4 substantial certainty to injure or substantial
5 probability.

6 In that sense, I think the Poyser case
7 probably is somewhat out of the mainstream of most of the
8 States. The States where there has been a very narrowly
9 drawn exemption to the exclusive remedy clause have not
10 had tremendous problems. The most serious potential
11 problem that we see with the statutorily drawn exception
12 is the language and the potential for the courts to expand
13 it. Because we see a substantial difference in situations
14 where there is a substantial certainty of harm and States
15 which have allowed tort actions, States which have
16 expanded the exclusive remedy to include situations based
17 on a secondary statement of torts where there is a
18 substantial certainty of harm have found some rather
19 adverse consequences.

20 Arthur Larson, in his treatise, has taken a
21 very clear position, and I'd like to quote some of that
22 directly because I think he says it much better than I
23 can. He says, "The experience of three-quarters of a
24 century has clearly proved that once a breach is made in
25 that dam to accommodate an appealing case, there follows a

1 flood of routine cases with no such appeal at all." He
2 goes on, "We may well be dealing here with one more
3 example of the fallacy of importing tort law concepts into
4 workers' compensation law," and here he's referring, of
5 course, to the restatement under the substantial certainty
6 concept. "Exclusiveness is a compensation law question.
7 It's not a tort law question. It's based on compensation
8 policy; indeed, on one of the most fundamental components
9 of that policy. It is all very well for the authors of
10 the various tort restatements to ring the changes on such
11 niceties as whether the defendant must have known as
12 distinguished from believed that injury was a substantial
13 certainty. That is their problem. Our problem is what is
14 the purpose of exclusiveness and how does our treatment of
15 intentional tort confirm to that purpose?"

16 There are two central purposes of
17 exclusiveness. First, to maintain the balance of
18 sacrifices between employer and employee and the
19 substitution of no-fault liability for tort liability; and
20 second, to minimize litigation, even litigation of
21 undoubted merit. Now, the interesting aspect, I think, of
22 Poyser is that on those facts, most States would have
23 decided Poyser in exactly the way it was decided, finding
24 that the facts in the case did not equal any specific
25 intent. What is different about Poyser is that they went

1 on then to say that there is no cause of action for a true
2 intentional tort.

3 REPRESENTATIVE McHALE: They went all the
4 way.

5 MS. SCHROADER: Yes, and that's what makes
6 Ohio slightly different now from most of the other States.

7 States where the exemption has been expanded
8 have seen litigation, they've seen increases in defense
9 costs, and in most cases, the court interpretations which
10 expanded the exemption have been corrected by legislation.
11 I went through some of the history in Michigan, Ohio and
12 West Virginia. In all three cases, in one case Ohio
13 expanded a previously court defined exemption. Before it
14 was corrected by legislation, it had gotten to the point
15 where an unsafe working condition was the basis for an
16 intentional tort. It became a major problem in the State.
17 Employers were clamoring for relief because of the number
18 of suits, the defense costs, and the potential exposure.
19 West Virginia and Michigan also had experiences. In those
20 States it wasn't quite as negative. Even though the
21 initial court decisions, the Mandalias and the Beauchamp
22 case expressed a rather broad interpretation and there was
23 a lot of litigation, because once you get one of the
24 cases, then you invite litigation after that to test its,
25 you know, its parameters, that the court subsequently

1 maintained a relatively tight definition, and many of the
2 cases that were brought were found not to be intentional
3 torts. The problem, however, was the litigation, the
4 uncertainty, and in both cases legislatures came back,
5 tightened the definitions back up. So I think the three
6 States where you've had some major experience with
7 expanding the intentional tort definition have chosen, by
8 legislation after this experience, to retighten the
9 definition.

10 In closing, I think just that common sense
11 tells us that there are major differences between an act
12 which is intended to injure and one in which there is no
13 intent, although the possibility or even the probability
14 may be substantial. Instinctively we can feel that a
15 deliberate intent to injure draws a situation beyond the
16 workplace. Someone walks up and shoots an employee
17 because he's been doing something that he doesn't like.
18 That's obviously an intentional tort. The situation where
19 the injury is a byproduct of other acts continues to arise
20 out of the work situation, no matter how blameful those
21 acts might be.

22 For the reasons that I've outlined, we think
23 that using the tort system to attempt to police workplace
24 safety in these kinds of situations is ill-advised and
25 appropriate. I think a narrowly, carefully drawn

1 exemption for true intentional acts may very well be
2 appropriate and would not put Pennsylvania out of the
3 mainline of other States.

4 That's all I have. Thanks.

5 CHAIRMAN CALTAGIRONE: Questions?

6 Paul.

7 BY REPRESENTATIVE MCHALE: (Of Ms. Schroader)

8 Q. As I understand your testimony, you agree
9 that Poyser went too far?

10 A. Not on the facts, but I think in the holding
11 that there is no exclusive remedy exemption for true
12 intentional acts, yes, I think we could agree with that.
13 It does takes it out of the mainstream. I think it's a
14 State determination, but you are no longer in the
15 mainstream of the case.

16 Q. Are you aware of any other State that has an
17 absolute bar to all Commonwealth actions regardless of
18 the--

19 A. There are probably some--

20 Q. --regardless of the level of misconduct on
21 the part of the employer?

22 A. There are some. The majority do allow tort
23 suits in a very narrowly defined area. There are other
24 States, however--

25 Q. We currently do not.

1 A. I know. I know you do. I've read the
2 Poyser case. Like I said, if you look at the facts, the
3 decision was probably in the mainstream. It was the
4 whole--

5 Q. All right, we can talk about that a little
6 because I understand what you're saying and I have a
7 philosophical difference of opinion with you.

8 You talked about the case law in Michigan,
9 Ohio, and West Virginia.

10 A. Um-hum.

11 Q. You did not address the any of the case law
12 in Pennsylvania. Was a there a reason for that?

13 Let me frame the question a little bit
14 differently. Isn't it true that we had an intentional
15 tort exception for at least 25 years and that there were
16 many Pennsylvania cases decided under that judicially
17 defined exemption to the exclusivity provisions?

18 A. Some of the cases that I read from
19 Pennsylvania allowed -- particularly it was one, I can't
20 remember the name of it now, let me just check on it here,
21 the Barber case.

22 Q. All right.

23 A. The Barber case actually expanded that
24 exception to the intentional tort to the point where we
25 feel that the State would begin to see some serious

1 problems.

2 Q. Well, let me--

3 A. That the cases in Pennsylvania, the historic
4 cases that allowed a direct intent to injure were in the
5 mainstream.

6 Q. And those cases were reversed, in effect, by
7 Poyser.

8 A. That's what I -- in reading Poyser, that's
9 what it looks like.

10 Q. All right, and what I'm suggesting to you is
11 that while it's interesting and perhaps persuasive to hear
12 Michigan, Ohio and West Virginia, for 2 1/2 decades, at
13 least going back to the Superior Court's case in Reddinger
14 v. Gottshall, 201 Pa. Super. 134, decided in 1963, up
15 until the time of the decision of Poyser in March of 1987,
16 we had developed a case law in Pennsylvania that defined
17 the intentional tort exception to the exclusivity of the
18 workmen's comp system, and isn't that true? We have a
19 long line of cases prior to Poyser defining an intentional
20 tort exception under Pennsylvania law.

21 A. Yes. I looked at a couple of them.

22 Q. Were there abuses during that period when
23 that was the law, or at least when people believed that
24 that was the law?

25 A. I'm not as familiar with Pennsylvania,

1 frankly. I've worked in several States, not as much in
2 Pennsylvania. I'm very familiar with what happened -- the
3 three States that I mentioned, I'm very familiar with what
4 happened in those particular States because they were
5 States that I was following very closely, and in each of
6 those cases it wasn't a gradual -- it was a situation
7 where you had a well-defined intentional tort exception, a
8 case came, was -- I'm sorry about my terminology here.
9 I'm not sounding very lawyer-like -- a case was decided
10 that expanded the exemption and certain things happened,
11 and those were increased litigation. I think the upshot
12 of that is that you have a case where the facts are bad.
13 Obviously, I think Poyser might be a case where there are
14 bad facts. But the experience in those States showed that
15 there's a difference between a deliberate intent to injure
16 and a workplace situation, and once -- there's a line
17 there that can be drawn with some amount of certainty, but
18 once you go beyond that, it becomes very difficult.

19 Q. I understand. And I don't want to belabor
20 this, but you raised Larson's Treatise on Workmens' Comp
21 to indicate that once there's a crack in the damn, the
22 next thing that you can expect is a flood, and all I'm
23 trying to point out is that the status of the law that I'm
24 advocating was in fact the law of Pennsylvania for 25
25 years and that we did not see a flood of frivolous

1 litigation. I think the case law between 1963 and 1987 in
2 Pennsylvania was responsible and reasonable. I frankly
3 think that if we can accept the opinion of Chief Justice
4 Nix on its face, he, too, probably thinks that it was
5 reasonable, but not in accord with the 1972 amendments to
6 the workmen's compensation statute. If you read Poyser,
7 it's an open-ended invitation for us to take corrective
8 action. The decision in Poyser was expressly based on the
9 Supreme Court's interpretation of legislative intent.
10 Chief Justice Nix wasn't saying, this is the system that I
11 would like to see in place; he was saying, this is the
12 system the legislature has mandated and that the
13 correction should come from the legislature.

14 All I am suggesting is that we have 25 years
15 of case law where the system seemed to work pretty well,
16 and we don't have to turn to Michigan and Ohio and West
17 Virginia to theorize about our possible experience. We
18 have 25 years of litigation on exactly the point of law
19 that I'm advocating.

20 A. If the legislature addresses the issue--

21 Q. If we do it narrowly, you wouldn't complain
22 about that?

23 A. Yes.

24 Q. Okay.

25 A. With the intent to allow only deliberate

1 intent -- situations where it was deliberate intent.

2 Q. I understand. I understand that's a
3 distinction that's been drawn before this committee by
4 other witnesses. So let's go to the other side of that
5 distinction. Let's put aside the truly intentional tort
6 where perhaps we agree, a restoration of the law to a
7 pre-Poyser position might be appropriate, and instead
8 let's talk about the Poyser situation where someone is
9 injured because of the intentional violation of a safety
10 standard. Do you think Poyser, at least in its result,
11 was correctly decided?

12 A. (Indicating in the affirmative.)

13 Q. All right, I don't, and my question, I
14 guess, is this: How do we deter the kind of misconduct
15 that took place in Poyser? If we don't want employers
16 removing safety shields, thereby causing the severing of
17 fingers by employees, if we want to prevent that,
18 obviously as we do in terms of public policy, how do we
19 shape the law to achieve that goal, and do you believe
20 that an exclusive workmen's compensation recovery is a
21 severe enough penalty to deter that kind of misconduct?

22 A. There are a lot of costs involved with
23 injury, obviously, in the workplace. I basically believe
24 that fashioning a safety system is a labor/management
25 issue. Insurers are very much, obviously, interested in

1 safety. They do provide loss control. But when I think
2 in issues of policing safety it should be a labor
3 management issue. I notice that Pennsylvania does not
4 have a State OSHA. I don't advocate it, but I think there
5 are -- my point is that there are avenues to take to
6 address that kind of situation that don't have the
7 negative impacts on the workers' compensation system that
8 the changing exclusive remedy will have.

9 Q. Are you saying that the decision of whether
10 or not an employer should be allowed to remove a safety
11 shield--

12 A. I think it's wrong.

13 Q. --is something for collective bargaining?

14 A. No.

15 Q. I assume you do think it's wrong. I think
16 it's wrong. My question is, how do we send a message, in
17 a practical sense, to an employer, don't take off that
18 safety shield? What kind of enforcement mechanism, what
19 kind of penalty is to be paid by an employer on the facts
20 in Poyser who removes a safety shield, knows darn well
21 what he's doing, takes off the safety shield and the
22 employee gets his fingers cut off. How do we send a
23 message to those kinds of employers not to engage in that
24 kind of misconduct? And my question was, do you think
25 workmen's comp is a severe enough penalty? Is that really

1 going to send a sufficient message in that kind of case to
2 deter that kind of misconduct?

3 A. I guess where I'm not sure of your question
4 is whether or not you want to use the comp system and the
5 tort system as the main policing mechanisms. I think
6 you've sort of accepted that as the basis of, I think, of
7 your question. My philosophic difference is that it
8 really is not advisable or appropriate to use the comp and
9 the tort system as your main deterrence.

10 Q. I'm asking for any method by which we as
11 hopefully responsible and compassionate legislators can
12 send that message to an employer. I want to turn the
13 clock back. I want to get into the head of that employer
14 in Poyser and in similar situations who is saying to
15 himself, yeah, I know the safety shields are supposed to
16 be on these machines, but if I take off the safety
17 shields, productivity is going to go up, my profit is
18 going to go up. And I don't want Bill to get his fingers
19 cut off, but it really will make a difference in terms of
20 bottom line profit, and maybe Bill won't get his fingers
21 cut off. I'm not sure he will, but I know that he might.
22 I want to the step into his head at that point and loudly
23 and clearly say to him, don't take off that safety shield.
24 If you do take it off and Bill does have his fingers cut
25 off, you're going to have to pay such a severe penalty

1 that the risk wasn't worth it. And if the threat of a
2 civil action is not a strong enough deterrent, I'm asking
3 you for any other alternative. How do we get into his
4 head as he, the employer, is making that decision to
5 convince him on other than moral grounds going beyond
6 morality, how do we convince him that it is simply unwise
7 and irresponsible to take off that safety shield? How do
8 we tell him that?

9 A. I'm obviously not a safety expert or an
10 industrial expert. Obviously, there's the avenue of
11 looking at State enforcement, the powers and penalties. I
12 think that, again, the philosophical difference is whether
13 or not you decide that you're going to use the tort
14 action, and I think that's where you have -- I think when
15 you look at a case where there's a deliberate removal of a
16 safety device and you say that's a bad case, we can use
17 this system to try and do something about that, but the
18 comp system is a very complex system, and when you do
19 that, you put other pressures on the comp system. I think
20 you, you know, you don't just add -- when you make those
21 changes in the comp system, and I think the experience
22 particularly in Ohio showed that -- I know this is
23 theoretical, but I think it's very direct to what we're
24 doing, that you penalize not just the bad employer. When
25 you use the exclusive remedy, you penalize all employers,

1 in a sense, because it's not just the cases that are
2 obvious that are going to be subject to a tort remedy, you
3 know. There's increased litigation. One of the big
4 issues in Ohio was we need insurance. You know, we have
5 to have insurance. You know, at what point does this
6 penalty, this deterrence, just become a situation where
7 you're spreading the costs among all employers good and
8 bad?

9 I guess, yes, you have to find a way to deal
10 with that with your issue, and I think that through the
11 State and through the minds here and perhaps with some,
12 you know, experts in the area you must come up with
13 something. My main concern is that by using the workers'
14 compensation system and trying to change the exclusive
15 remedy you're not just penalizing the bad employer, you're
16 really making major changes in a system that's very
17 complex.

18 Q. And I don't mean to belabor this. I truly
19 don't understand your logic. What Poyser says is that
20 where you have the intentional violation of the safety
21 standard you can't haul that irresponsible employer into
22 court and sue him. You must go through the workmen's
23 compensation system, thereby under the theory of Poyser
24 guaranteeing that the misconduct of one bad employer ends
25 up being spread amongst the whole pool of employers good

1 and bad alike. I think Poyser cuts directly opposite to
2 your argument. I truly don't understand your logic.

3 My preference would be if we have an
4 employer who is a genuinely bad person, who either
5 intentionally hurts his employee or acts so recklessly
6 through the intentional removal of a safety shield, that
7 that employee is hurt, that employee ought to obtain a
8 common law cause of action so that he can haul that
9 employer into court and teach him a lesson, not just so
10 that that employer retrospectively learns a lesson, but so
11 that other employers who are contemplating similar
12 misconduct are in fact deterred. And for the life of me,
13 I don't see how anyone can argue that the workmen's comp
14 system is going to provide that kind of deterrent to
15 potential employer misconduct.

16 And lastly, I would simply say, we don't
17 have to theorize as to what the law might be on this
18 point. We have 25 years of case law in our own
19 jurisdiction when it was virtually black letter law that
20 there was an intentional tort exception to the exclusivity
21 provision. All I would like to do is turn the clock back
22 to at least March 16, 1987, pre-Poyser. And I don't think
23 we have to theorize about terrible results. We have 25
24 years of case law to tell us what the law would be on that
25 point if we were to statutorily override Poyser, as I

1 believe the Supreme Court has invited us to do.

2 Thank you, Mr. Chairman.

3 REPRESENTATIVE LEE: Mr. Chairman?

4 CHAIRMAN CALTAGIRONE: Yes.

5 BY REPRESENTATIVE LEE: (Of Ms.Schroader)

6 Q. I would just like to follow up on what Mr.
7 McHale was saying, and I tend to agree with him that I
8 don't think you can have a State-run OSHA system or an
9 OSHA system -- I don't think that's going to protect
10 workers because you're going to have to have someone
11 sitting in every workplace 24 hours a day to make sure to
12 keep employers on the line. But rather than allowing a
13 worker to jump outside the workers' compensation system in
14 order to deter employers, what do you think about the
15 system that Mr. Frohman just mentioned in Wisconsin, where
16 basically within the workmen's compensation system
17 additional penalties for certain types of conduct handled
18 administratively through the workmen's compensation
19 system?

20 A. I'm not as familiar with Wisconsin as Mr.
21 Frohman is. It appears that it's worked relatively well.
22 We would have no problem with that. The difference, I
23 think, between that and a tort action is the impact it has
24 on the overall system.

25 MR. CASSIDY: Mr. Chairman?

1 CHAIRMAN CALTAGIRONE: Yes.

2 MR. CASSIDY: Just briefly.

3 BY MR. CASSIDY: (Of Ms. Schroader)

4 Q. In talking about Poyser and that, and
5 assuming that you could come up with a penalty provision
6 on workers' comp, maybe you could say come up with a fair
7 compensation for losing some digits or fingers which is
8 now a scheduled loss in the workers' comp system in
9 Pennsylvania, but we had another witness that had a much
10 different situation with much greater consequences where
11 the employer falsified the medical records of the lead
12 monitoring. He was making batteries, and he and a number
13 of other employees were making batteries for the York
14 Battery Company, I believe, so he has ended up with lead
15 poisoning, very severe lead poisoning. His kidney
16 functions a fraction of what it should be. He will soon
17 be on dialysis. His bones won't heal, so his hip
18 replacement has failed and probably the next one won't
19 take hold so he will be ending up in a wheelchair.
20 Probably after his next hip replacement his life
21 expectancy will be shortened dramatically. Even
22 Wisconsin's 15-percent penalty, does it address that kind
23 of egregious behavior on that part of the employer where
24 he basically tore up medical reports on lead monitoring
25 and replaced them with false reports and allowed these

1 workers to continue to increase their level of lead
2 poisoning? I mean does that--

3 A. You're--

4 Q. You say it works very well, but not in that
5 case, does it?

6 A. You're focusing in on the impact on the
7 employee, which is understandable.

8 Q. I'm talking about employers, if it's murder.

9 A. If it's murder, there may be other avenues.

10 Q. Well, when you say that's different, you
11 know, but it would be murder for profit.

12 A. I'm not advocating this, certainly, and I
13 know that -- it seems that that kind of behavior of
14 employers, the focus should be on the employer behavior
15 and administratively the employer should be answerable.

16 Q. Well, he was answerable to OSHA for that
17 violation and his sentence was the most satisfactory, I'm
18 sure. It was a suspended sentence on the OSHA violations
19 of falsifying the medical records. It doesn't seem to me
20 to be an adequate administrative remedy.

21 A. Well, but I think you're focusing on what
22 may be inadequacies in OSHA and trying to get around them
23 by going to the comp system. It might be better to focus
24 on OSHA and what OSHA has done.

25 Q. Unfortunately, that's not in the

1 jurisdiction of either of the committees here.

2 CHAIRMAN CALTAGIRONE: Thank you.

3 MS. SCHROADER: If I seem a little weird, I
4 have the flu, so I'm happy that I got through this.

5 REPRESENTATIVE McHALE: We seem a little
6 weird and we have no excuse.

7 MS. SCHROADER: I'm just happy that I didn't
8 have to leave in a hurry.

9 CHAIRMAN CALTAGIRONE: I call for the
10 adjournment. Thank you, and have a nice holiday.

11 We will adjourn.

12 (Whereupon, the proceedings were concluded
13 at 12:26 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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