Testimony of the Texas AFL-CIO
Before the Senate State Affairs Committee
Concerning Interim Charges 10 and 11
Tuesday, August 17, 2010

Submitted by:

Richard Levy
Texas AFL-CIO Legal Director
1204 San Antonio, Ste. 203
Austin, TX 78701
(512) 474-6200
(512) 474-7896 [fax]
rick@texasaflcio.org

Chairman Duncan and Distinguished Members of the Committee:

I am privileged to offer this testimony today on behalf of the Texas AFL-CIO. The Texas AFL-CIO is federation of labor unions consisting of approximately six hundred fifty (650) local unions with over two hundred twenty thousand (220,000) dues paying members. The Texas AFL-CIO is the principal statewide labor federation in Texas existing for the purpose of promoting the interests of Texas wage earners, in legislative, judicial, and other public forms and activities.

1. **Benefits should be increase, particularly SIBS and the maximum benefit amount, but not as the result of a quid pro quo involving unrelated issues**

The Texas AFL-CIO welcomes the fact that this committee is looking into the issue of adequacy of benefits for injured workers. As will become clear by looking at the most recent statistics, benefits for injured workers are lagging in some key categories, and this situation certainly requires attention from this committee and the legislature as a whole.

It is our belief, however, that this inquiry should **not** be tied to any quid pro quo involving stripping other rights from workers. For that reason, we reject the attempt to look at raising benefits ancillary to any codification of the Entergy decision. Either benefits are adequate to compensate those injured at work, or they are not. The amount should not be dependent on some speculative calculation regarding the ability to hold a third party accountable for causing an injury. We categorically reject the idea that adjustments to the benefits for a very small subset of workers who suffer catastrophic injuries can counterbalance the devastating impact that the Entergy decision has wrought.

If we do look at benefits, the areas that are most in need of review are Supplemental Income Benefits and the maximum benefits payable to higher wage workers. The attached table from the most recent TDI study shows that an almost infinitesimal number of workers even qualify at all for this tier of benefits. This is due to the 15 percent threshold being virtually unattainable, which in turn is due to utilization of an outdated version of the AMA Guides. Strict work search requirements also play a role in the number of workers prevented from receiving these benefits. The committee should look at lowering the 15 percent threshold, using a later version of the AMA Guides, and evaluating the efficacy of the work search requirements.

The second aspect of benefits that needs to be addressed is the maximum benefit amount. While the ceiling for benefits was raised somewhat in HB 7, efforts to raise them even more were unsuccessful. The rationale at the time was that we needed to phase in the increase – that any more sudden increase would be unsettling to the system in a time of great change. Four years have now passed. It is time to revisit this issue.

Finally, we continue to believe that benefit amounts should reflect the education, training and skill level of the injured worker. We continue to operate under a system that assigns the same percentage of impairment to a lawyer and a ditch digger for the same

injury, regardless of the fact that the economic consequences of the injury are drastically different. We believe that a modified approach would better serve the system.

2. **Texas must act to gauge the impact of non-subscription**

The interim charge also contemplates an evaluation of the impact of the changes we are considering on rates of non-subscription. Texas, of course, is the only state in the nation that gives employers the option of not carrying workers compensation insurance. While this has long been an option for employers, there are alarming trends that threaten the very viability of the workers compensation system in Texas.

Fully one third of all employees in Texas now work without the protection of workers compensation insurance. As noted by staff, the number of employers without workers compensation is growing among employers with more than 500 employees. These large non-subscribers, and many smaller ones as well, increasingly use sophisticated measures such as mandatory arbitration, ERISA plans etc. to deny workers access to court when they are hurt in a workplace not covered by workers compensation. Anecdotally, we hear reports of workers who present for care at public hospitals, who lose their jobs with no benefits at all, who have to move forward in their lives without any coverage from their employer whatsoever.

Advocates for non-subscription have no doubt regaled you and will continue to do so with tales of how good non-subscription is for the workers they employ. We do not deny that in some cases, this could conceivably be the case. But you, as state policy makers, are completely in the dark as to the true situation faced by injured workers and their families when the employee for which they work has no workers compensation coverage.

For employers that participate in the workers compensation system, you are able to see exactly how many employees are hurt, what income benefits they receive, how long they were off work, the cost of their medical care, the cost of premiums, the quality of their medical care, and more. You also know, importantly, that the taxpayers are not footing the bill for medical care for workers who are injured at work. In short, you have the data you need to determine whether the system is working properly for workers and employers in this state.

For nonsubscribers, on the other hand, we know absolutely none of this information. As the report notes, less than ten percent of non-subscribers even bother to comply with their minimal obligation under current law to even report the injury. Even for those that do, however, we have absolutely no information as to any of data that you have invested so heavily in collecting from employers who do carry workers compensation to protect their workers. Amazingly, we don't even know how much of injured workers' medical care is paid for by the taxpayers in the form of uncompensated emergency care.

Thus, we are increasingly creating a perverse incentive in this state for employers to **not** carry workers compensation. If employers carry workers compensation, we collect their data, mandate what we determine to be sufficient benefit levels, enforce at least minimal standards of fairness in adjudicating claims, maintain administrative and judicial oversight of their behavior, etc. We evaluate success and failure.

For the non-subscriber, we turn our heads and allow virtually whatever the employer chooses to do. We also, unfortunately, force employers who do carry workers compensation insurance to compete with those who shirk this responsibility, and what's more, to subsidize those who do not by increasing their taxes to pay for the uncompensated medical care non-covered workers must seek when they are hurt. We allow them to employ such legal tactics as mandatory arbitration, post-injury waivers, termination of injured employees to avoid responsibility for their actions. The balance is precarious – at what point do enough employers decide to strike out on their own that the very existence of the system is threatened?

The Texas AFL-CIO has long been a proponent of mandatory workers compensation for all employers and employees in this state. We believe that no worker who is injured at work should be left at the mercy of the employer's largesse, or lack thereof. We are under no illusion that this will come to pass at any time in the near future. We do feel, however, that this state has an obligation to at least look squarely at the facts of the situation and collect the data necessary to at least fairly evaluate the merits of the current arrangement. To do less is simply irresponsible in terms of our obligation to injured workers and their families, employers and taxpayers who too often are left with the bill.

3. **Entergy v. Summers is bad public judicially enacted public policy and should be reversed by the legislature.**

Finally, we do feel the need to state to this committee categorically that we feel the Entergy v. Summers decision should be overturned. It is not a well reasoned adjudication of a dispute between two parties. Rather, it is an activist, result oriented decision which has judicially enacted unsound public policy directly in conflict with the actions of this body. We ask this committee to recommend to the full senate that this decision be overturned and that the rights of workers be restored.

There are four reasons why we think that the legislature needs to address this matter and protect the exercise its legislative authority. First, the decision represents a perversion of the historical bargain between workers and their employers. It unfairly and unwisely extends the umbrella of immunity to entities other than the employer while providing no additional benefit to the injured worker. Second, it seriously undermines worker safety by eliminating safety incentives and deterrent effects in an environment of decreased governmental regulation and oversight. Third, it poses serious threats to the viability of a workers compensation system already under stress by raising costs and complexity to all employers, particularly ones that don't benefit from this decision.

Finally, this decision is an act of judicial activism directly contrary to the oft-expressed will of legislature.

a. The Entergy decision is a perversion of the historic bargain of workers compensation

Workers compensation is born of a historic bargain between workers and their employers. For their part of the bargain, workers gain the right to receive compensation for workplace injuries regardless of fault. That compensation includes both lifetime medical care and some measure of income benefits designed to bridge the gap between the injury and return to gainful employment.

Employers gain something important as well, immunity from suit being the most significant. As a result, workers also give up the right to all other forms of common law remedies such as compensatory damages, punitive damages, loss of wage earning capacity, and damages for such things as disfigurement, loss of consortium, etc.

To encourage employers to opt into the workers compensation system, the legislature has provided important incentives and deterrents. Employers who choose not to offer workers compensation benefits remain subject to lawsuits regarding workplace injuries, and in connection with those lawsuits, they lose the ability to raise certain common law defenses, such as assumption of the risk, comparative negligence, etc.

As recognized in the landmark *Garcia v. TWCC* case, this bargain has a very important constitutional underpinning. In order to justify the lack of availability of common law remedies, the legislature had to replace those remedies with something of value, i.e. the benefits of workers compensation.

The fallacy of the Entergy decision is that it extends the umbrella of immunity far beyond the employer of the injured employee, while at the same time offering absolutely nothing of value to the employee in exchange. This extends far beyond the initial trade off of workers compensation. The worker gains absolutely nothing from this arrangement. There is no *quid pro quo*. This is not only an unfair result, but also is of questionable constitutional legitimacy in light of *Garcia*.

In coming to this result, the Court hands to these large special interests a benefit that no other employer has available to them. If the premises owner chooses to carry workers compensation for their contractors, it gains the immunity of workers compensation. If, however, the premises owner chooses NOT to do so, it will NOT lose the ability to raise important common law defenses should they be sued, unlike every other employer in this state, including small businesses, who aren't in a position to take advantage of such a scheme. They get to have their cake and eat it too.

What is even more stunning about the decision is that the Supreme Court is handing over this blanket immunity to some of the most dangerous workplaces in Texas. Even a cursory glance at the major industrial tragedies in this state demonstrates this point

dramatically. BP, CITGO, ARCO, Phillips, etc. They are the intended beneficiaries of this ruling. At the same time, do we really want to give a free pass on liability to these premises owners, who are the very entities with the most control over key decisions that affect the safety of the workplace? They have already benefited from previous tort reform measures that require significantly elevated standards of proof to be held liable at all.

If the decision were allowed to stand, workers would be limited to workers compensation benefits when injured at work. These benefits do not fully compensate workers for their injuries because ***they were never intended to do so.*** We also reject the notion that workers should give up important rights in exchange for adequacy of benefits. The issue of benefits should be considered in the context of what is fair, just and affordable for employees and employers, not as an adjunct to a limited class of large corporations seeking to limit their liability beyond traditional workers compensation principles

The consequences for workers are dramatic. The victims of the explosion at BP in 2005 were able to go to court in an attempt to hold the company accountable for its negligence. BP has paid more than 1.5 billion dollars in settlements to injured victims and their families. Were Entergy the law of this state at the time of that tragedy, the figure paid to workers and their families by BP would be ZERO! For what purpose are we shifting this wealth from victims and their families to those who have been proven to have engaged in wrongdoing?

b. The decision of the Court in Entergy undermines safety and accountability

There is no higher priority than workplace safety to Texas workers. Every Texas worker has a fundamental right to expect that, when he or she goes to work each day, he or she will return home healthy and safe. The Entergy decision fatally undermines that right. Under Entergy, workplace injuries and deaths become merely a readily quantifiable cost of doing business. By freeing large corporations from litigation and accountability for even the catastrophic injuries they inflict, the Court has undermined powerful incentives to make workplaces safer. The bottom line is that if the original Entergy decision is allowed to stand, Texas workplaces will become much more dangerous.

This decision is being considered in a climate where government regulation has been significantly reduced. OSHA has been pared back as a result of budget reductions and shifting political philosophy which reflects more limited government. I have included a summary of these trends in an attachment, but by way of example, consider that under current rates, it would take OSHA 148 years to inspect each workplace under its jurisdiction in Texas. Texas, unlike many states, does not have a state enforcement program. I don't think that there is much argument that there are now much less rigorous prevention efforts by the government and more of a reliance on the private sector to insure safety in the workplace.

We can argue about the merits of such an approach, but the reality is that government action is decreasing in its efficacy in preventing workplace accidents. We already see injuries trending higher in Texas relative to the national average, and this trend would very likely accelerate were we to remove the deterrent effect of private enforcement from the calculation.

The bottom line is that if government is going to step back from its historic role or workplace protection, and access to the courts is blocked for injury victims, what effective strategy remains to protect workers? Without a credible deterrent, workers will be at the mercy of the proclivities and inclinations not just of their employer, but of any business the employer seeks to serve. These premises owners, which again, are some of the most dangerous places to work in Texas, must know that serious consequences await them for failing to adequately pay attention to safety issues.

This decision devalues the employer-employee relationship, diminishing safety, not to mention wages and benefits. These huge refineries are better served by the presence of a stable, experienced work force. This decision places a premium on the use of contract labor. This, as the famous study by the John Gray Institute demonstrated, undermines the safety of everyone associated with a given plant.

In sum, the vaunted "healthy business climate" in Texas must include better incentives for employers to keep workers alive and well. That's a basic principle that would honor the memories of the 500 or so Texas workers who die each year on the job.

c. The Entergy decision will increase the cost of workers compensation for all employers in Texas

As this committee well knows, the Texas AFL-CIO has been extremely active in working to improve and expand our workers compensation system in Texas. Working with this committee and others in the legislature, we have joined together to pioneer some innovative ideas that I think we can all be proud of in an effort to improve the system for workers and employers alike. We have worked together to balance issues of benefit adequacy and affordability for employers.

This decision threatens that work by increasing costs across the system. Millions of dollars will leave the system due to diminished subrogation reimbursement. Consider the BP example. Assume that each worker who recovered a settlement from BP in a third party action also recovered workers compensation medical and indemnity benefits. When that settlement was paid, the workers compensation carrier was reimbursed for all money it expended before the worker ever recovers anything.

This is as it should be. There was a negligent party. That party bears the expense of the harm it caused. The workers compensation carrier should not be forced to bear that cost. But under the Entergy decision, that is exactly what will happen. Those hundreds of millions of dollars in medical costs and indemnity benefits will be borne by the workers compensation carrier. This will cause costs to rise for all employers as those expenses

are socialized throughout the system, and it is those who maintain safer workplaces who will end up being penalized. Employers who are not currently subject to third party liability, public employers for example, will end up bearing the cost of this shift as well.

This will add complicating factors to the system as well. It is unclear exactly how experience rating will work under this system. If the premises owner has the policy for all subcontractors, regardless of the nature of the work being done by each contractor, upon whose experience will the premium be rated for that as well as future jobs? This is but one question that is raised by allowing such a broad umbrella policy.

d. The decision is directly contrary to well established legislative intent

Other parties, including four legislators, have adequately addressed the issue of how at odds the Entergy decision is with legislative intent. I raise it here only to emphasize that the legislature has on numerous instances refused to extend this get out of jail free card to large corporate interests who negligently hurt and kill workers on their property. The last time I can personally recall was when Chairman Nixon's bill, which would have done exactly what the Court has presumed to do in this case, was left pending in the wake of the BP explosion in 2005. We at the Texas AFL-CIO can personally attest to the intensity of the effort to move that bill through the legislature at that time. If the law really is, as the Court originally held, that premises owners can avail themselves of immunity through the purchase of workers compensation policy, that would come as a huge surprise to the advocates of that bill, including many who are here today.

In closing, I want to remind the committee that the passage of time after that tragic blast does not dull the fundamental imperative laid bare by that experience. Large corporations, like any other person or company, must be held accountable for wrongdoing that results in the injury and death of human beings in this state. Workers in this state must know that their lives and safety are valued and respected. We do that by making sure that we have strong deterrents in place to protect them as they seek to earn a living for themselves and their families, and that if, by some cruel twist of fate that deterrent does not work, they and their families should be free to seek justice from those who have caused the harm.

I thank you for taking the time to consider our views.

Respectfully Submitted

Richard Levy
Texas AFL-CIO Legal Director
1204 San Antonio, Ste. 203
Austin, TX 78701
(512) 474-6200
(512) 474-7896 [fax]
rick@texasaflcio.org