

P U B L I C H E A R I N G

before

ASSEMBLY LABOR COMMITTEE

on

A-1752

(Modification of the Occupational Hearing Loss Law)

Held:
January 29, 1981
Assembly Chamber
State House
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Joseph D. Patero, Chairman
Assemblyman Thomas F. Cowan
Assemblyman James Zangari
Assemblywoman Leanna Brown

ALSO:

Daniel L. Ben-Asher, Research Associate
Office of Legislative Services
Aide, Assembly Labor Committee

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ASSEMBLY, No. 1752

STATE OF NEW JERSEY

INTRODUCED JUNE 9, 1980

By Assemblymen PELLECCIA and GIRGENTI

Referred to Committee on Labor

AN ACT concerning workers' compensation for certain noise induced hearing loss and amending section 15 of P. L. 1979, c. 285.

1 BE IT ENACTED *by the Senate and General Assembly of the State*
2 *of New Jersey:*

1 1. Section 15 of P. L. 1979, c. 285 is amended to read as follows:

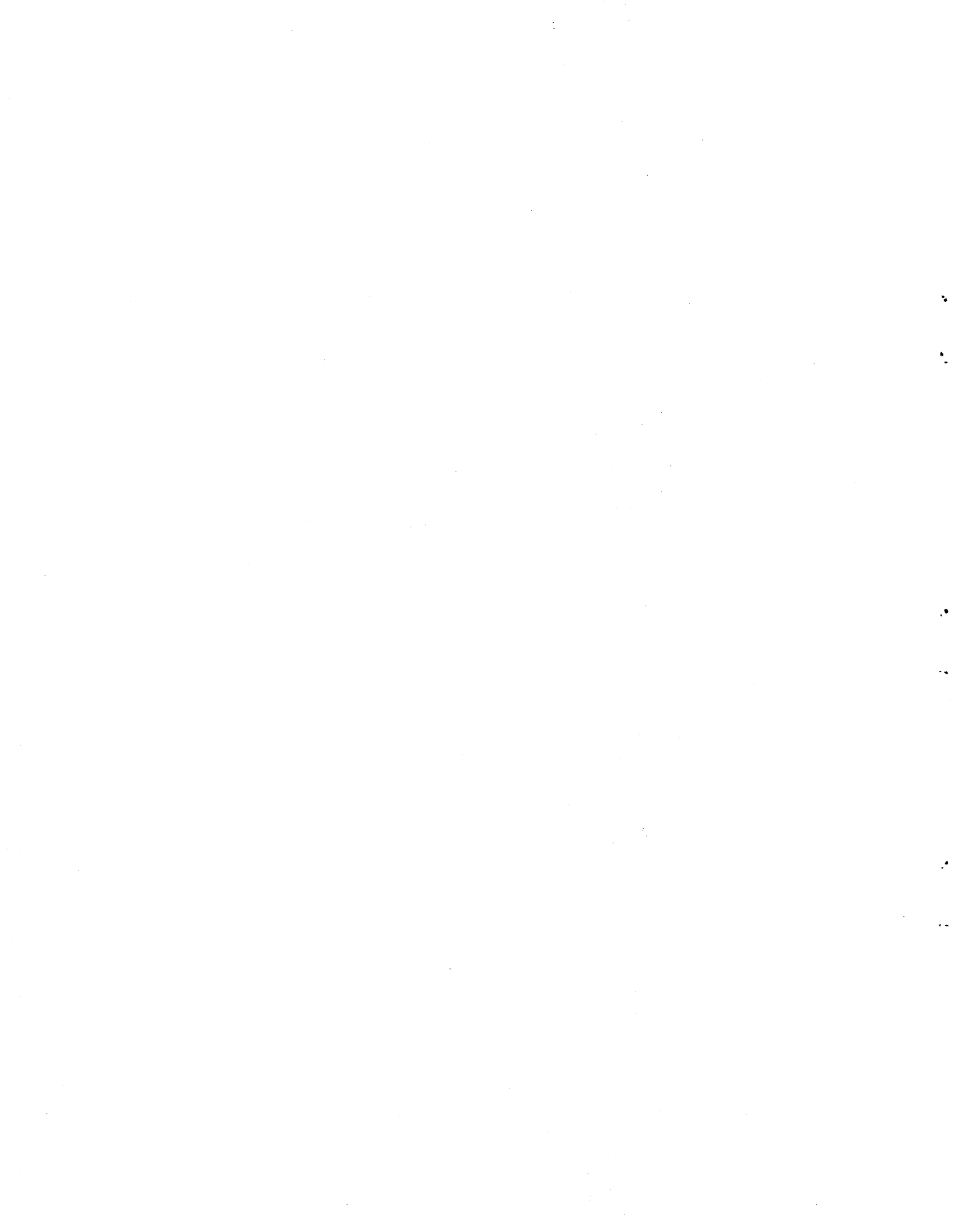
2 15. This act shall take effect on the sixtieth day after its enact-
3 ment and **[**, where practicable, **]** shall apply to all actions instituted
4 thereafter **[**, and to all proceedings taken subsequent thereto in all
5 actions pending on such effective date **]**; except that judgments
6 theretofore entered or awards theretofore made pursuant to law
7 shall not be affected by this act.

1 2. This act shall take effect immediately.

STATEMENT

This bill eliminates the application of the new workers' compensation hearing loss law to cases that were pending at the time of the law's effective date.

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.



ASSEMBLYMAN JOSEPH D. PATERO (CHAIRMAN): This public hearing will now come to order. First of all, I would like to welcome you all here this morning for a public hearing of the New Jersey State Assembly Labor Committee on Assembly Bill 1752, a bill which would modify a provision of the State's Occupational Hearing Loss Law, enacted last January. I am Assemblyman Joseph Patero, Chairman of the Committee. Other members of the Committee seated with me are Assemblyman James Zangari and Assemblyman Tom Cowan and also we have our legislative staff person, Mr. Daniel Ben-Asher.

The bill before us would eliminate the requirement that the procedures and standards of P.L. 1979, c.285, for determining the extent of an employee's hearing loss be applied, where practicable, to unresolved claims filed before the new law's effective date of March 10, 1980.

Today we are scheduled to hear the views of representatives of workers, of management spokesmen and the head of the State's workers' compensation program. As each witness is called, we ask that he or she come to this desk and speak into the microphone, after identifying himself or herself. It would be most helpful, for the purpose of assembling an official transcript of this hearing, if you have a written statement, that you present copies of it to the Committee members, our staff and to the hearing stenographer just prior to the time that you present your comments. Also, anyone who has not already expressed an interest in speaking before the Committee and wishes to do so, will you please see Mr. Ben-Asher. If you have a written statement, try to give us a brief resume of it and your entire statement will be made a part of the record. After each participant has made his or her statement, the Committee members or staff may have some questions and we trust that each participant will make himself or herself available in order to respond to these questions. No questions may be directed to the members of the Committee.

Before our first witness begins, I will announce the procedure to be followed. What we're going to do is go right through lunch, rather than take a lunch break. I guess everyone else has something else to do today. We were supposed to have a statement from the sponsor, Assemblyman Pellecchia. We're going to have to do away with the statement. If he comes in later or if he has the statement brought to us, we will read it into the record. The first speaker that we have today is Judge Alfred Napier, Acting Director of the Division of Workers' Compensation. Good morning, Judge.

J U D G E A L F R E D N A P I E R: Good morning. I had previous contact with your legislative aide, who indicated to me that your Committee was interested in whatever statistical data that we have that would be available. I would like to point out that back in 1975, by reason of budget cuts, you will recall our austerity program. During that period, we were obliged to discontinue data processing and we no longer keep our data on computer. We maintained a system of statistical collection manually in such form so when we got a data program finally into place, we could use this material as source documents, which then could be put on a computer. The computer program is slowly being put into place, but it is not completed as of this date. So, in two or three months, I would be in a better position to give more definitive statistics.

I understand that the prime concern is what data I might be able to submit concerning experience in awards, worker compensation awards, under the

new hearing loss bill. In this connection, I was able to take the experience of the month of June of this year and the experience of the month of June of last year, as at least some type of yardstick, as crude as it might be. In June of 1979, there were 230 awards for hearing loss. These awards averaged \$1200 a case. In June of this year, there were 96 awards for hearing loss and they averaged \$1400 per case. I am rounding off these figures. So, we have almost 2½ times the awards for hearing loss prior to the enactment of the new hearing loss bill as compared to now. In attempting to analyze why, several factors are present. One, of course, the new hearing loss bill, by design, was more restrictive as far as allowing compensation for hearing loss in the minor cases since the low fence was increased from 25 decibels to 30 decibels and in some instances, the low fence of 25, prior to the enactment of this bill, was not recognized, since one expert contended that the startoff point or fence, if you will, was zero and any decibel threshold above zero constituted a hearing loss. This, of course, was contrary to all of the medical opinions at that time and now. So, at the very least, even if we took 25 decibels as a valid low fence, at least those thresholds between 25 and 30 were eliminated.

In addition, we had a large number of claims filed in October, November and December of 1979 in all categories. Apparently, these formal claims were filed in anticipation of the adoption of the new legislation and I suppose there was an effort on the part of lawyers representing their clients to avoid some of the restrictions contained in the new legislation.

Now, when the hearing loss bill was adopted, this provision concerning retroactive applications was inserted in the bill so that I believe some lawyers are dragging their feet, so to speak, to avoid a trial of these matters in the hope that possibly this amendment would be adopted. So, that's another factor.

Thirdly, we have not declared a moratorium on hearing these cases. I've been urging the judges to bring them to fruition through a trial and conclusion. There have been a substantial number of dismissals so that when I say there were 96 awards in June of 1980, that does not contemplate the number of cases that were dismissed in that month that were based on a claim of hearing loss. Unfortunately, I do not have that data available to me. I did poll some of the judges involved in hearing these cases and they tell me that--I had estimates between 25 to 50% of these cases are being dismissed with no compensation award because they do not meet the criteria of the hearing loss bill.

I would submit to any questions that the Committee might be interested in.

ASSEMBLYMAN COWAN: I think, Judge, that Assemblyman Patero, when he does return, has a number of questions he would like to ask. Does anyone else have any questions at all?

JUDGE NAPIER: As an aside, since this Committee was generally involved in not only the hearing loss bill, but the general revision of the workers' compensation law, we did note that the percentage of dismissals, prior to the adoption of S-802, was approximately 20% in the Division, 20% of the claims. Now, that is up to 30% of the claims.

ASSEMBLYMAN PATERO: Was that on the total number?

JUDGE NAPIER: That is all categories, but that does not include payments made under Section 20. These are dismissals with no compensation whatsoever and they also include dismissals for lack of prosecution.

ASSEMBLYMAN PATERO: I'm sorry I had to leave. I had an urgent phone call. First of all, what is the status of all those hearing loss claims that were pending at the time of the effective date of P.L. 1979, Chapter 285?

JUDGE NAPIER: Well, I have instructed all of the judges hearing these cases not to permit an adjournment simply because attorneys may be waiting for action on this particular amendment. As a consequence, wherever attorneys are reluctant, these cases are being marked, "Not moved" or else being tried rather than being settled. So, there is a slowdown in this particular field, but no moratorium

ASSEMBLYMAN PATERO: Then, if A-1752 should be enacted--this is the bill that we're discussing today--without further clarifying amendments, how would your Division probably treat those cases that were pending at the time of the new law's effective date and have since been dismissed under the new law?

JUDGE NAPIER: Well, I think a determination in that category of cases beyond the administration, I think you would have to provide for it in the statute because once a case is dismissed, that constitutes an adjudication and, if there was no appeal, I would think that the worker's rights are foreclosed as far as reopening that case. That is an off-the-cuff opinion. I haven't studied it in depth, but that is my immediate reaction. So that there be no question, if the Legislature is disposed to enact this type of legislation, I think there should be some type of saving provision to permit cases to be reopened that were dismissed during this period.

ASSEMBLYMAN PATERO: In other words, Judge, if a case was dismissed in January or February, would that case be reopened or would the individual--

JUDGE NAPIER: I don't know whether it can be reopened.

ASSEMBLYMAN PATERO: But, would the individual have the right to file another claim?

JUDGE NAPIER: No, not unless he had additional exposure. Then he might file for the period of additional exposure, but many of these claims are filed by retired workers. I had suggested maybe some statutory relief, but there is some question in my mind about the constitutionality of that because once a case is decided and adjudicated and there is no appeal, I think you are violating the due process clause. So, I would retract my suggestion that you take care of that legislatively. I think those cases will be gone.

ASSEMBLYMAN PATERO: Putting aside any personal feelings that you may have, what is your opinion as to the validity of applying the provisions of the new law retroactively?

JUDGE NAPIER: You mean the way the law stands now, without this amendment being enacted?

ASSEMBLYMAN PATERO: That's correct.

JUDGE NAPIER: Well, I think, maybe, we might briefly look into the position of the State of New Jersey as regards hearing loss, prior to the adoption of the hearing loss bill. We never did have a specific statute or regulation concerning hearing loss until the broad Occupational Disease Act was adopted in this State in 1949. That covered all occupational diseases, excluding none. So, under that statute, hearing loss could be compensated. Now, the state of medical knowledge, at that point, as demonstrated by the American Medical Association, was a specific formula adopted in 1947 to evaluate disability for impairment--they prefer to use that term--and at that time, they considered the frequencies of 500, 1000, 2000,

4000 hertz , but they weighted them according to what they felt was important. So, when New Jersey first started to compensate these cases, we followed what is now generally referred to as the old AMA formula and, in those days, they used to put out a kind of a slide rule in which these weights were cranked in so you could quickly arrive at the disability. Then, the American Medical Association had a sub-division, the American Association of Ophthalmologists and Otolaryngologists, and they adopted a new formula where they excluded the 3000 and 4000 frequencies. This is important to note because these are the frequencies that are most generally affected by noise. Now, New Jersey still continued to act and now we were operating under the old AMA and now we have a new AMA formula. Now, the question is whether we are going to have the medical association tell us what formula to use or whether we should depart. So, that created considerable amount of confusion or, at least, a divergence of opinion within the judges who were adjudicating these claims. So, there was no uniformity. Then, to make the pot boil a little more, in 1979, the AAOO changed the formula again to include the 3000 hertz. Now, the point of what I'm saying is that were going through a transition of the medical profession changing their attitudes towards occupational hearing loss and yet, we had no statute nor any regulation and, in my view, we're not empowered to make any regulations to set up a system of uniformity in evaluating disability. So, until the hearing loss bill was adopted by the Legislature, we had no formula. I will answer your question about constitutionality. I'm almost there. So, we're faced with a situation where the Legislature decided to act and the bill took effect in January of 1980 and it filled a void. It set up a formula legislatively for the evaluation of disability, where one did not exist prior thereto. I think this is certainly within their power. There is no question of that and, so far as any retroactivity is concerned, since there was no formula prior to that, I feel that there is no constitutional impediment. Let's assume there was action by the Supreme Court in establishing criteria for heart cases. The Legislature now has acted in that area, but in Dwyer versus Ford, they made a very significant change from unusual stress at work, causing a heart attack, to simply ordinary activity sufficient in a material degree to precipitate a heart attack. Now, that affected all pending cases. Now, I find it hard to believe-- we hear a lot of talk about a judicial oligarchy. I find it hard to believe that the Supreme Court can legislate more effectively than the Legislature. If we reach this point, I think we're in pretty bad shape.

ASSEMBLYMAN PATERO: Is this the federal Supreme Court?

JUDGE NAPIER: No, the New Jersey Supreme Court. It is a compensation case where they relaxed the criteria for compensable heart attacks. So, therefore, I do not think there is a constitutional problem here or, if there is one, it would be resolved in favor of the bill as it stands.

ASSEMBLYMAN PATERO: Judge, that's all the questions I have. I would like to introduce to you all our new member of the Labor Committee, Assemblywoman Leanna Brown, who will be on our Committee this year. I have no further questions. Does anyone else on the Committee have any questions? (no response) Thank you very much, Judge. Are you going to be around yet for a while?

JUDGE NAPIER: Yes.

ASSEMBLYMAN PATERO: Okay, thank you very much. The next speaker we have is Mr. Murray Weingartner of Lawyers Encouraging Government and Law.

MURRAY WEINGARTNER: Good morning, Assemblyman Patero and other esteemed members of the Committee. Thank you for this opportunity to be heard. I want to assure those of you who have been present during my prior performances that I will be relatively short today. I also want to thank you for putting me right up front, as usual, so that I can be shot at, but cannot shoot back.

I think this bill only takes up a few lines on a piece of paper, but it is, in my opinion, a very important bill. Quite frankly, the importance of this bill supercedes the wishes of those of us who practice in Workers' Compensation Court on behalf of injured workers and it supercedes the wishes of those who practice on behalf of respondents or industry, if you will, because the passage of this bill, in my opinion, will restore the faith of the electorate, of the worker out there, of the general public.

In workers' compensation--and this bill is for occupational hearing loss--those cases, by their very nature, most times are slow to come to fruition, are slow to get to court to be litigated or settled. The reason for that is not that prior to the enactment of the bill they were difficult to dispose of. The reason for that is that they are usually accompanied by other occupational disease claims and even though they may be separate petitions, they ride together. They are usually found in cases which involve more than one respondent, which is difficult in workers' compensation because you have to get more than two attorneys together at the same spot, at the same time, and hearing loss claims are often found in second injury fund cases which, unfortunately, have backed up somewhat in the courts because of the manpower available out of the Attorney General's Office. So, what we have had now, since the introduction of the new Hearing Loss Act, with its retroactivity, is a very interesting phenomena that I could not find in any other area of the law.

It is not uncommon now to see claims that were filed in 1976, 1977, 1978, which have already been pre-tried, in which both sides admit that there is actionable hearing loss prior to the passage of this amendment, but when that case comes up, although my report may indicate disability which just squeezes by the present fence, the respondent's report may indicate disability, but disability which is not cognizable now because it does not squeeze by the present fence.

I'm not going to blame the judges. The lawyers really don't know what that language of "where practicable" means. We've argued several different ways and very often, we have a dismissal of the hearing loss claim and your client looks at you and he says, "What happened? You told me I had a hearing loss and I was going to get money for it." All I can tell him is, "Well, the Legislature passed a bill which said that your hearing loss was not enough to be paid for in workers' compensation." When did that bill pass? Well, that bill became effective in March of 1980. He says, "But, I went to you in 1976. My case has been pending since then. I have not worked since 1975. How is that possible?" The only thing that we can say to that client is, "You're going to have to talk to your senator or your assemblyman." We don't have the answer, except for the answer that we've given. That is happening more and more and I think it is unequitable and is unfair.

Gentlemen and lady, I'm not talking now about the giveaway, the 2% or 3% of binaural hearing loss that a respondent would pay in an effort to wipe up the entire case. I'm talking about cognizable hearing disability which doesn't meet the present fence. So that, by and large, is the first and most drastic point.

Now, there is another phenomenon which is interesting and which has

raised its head. Again, I have no answer for this. Even those cases that were filed prior to the passage of the new bill that come up after March of 1980 that do give rise to a judgement for hearing loss create a problem and this is the problem. By the very nature of the new formula, you can obtain a hearing loss judgement for, let's say, a binaural 5% hearing loss because, don't forget, that calculation, now, means that the hearing loss is greater than the 30 decibel fence. Prior to March of 1980, that case, under the old method, whichever one we chose--and Judge Napier is absolutely right when he said that there was some confusion, but on an everyday level very few cases hung up that way--that very case which is now worth 5%, applying the new formula, could have been worth 10 or 12½% applying the old formula. Now, here comes the problem. Now, my client is going to get 5%, but he's not going to get 5% at \$47.00 per week, which is the new rate for 1980 because there is no way that the judge can say, "Okay, we're using the new formula so we're going to use the new rate." So, he's going to get 5% at \$40.00 per week, which was the rate in existence at the time that the claim petition was filed.

ASSEMBLYMAN PATERO: Excuse me. Would you do that over again?

MR. WEINGARTNER: We come up with results now, even where we can establish hearing loss under the new formula, where the amount of hearing loss that we obtained is less, under the new formula, than it is under the old formula. For example, we may have a cognizable hearing loss, on a 1978 case, which is heard today of 5% using the new formula, which might have been worth 10% using the old formula. I'll try to do the math for you, but that's not my area. 10% is 20 weeks of disability at \$40.00, which would be \$800.00, I guess, if I'm correct. Now, 5% is ten weeks of disability at \$40.00, which is \$400.00. So, there is a difference of \$400.00 in money. Perhaps, the difference would not be so great if we not only could use the new hearing loss calculation, but could use the new rate, which is \$47.00 per week. We can't do that. There is no compensation judge that I know of who will apply the 1980 rate to a case that was filed in 1978 or 1979. So, in the example that I'm setting forth, the petitioner, although he is getting paid for a hearing loss, is losing \$400.00. Of course, that's hard to explain to an injured worker. Those two major factors are really what I think is important here today. I really would urge this Committee to vote this bill out and get it passed because what we're talking about here is something that would be in existence for two or three years anyway before we exhaust whatever has been pending before March of 1980. I thank you for your attention.

ASSEMBLYMAN PATERO: Thank you for bringing that to our attention because that just doesn't seem right either. Are there any other questions?

ASSEMBLYMAN COWAN: Will this now, as it stands, address that factor?

MR. WEINGARTNER: Yes, because, as I read this bill, what will happen is that the retroactivity will be gone with anything filed before March. That's a problem I was hoping you wouldn't get me into. For some reason, 802 went into effect January 1 and the hearing loss bill went into effect March of 1980. I suppose when I leave this microphone I will be shot, but it would make things a lot easier, if this bill gets passed, that the new hearing loss or that the formula for new hearing loss be effective as of January 1, 1980 or at the same time as 802. There's a technical problem of whether 802 is on the 10th or the 1st. My own opinion is that it is the 1st. But, by passing this bill, what will happen is that all those cases that were filed prior to, let's say, January 1, 1980 or, at least, prior to March 1, 1980, would be disposed of under the old rules. The only objection that

there can be to that is that it is going to cost industry money. But, it is going to cost industry under the old rules, not under the new rules. It is not going to foster litigation because I say to you and I am sure that there are others here who can back me up. The hearing loss cases were not a problem in the worker's compensation court. Except for a very few cases that had to be litigated for one reason or another, they were very easy to solve and were disposed of rather rapidly.

ASSEMBLYMAN PATERO: Are there any other questions? (no response)
Okay, thank you very much. What we are going to do is we're going to take someone with an opposing view right now and the person we will be calling will be Mr. Jeff Purtell, who will be representing four major business groups.

J E F F R E Y P U R T E L L: My comments this morning are made in my capacity as Chairman of the Joint Industry Workers' Compensation Committee. This Committee consists of members from The New Jersey Business and Industry Association; The New Jersey State Chamber of Commerce; The Employers Legislative Committees of New Jersey; and The New Jersey Self-Insurers Association.

In June of 1979, the Assembly Labor Committee reported out the first major revisions in New Jersey's Workers' Compensation Law since its enactment nearly 70 years ago.

Following this action, further revisions were made in the proposed legislation at the recommendation of both houses and again prior to being signed into law by the Governor.

These revisions represented a major breakthrough in the Workers' Compensation arena after many years of legislative stalemate.

The revisions came about as a result of an agreement reached between representatives of labor and business communities with encouragement from the Chairman of the Assembly Committee and the Senate Labor Committee. While they were not totally acceptable to either labor or business, the changes recommended by this Committee were agreed upon as an initial step in the right direction.

Labor achieved an immediate, sizable increase in disability benefit rates for time lost and a dramatic increase in the amount of permanent disability awards for serious injuries. The employers in New Jersey achieved law provisions which they are hopeful will significantly reduce the cost drain of dollars that has, amongst other factors, been a deterrent to either remaining in or locating operations in New Jersey.

The enacted legislation provided for a review of the effects and experience of changes in our compensation law over an 18 month period to determine if it had achieved its purpose. This review is to be conducted by the Commissioner of Labor and Industry and reported to both this Committee and its counterpart in the Senate.

The revisions were contained in two bills. S-802 addressed itself to overall changes in the compensation law. Its companion bill, A-3362, dealt solely with hearing loss disabilities, since this type of disability was considered to be very technical and a unique problem in itself.

The overall revisions have already provided a significant increase in compensation benefits to New Jersey employees. The maximum total disability rate, which was at \$156 per week in 1979 increased to \$185 per week in 1980 and is at \$199 per week in 1981. Part of this increase is due to a rise in the State Average Weekly Wage and part of it is to increasing the maximum percentage base from 66 2/3% to 75%.

Benefits for permanent-partial disability, the largest single cost factor in New Jersey Workers' Compensation, have also risen dramatically. The maximum disability awards existing just over a year have increased in the following proportions: Hearing loss, the maximum has gone from \$8000 to \$18,600, a 233% increase; exclusive of amputation amounts, hand disabilities have increased maximum-wise from \$9200 to \$29,155, a 317% increase; Arm, \$12,000 to \$48,180, 402%; the leg, from \$11,000 to \$45,990, 418%; the foot, from \$8000 to \$20,900, an increase of 305%; Partial-total, from a maximum of \$20,900 to the current maximum of \$119,400 or a 571% increase. These amounts will continue to go up on the basis of an indexing system which is built into the law.

These payments have moved New Jersey's position in permanent-partial disability awards from the lowest in state schedules to amongst the highest in the nation.

Cost increases as a result of these benefit changes were imposed immediately upon New Jersey employers in the form of increases in insurance premiums and lost time payments. The cost increases, I might add, were not unexpected by New Jersey employers. However, New Jersey employers do expect cost containment in accordance with provisions of S-802 and the Hearing Loss Law.

The Hearing Loss Law contains a provision for its application, where practicable, to cases pending on its effective date. This provision was contained when it was approved by both Senate and Assembly Committees. It was intact after its approval by the full Assembly and Senate. It was contained when it was signed into law by the Governor. It was challenged at each step along the way and, even now, prior to the completion of the 18 month study period required by this law, it is again being challenged. I remain under the impression that a new beginning was made to correct abuses in a much maligned system and I remain hopeful that the revised compensation law may serve as a model for other measures that would improve the business climate in New Jersey and preserve the high paying jobs that have afforded many of our workers with a very comfortable standard of living.

The value of increasing benefit levels for serious disabilities is diminished if workers in this state who are truly and seriously disabled must continue to wait their turn in court on a "first-come, first-served" basis. It must be completely frustrating for them to wait another year in order for compensation judges to work their way through a long list of disabilities of a minor nature and of questionable relationship to their workplace. Many of these minor and questionable claims are those for hearing loss. The criteria established for adjudicating these claims should prove helpful in expediting the 100,000 cases awaiting judgement at the beginning of 1980. I understand that that 100,000 figure is now in the neighborhood of 115,000 cases.

The legislation proposed here today seeks to undermine the changes in state law enacted only one year ago. It is interesting to note that it was introduced in June, 1979, just three months after the effective date of the Hearing Loss Law. It addresses itself to just one aspect of that law, retroactivity. The history of single purpose legislation has been the chief reason no overall revisions in compensation law came about until last year. I strongly urge that this Committee not approve A-1752. To approve this bill would be a step backward and signal present and perspective employers that the business climate in New Jersey has not really changed at all. Thank you.

ASSEMBLYMAN PATERO: Mr. Purtell, thank you for your comments. I gave you a little leeway because you did bring in about the overall workers' compensation and right now we're working with this bill of Ozzie Pellechia's. Again, it is very comprehensive and I'm glad you did bring this to our attention. I have no questions. Does any other member of the Committee have any questions? (no response) Thank you very much.

MR. PURTELL: Thank you.

ASSEMBLYMAN PATERO: The next speaker will be Mr. Frank Pykon, New Jersey Building and Construction Trades Council.

F R A N K P Y K O N: My name is Frank Pykon. I am the attorney for the New Jersey State Building and Construction Trades Council. I am the attorney for the New Jersey State Sheet Metal Association. I am a member of the law firm of Parsonnet, Duggan and Pykon. We represent many other trade local unions throughout the State.

I wish to thank the Committee for allowing me to speak. I'm going to be very short. I'm going to state the position of our clients.

We are in favor of this bill which takes out, which does not apply the retroactivity of the January, 1980 Hearing bill to the cases which came up prior thereto.

I think we can all agree that the new Hearing Loss Bill, whether it is good or bad--we think it is bad and we know that there are other people that think it is good, and we're not here to debate the merits of that bill at this time. That was debated and may be debated in other forms. I think all sides agree that it is a more restrictive bill on the rights of the petitioners to get hearing disability. It is more restrictive, whether it is good or bad. We all have views on that.

I think what this Committee and the Assembly must recognize is that working people of this state went to work in the '70's and prior to the passage of the hearing bill under the workers' compensation law in existence at that time and they got injured, they sustained hearing losses, at that time, under the existing law and, had the new law not passed, they would have been entitled to certain amounts of money. The Legislature, in their wisdom, had the perfect right to do this and passed a new hearing loss law. But, what you have effectively done is taken away the claims and rights of these people that had these hearing losses prior to the passage of the law. You have just eliminated a good percentage of these claims, these people who were working, who sustained these hearing losses and would have been entitled to certain sums of money. Now, we heard Judge Napier discuss the constitutionality of this this morning. I think I have a contrary opinion and I think, probably, if this is taken up to the New Jersey Supreme Court, I think there is a good chance that the court may hold that it is unconstitutional. But, I don't think that is the point that I want to make this morning, whether it is constitutional or whether it isn't. The point that I want to make is that I just don't think it is moral. I just don't think it is fair. I just don't think that this Legislature really wanted, when they passed that law, to take away from people who had existing claims, to take their claims away from them. What the Legislature wanted to do for the future, that's up to them in their experience and their wisdom, which is fine. That's the way our society works. But, to take something away from these people who were injured prior to the passage of this law and just take it away from them and say, "You no longer have a claim, you are no longer entitled to a sum of money,"

I think is immoral. I don't think the New Jersey society or the American society works that way. There are other societies in the world that do, but we don't. We protest that portion of the new hearing loss bill that went into effect last year and we wholeheartedly support this amendment and we hope this Committee, in its wisdom, will see fit to adopt it and vote it out of committee and to have the Legislature pass it. That's my statement and I thank you very much.

ASSEMBLYMAN PATERO: Thank you very much, Mr. Pykon. Any questions?
(no response) Okay, thank you. The next speaker we have is Mr. Richard Kimberly, Joint Hearing Loss Task Force.

R I C H A R D H. K I M B E R L Y: Mr. Chairman, members of the Committee, staff-
persons, my name is Richard Kimberly and I am Chairman of the Joint Hearing Loss
Task Force.

Assembly bill 1752 relates to the retroactivity of Assembly bill 3362, which became Chapter 282 and became effective on March 10, 1980, as we've heard. I think what is significant in getting to the question of the retroactivity is to quickly review what Assembly bill 3362 was intended to do. I think Mr. Purtell has very adequately reviewed the background of its relationship to 802 and that the rates in 802 apply to the hearing loss bill, as was intended. But, in the case of the hearing loss bill itself, it came before this Committee on a number of occasions and changes were made in each of those cases and some changes were made on the Senate side also and then in the Governor's conditional veto. Still, what came out of that was that the bill was intended to compensate those who had significant, noise-induced, occupational hearing loss and to standardize the testing equipment, the qualifications of the testers and the methods by which the testing was done. It was also intended to create a formula because, as Judge Napier earlier stated, there was no statute really governing this and it was done primarily by the hearing examiners in the various districts and things. This was to come up with a formula whereby compensation could be taken from the standardized tests and read off very directly and compensation could be settled promptly and quickly without litigation in many cases. It did not eliminate litigation if the injured worker felt there was reason to go ahead and pursue additional compensation or have other testing or something of this nature. But, the purpose was to try and eliminate some of that backlog in the courts and to allow the employee to get compensation as quickly as possible when there was genuine occupational, noise-induced loss.

Also, it was intended to establish levels of compensation based on the formula, which would more significantly benefit those people that had the major loss and, at the same time, eliminate the situation of minor decibel losses in the normal speech ranges and I stress the normal speech ranges because part of what the low fence does, which, again, Judge Napier referred to, is that it eliminates that portion of the speech ranges where people are not aware of any loss and therefore, there is no reason to have compensation for something that people don't know about. Virtually everybody has some loss of hearing at the very low decibel ranges and this does not show up in these areas and yet, in a test, it will show up, but it does not affect anything that they are doing. So, this was part of what this bill was intended to do and that is done in many, many other states around here. One example of the imbalance in New Jersey was in the Port Authority where people that worked on the tunnels and things could not get compensation in New York, but could come over to New Jersey and get compensation for the exact same level of hearing loss.

which did not help industry and business, in general, in this state. It was an inequity that did not make sense. Mr. Pykon mentioned that claims pending should be paid or any of those claims filed in the past should be compensated on that basis. Well, again, the Hearing Loss bill was taking that into consideration and, as I said, it was amended a number of times. Part of what it was doing was to remove those cases that really do not have any significant loss of hearing, where people are not aware of it, as the other states are doing. Therefore, that was intended. Now, claims that have been filed previously that have significant loss, that would show up and the injured employee would be aware of it in normal speech ranges, conversation, listening, things of that nature, where they would be aware of their loss, those cases, there will be compensation. It comes under it and I think, and obviously, Judge Napier is in a much better position to comment on this, but I think I'm accurate in saying that as far as the experience in compensation, the hearing examiners have, for the most part, been compensating on the basis of the new rate, even on cases that were filed prior to 1980, where there is continuing exposure. Where there was no continuing exposure, I believe it may be correct that they may be compensated on the basis of the old rate because it did not go beyond the March 10, 1981 situation, as far as continuing exposure went.

What are our options, then, as far as what this Committee can recommend and do? I think the first one, obviously, is to report 1752 out of committee. Then, should it be subsequently passed by both the Assembly and the Senate and become law, we would be, in my opinion, going against the original intent of S-3362 by compensating a number of these employees at the low range and this would be greatly increasing the cost of S-3362, which it had been intended that those cases that were not a notable loss and would not have been compensated in other states would not be compensated here and the savings in those areas could be applied to the more significant losses and those people would get the greater compensation. That is the way it is going. Judge Napier has stated data from June of 1979 and 1980 which would indicate that this is happening. Obviously, we are looking at a very segment of data so far and we need to see significantly more. But, it would support that position at this time. So, I think, to take that kind of action, it would definitely be going against the intent of S-3362 in the sense that the General Assembly passed it.

Other possibilities would be to continue on through, again, at the recommendation of the General Assembly, the 18 month oversight period, which we are approximately 3/4 of the way or slightly under 3/4 of the way through now and, hopefully, at the end of that time, the Labor Department will have considerably more data available for the Committee and others to look at to get a greater experience on the limited data shown for June of the two years. Then, we can realistically see what the experience is and if this legislation is continuing to do what was intended, as I indicated before.

So, I think that if this action is taken now to repeal the retro-activity, again, we're going against the original wishes of the General Assembly in putting in the oversight provision, which it was very wise in doing, along with S-802, to be able to examine actual experience and be sure that this is doing what it is because, as we stated earlier, this workers' compensation revision is major changes and it needed to be reviewed. But, to make changes prior to that time would not seem realistic to us.

I think one other thing worth mentioning at this point was that this bill was introduced on June 9 of 1980 and that would be some three months after the effective date of the law. I commend the Committee for not taking action prior to this because, certainly, at that time, it was premature. There was almost data of any kind available and I think it is still premature at this time, but much more so at that point.

Now, many of these claims that are pending right now, and again, Judge Napier mentioned the increase in frequency in October, November and December, which might have been in anticipation of the effective date of the law. I think it is interesting that most, for some reason, stopped filing claims on 1-1-80, the effective date of S-802, and not 3-10-80, the effective date of A--3362, which there were three other months there that, if they were trying to beat the effective date, claims could have been filed and still, if the retroactivity would have been changed, would have come under that period. But, for some reason, it appears that that was not done. I don't know why. But, a lot of those extra claims that are in there are repeat filings, people that have received compensation previously and I think, if examined, it will show up that many of them, if not almost all, would not receive any compensation under the old conditions that these claims were settled. Those that would still be receiving compensation here and those would be the more significant losses, again.

I think that basically summarizes the key items. Therefore, I would say that the Joint Hearing Loss Task Force respectfully urges this Committee not to report this bill from committee at this time. In our opinion, such action would be in the best interests of the significantly injured employee, that is, not to report it out of committee, and industry, in general, in the state, in the general business climate, to go ahead and get the additional time of the oversight period. We appreciate this opportunity to come before you and certainly concur that this is a very important thing and needs to be watched and we commend you for that. I would certainly be happy to answer any questions. We did try, I would comment, Mr. Chairman, to have Dr. Sataloff, the technical expert that we had used, here, but unfortunately, due to a prior commitment, he could not be here, but Dr. John Tobin, the Vice-Chairman of the Task Force is here, should there be any questions.

ASSEMBLYMAN PATERO: Are there any questions from the members of the Committee?

ASSEMBLYMAN COWAN: Mr. Kimberly, on the one point that you mentioned there, so far as the refiling of cases that had been dismissed, did they send them in on appeal or is this just a refiling of them?

MR. KIMBERLY: It is my understanding that they were not necessarily dismissed. Some were compensated for, but there would be no additional compensation, in other words, due to the refiling. I think what was happening was that many were being refiled just to cover themselves in the event that there was anything there and the retroactivity might be changed.

ASSEMBLYMAN COWAN: Well, is that unusual or is that the normal procedure in compensation, that some people come back and refile?

MR. KIMBERLY: I think there are cases, definitely--

ASSEMBLYMAN COWAN: Was there a large influx? That is what I am trying to get at. You are relating this as an abnormal time. In normal times, was there a large influx over what you would consider normal?

MR. KIMBERLY: Yes.

ASSEMBLYMAN COWAN: Do we have any comment on that?

ASSEMBLYMAN PATERO: Judge Napier?

JUDGE NAPIER: I didn't bring the figures with me, but I can present them to the Committee. There were record numbers of petitions filed within the last three months of '79. I'm not saying they were hearing loss cases. I'm saying they were claim petitions, period. This is because our statistical data is based on cases that are completed and there is an analysis of awards made, rather than the type of claim being made. So, this large number of filings would represent some apprehension about S-802, probably more so than the hearing loss situation.

ASSEMBLYMAN PATERO: Any other questions, Assemblyman Cowan?

ASSEMBLYMAN COWAN: No further questions.

ASSEMBLYMAN PATERO: Okay, thank you very much.

MR. KIMBERLY: I would just like to leave one thing with you, which is a comparative schedule on the two bills. You might find it interesting. Thank you.

ASSEMBLYMAN PATERO: We do have new members on the Committee and just to keep them from getting confused, you have heard two different numbers on this hearing bill. You have heard the Assembly number and you heard the Senate number. What we did last session, we put identical bills in the Senate and in the Assembly and they were combined together to make the present law. So, if you hear the Senate bill number or the Assembly bill number, they are the same identical bill. Also, we did state, at that time, that once the bills became law that there would be an 18 month review with the Department of Labor and with labor and management at the same time. So, I just hope that this clears any confusions that might be in your mind. The next person who would like to address the group is Mr. Charles Marciante, who is the President of the New Jersey State AFL-CIO.

CHARLES MARCIANTE: Chairman Patero and other members of the Committee, I think the point that has been made here more than anything else, more clearly, is the fact that we don't have any real data on which to base how we feel about the bill under consideration, namely, A-1752. Judge Napier indicated that it would be two or three more months before that kind of data would be available. It is really unfair of anyone to ask you to act on a piece of legislation without significant data as backup. I feel an utter sense of frustration in not having a resolve to this very touchy question. One factor was brought out today which I find particularly repugnant is the fact that they're still paying a benefit based on the old law dollar amount, while supposing denying payments for claims filed under the old law. Now, how much of this is valid, we don't know and, quite frankly, I would like to be a little critical of the Department of Labor and Industry and its leadership and not for political purposes, but for purposes that they have been created at a great expense to the taxpayers to serve the general public and, in this instance, workers' compensation is one of the biggest areas that the Department is supposed to cover and while there have been hundreds of millions dollars spent in maintaining this system within state government, we come to a hearing such as this, nine months after the enactment of a law. All this time has gone by without the Department having any kind of information for us. We look forward, in two or three months, to having this data. But, quite frankly, they have been remiss in their obligations to the people of this state.

You know, I sat here and listened to the learned counsel for a number of unions and he sat here and told us that the legislation is not fair, it's not moral, that it's immoral. What did he mean, that the Legislature was immoral in passing this bill? I don't think that that was what he meant, but he said it. The idea of not wanting to take money away from people, I heard the Judge of Compensation indicate that the award is not \$1200 anymore, the average award, but it's \$1400. That doesn't indicate that they're taking money away. There has been a less number of cases, but I think the overriding feature we constantly come back to is that we have no data on which to base our discoveries and then have no facts on which to base a program of action to it, if it is necessary to correct it.

You know, the thing that bothers me so much, if it is so immoral on what was done, the Supreme Court could certainly make a decision whether something was immoral or wrong about something that was done legislatively. Why hasn't something been done through the court if people feel such genuine outrage?

Indicently, the point that was raised by Judge Napier is that there has been no filing by anyone to challenge anything that has been done in the past. These are interesting facts and it is obvious that a lot of this has to be put into a computer to come up with the basis on which you can form your opinions. If, indeed, people are being denied benefits because of the new law, then, of course, it is not right that they are being denied, but we should certainly have the data on which to make a decision and you can make a decision to see that these people are compensated. As I say, the idea of paying people at the old rate and still subjecting them to the new guidelines, that's a case of having your cake and eating it too. That's incorrect and I would ask this Committee, if it is at all humanly possible, to some way indicate that any decisions made in this instance be held in abeyance and that any payments that are made be made at the new rate. That, at least, we can do immediately and then, of course, wait for the data to come in from the Department of Labor and Industry to make determinations, finally, on this overall, legislative proposal.

ASSEMBLYMAN PATERO: Mr. Marciante, that's why I'm glad that Mr. Weingartner brought this to our attention on the rate scale. But, I think, as everyone that was on the Committee before, that that was one of the biggest problems that the Labor Committee had, both the Senate and Assembly, that we just couldn't get any data from the State. What we had to do was get some data from the federal government and that's what we worked on and it was very difficult to come up with some sort of a program. I think that the program is working well, but I think that's the reason we put the 18 months in here, to review everything because we should have some data. We have instructed the State Department of Labor to give us data so that we could review this whole package and, at that time, it was stated by both the Senate and Assembly Committee that if there were any difficulties, we would make the changes at that time, once the data came in. I just want everyone to know the problems that we had to try to come up with a good workers' compensation program. It was very difficult. We will be reviewing this in 18 months, but, at this time, we are discussing this bill that Assemblyman Pellechia has put in front of us. So, if there are no other questions, thank you very much.

MR. MARCIANTE: Thank you very much.

ASSEMBLYMAN PATERO: The next person to speak is Eileen Measel, New Jersey Business and Industry Association.

E I L E E N M E A S E L: Good morning, Mr. Chairman and members of the Committee. I would like to thank you for this opportunity to present the New Jersey Business and Industry Association's views on this matter. I do have a prepared statement and I will keep my remarks very brief.

I think the Legislature realizes--at least all of those members of the Legislature that were members during 1979--and knows what a brave and unprecedented step they took when they passed what is referred to as the Workers' Compensation Reform Act of 1980. It was controversial and certainly nothing was less controversial than the Hearing Loss Law that was a companion to the overall reform bill. At each step of the legislative process, opponents of the Hearing Loss Law made their arguments against the bill. As a result, substantial amendments were reflected in that legislation. The Governor recommended changes to the hearing loss bill and I would like to quote from the message that he sent to the Legislature in which he recommended certain changes: "these recommendations may not solve all future problems, but the Legislature has wisely provided for an 18 month study period to report back on any deficiencies." I think you know, and it was pointed out here this morning, that this bill was introduced roughly three months after the law went into effect. The proponents of this bill continue to argue the issues which were so thoroughly reviewed and decided by the Legislature last year. For many of those individuals, I believe nothing short of returning to the highly criticized system which existed before the reforms will suffice.

The retroactivity feature of the Hearing Loss Law was adopted in recognition of the fact that many of the hearing loss claims pending in the Division of Workers' Compensation at that time were of a questionable nature. It was the intent of the Legislature that in those cases, hearing loss claims, which had already been filed but not heard that did not meet the accepted criteria set out in the new law, that these cases would not be compensated.

Prior to March 10, 1980, which I believe is the effective date--the law was passed in January, but it didn't go into effect until March 10, 1980--there were no statutory procedural mechanics, as Judge Napier has indicated this morning, by which occupational hearing losses were to be determined. Now, there was some discussion or brief mention this morning of the morality of the bill and the fact that people who had filed claims had a right to compensation. Compensation, this whole system that we're talking about, is a statutory animal. No one in this state has a right to receive any kind of compensation benefit unless it is specifically enumerated in that statute. So, the fact that there was no specific right to have any particular formula applied in the measurement or the determination of the loss means that there was no vested right that an individual had prior to March 10, 1980.

Furthermore, the retroactivity provision of the law contains language which permits a judge of compensation discretion not to apply the new standards where it is not practicable to do so. In such cases, a judge may determine the case as he could have prior to March 10, 1980 and, basically, he could determine that case based upon his or her own proclivity as to how to do so.

On or before July, 1981, the Commissioner of Labor and Industry is required by statute to "report in detail the degree of success changes in the hearing loss law have achieved in increasing awards to workers with serious hearing losses and in standardizing the evaluation of occupational hearing loss." We respectfully urge the Committee and the entire New Jersey Legislature not to take action on this

or any other legislation which would alter the provisions in the reform bills until an accounting of the overall experience with the law is available.

Now, I realize and we've heard this morning that there is difficulty in getting data. I think if anything results from this particular hearing this morning it will be the message to those individuals responsible to do whatever is necessary to get us or, at least, to get the Committee facts upon which to make a valid determination. I think it is crucial. This morning, someone mentioned keeping faith with the workers in the State of New Jersey. I think we also have to keep faith with the individuals involved in this reform package as well, and I believe it was the intent of the Legislature to have what I call an 18 month truce and we're only a few months away from that right now. This is almost February. We have less than six months until July. I thank the Committee for listening to my views and I would certainly answer any questions you might have.

ASSEMBLYMAN PATERO: Does anyone have any questions? (no response)
There are no questions. Thank you very much.

MS. MEASEL: Thank you.

ASSEMBLYMAN PATERO: The next speaker is Mr. Joseph Yeager, Chairman of the New Jersey Legislative Committee, United Steelworkers of America.

J O S E P H Y E A G E R: Mr. Chairman and members of the State Assembly Labor Committee, I am grateful for this opportunity to testify before your committee relating to Assembly bill 1752.

I am the Sub-District Director of the United Steelworkers of America, AFL-CIO, representing workers in District #9, which covers the entire State of New Jersey.

We represent approximately 152 local unions in New Jersey, with 52,000 members, who are employees of various companies located in New Jersey. I am also the Legislative Director for the Steelworkers Union and I appear before you today to urge you to support Assembly bill 1752 because, indeed, it corrects a glaring inequity that now exists under the current Workers' Compensation Law.

This bill would modify the state's Occupational Hearing Loss Law that was approved last January or March. It would eliminate the requirement that a judge of compensation, where practicable, apply the new law's procedures and standards for determining the extent of an employee's hearing loss to unresolved claims that were filed prior to the effective date of the new law.

Under this bill before you, earlier case law would be applied in all actions which were pending as of March 10, 1980 and not yet been adjudicated.

The reason we, as steelworkers, support this bill is because having worked in the field with members of our union, we find that there were many cases properly filed under the old Workers' Compensation law before it was revised. The judges, in applying the new Compensation law, are short-changing our people in terms of compensation. We do not believe that it was the intent of the new Workers' Compensation law, as passed by the Legislature, to, in a sense, be retroactive and be applied against the old hearing cases that were filed under the old act. Any new cases filed since the inception of the new Workers' Compensation law certainly do not come under the domain and rules and regulations of this new law.

All that we are asking is that equity be granted in the adjudication of the old pending cases that were filed under the old law.

We find, generally, that the new Workers' Compensation law is fair and equitable and a good piece of legislation, except for this oversight, which this bill, if passed, would correct.

This is the primary purpose that I have appeared for here today before you as a representative of the United Steelworkers of America, AFL-CIO.

Mr. Chairman, I would just like to get away from my prepared text for just a moment and call to your attention that in June or in 1979 there were approximately 20% dismissals in cases that were heard in the courts. I heard the Judge's own figures that now relates and states that 30% of the cases are dismissed now in 1980 because the new statute is more restrictive. I would like to call to your attention that probably in the latter part of 1979, when citizens and workers of this state became aware that the law would be changed, because we do correlate information and pass it on to our local unions and our membership through our officers. There were probably people with possible hearing losses who probably did consult attorneys where, in many instances, attorneys urged people who they were aware of with hearing losses to file their claims because the law was going to change and become more restrictive. But, I also call to your attention and, perhaps, all this I hear about computers being able to correlate records for you, I say to you that our concern here goes far beyond the last quarter of 1979. In working in the field, it has been called to my attention that some of our people, steelworkers, who have come up with this injury, which is yet to be adjudicated by the courts, are as much as three years old and the difficulty that we find in the field is that when these people's cases are heard through their attorney--and these are independent attorneys; they can go to any attorney of their choice--they are then told that even though their case is three years old the court or the judge threw it out because the new law is more restrictive. What they can't understand and why they are complaining to their union--maybe I can correlate it this way. I'm only an ordinary layman, I'm not an attorney. He says, "If I got caught speeding for 70 mph three years ago and the cost was \$10.00 and either administratively or because of the backlog in the courts, my case wasn't processed until three years later and suddenly the law changed and the fine is now \$70.00, should I be fined \$70.00 or the \$10.00 rate back when my case was filed?" I ought to be judged on the basis of the merit of the law at the time it existed. That is the complaint that we find from our people in the field. Therefore, Mr. Chairman, I want to go on the record that the United Steelworkers of America strongly support this bill and, Mr. Chairman, I wish to thank you and the Committee for the opportunity to present testimony here today relating to this bill before the Legislature that would ease some of the problems faced by members of our union who have had long pending hearing cases for compensation. Thank you.

ASSEMBLYMAN PATERO: Thank you very much. Are there any questions?

(No response) Thank you again. Mr. Allen Goldberger, Esq.?

A L L E N G O L D B E R G E R: Mr. Chairman and members of the Committee, my name is Allen S. Goldberger. I am an attorney specializing in Workers' Compensation and I am a senior member of the firm of Balk, Jacobs, Goldberger, Mandell, Seligsohn and O'Connor with offices in Newark. I am a member of the Executive Committee of the Workers' Compensation section of the New Jersey State Bar Association and am its secretary. I have testified before various committees of the Legislature concerning workers' compensation in this state commencing with the Debevoise

Commission which was held in 1972.

With regard to the amendments introduced in 1979, with specific reference to the Hearing Bill, A-3071 or S-3362, I believe I attended almost every open committee session. I further believe it is fair to state that on the day that the Hearing Bill was voted out of the Committee, my statement from the floor lead directly to the introduction of Paragraph 5 of the Hearing Bill regarding the discretion of a hearing official to refer a petitioner for additional audiometric testing.

Now, with that as a background, if I may depart from the text for a moment, you heard statements about requiring data. You do not require data. There are two things I can tell you categorically and Chief Judge Napier is here. Any claim for hearing loss filed before 1980 pending is, at the present time, because of the mess created by the new Hearing Bill, two things happened. The restrictive standards of the Hearing Bill are applied to the old pre-1980 claims. So, either you meet the 1980 standards or your case is dismissed. However, every single hearing case--and I'm sorry Mr. Marciante stepped out--of a pre-1980 hearing loss, if it meets the new restrictive standards, is paid at the old rate. So, what you have, Mr. Patero, is somebody having his cake and eating it too. Judge Napier, I believe, will back me up on that. The cases are either dismissed or, if you meet the new criteria, you are paid at the old 1979 rates.

With that as a background, I would also like to categorically state to you that at no time did any proponent of change in our Workers' Compensation Act, going through all the hearings, if you recall, advocate that it have a retro-active application. To the contrary, all statements concerning the bill as discussed contained a provision that would "be applied only to accidents and occupational disease exposures which occur on or after January 1, 1980 and would not be applied retroactively to accidents or occupational diseases occurring prior to January 1, 1980." I refer you to the joint committee statements of S-802 and A-3071.

All statements made by labor, industry and members of the committees concerning the amendments were to the effect, very simply, that there would be a trade-off, that is, greater workers' compensation benefits to the more seriously disabled--and I don't agree with this--but the trade-off was the quid pro quo being the elimination or tightening of awards of workers' compensation based upon minor permanent partial disabilities.

With specific reference to the Hearing Bill, the trade-off was a greater payment to workers with substantial hearing losses, the quid pro quo, again, being the elimination of payment to those workers who had less disabling hearing losses.

Now, let's see how that is translated into what's happened and why we desperately need for A-1752 to be passed. It is obvious that A-3071, which is the Hearing Bill, was intended to apply only to those cases filed after its effective date of March of 1980. If not, we would have the situation which we do have today of elimination of payment for cases of hearing loss pending on December 31, 1979 for those workers did not meet the strict criteria set forth in the new Hearing Bill. However, there would be no quid pro quo by any award of greater benefits to the pending pre-1980 hearing loss claims who qualify under the stricter terms of the new Act. This, obviously, is both unconscionable and grossly unjust.

I can personally supply you, as a member of the Bar who is in court everyday, with any number of cases with hearing loss claims that happened to be listed by the luck of the draw by the Division of Workers' Compensation in November

and December of 1979 and were settled and paid with absolutely no problem. By the same token, I can supply you with pending hearing loss claims filed at the same time as these hearing loss cases, but, unfortunately for injured worker, not listed until January or February of 1980. Though, these pre-1980 claims were for the exact same injury and disability and for the same occupational exposure, in many cases in the same shop, they have not been paid on the basis of the fact that the carriers and self-insureds deemed A-3071 to have retroactive application. Unfortunately, the judges of compensation have taken the same tack. This is totally unjust.

Conclusive proof that a retroactive application of the Hearing Bill was not intended by the Legislature is found in the Committee Statement to the Hearing Bill, a copy of which I have attached on the last page of my presentation. It states, first of all, "the provisions of this bill are intended to provide an element of fairness to all parties concerned." Then, I underlined the next portion of it, what the committee which voted it out, what they wanted to do. It says, "Token awards for minimal hearing loss have been eliminated, but awards to employees incurring major losses have been increased." That is not what is happening today, ladies and gentlemen. What's happening is that they are paying those cases that meet the strict criteria of the Hearing Bill on the old rates. They have not increased the rates. By the same token, if you have a pre-1980 rate or a pre-1980 case that meets the requirements, the stricter requirements, you are not getting paid the quid pro quo. You are still being paid the lesser rates. If industry states, "Okay, we want it to relate back," let them come before, as I believe Mr. Kimberly said, he said the judges apply it, let them come before you categorically and say, "We want those cases that do meet the stricter requirements that were in existence on December 31, 1979, we want them to get the higher rates." Frankly, if you did that, while I don't agree with the Hearing Bill, I really could have no qualms. But, that is not what's happening. They're having their cake and eating it too.

As stated previously, if you read the committee statement, obviously, the committee intended the Hearing Bill to apply to only post-1980 cases, as neither industry nor any insurance company has come forth and has stated that it will pay any pre-1980 hearing loss case that meets the new strict requirements at the increased rate of compensation provided for in the 1980 legislation.

Simple justice demands that A-1752 be voted out of Committee and passed by the Legislature. I haven't gone into the merits of the Hearing Bill. You don't need any doctor to come here and tell you about the Hearing Bill. You don't have to know anything about threshold limits or hearing limits or hearing tests. It is a question of simple justice of an obvious mistake if you look at the statement of the committee. Obviously, the committee did not intend this new Hearing Bill to have a retroactive effect on pre-1980 cases.

ASSEMBLYMAN PATERO: I would just like to correct one statement, Mr. Goldberger. This is the introduction statement. This is not the committee statement. There is another statement. This is when the bill has been introduced.

MR. GOLDBERGER: This is taken, if I may show you where it is taken from, Mr. Patero--

ASSEMBLYMAN PATERO: Yes, but, that's probably the introduction statement.

MR. GOLDBERGER: This was the introductory statement of the Hearing Bill. But, that's where it was taken from. It was the introductory statement passed out by your committee.

ASSEMBLYMAN PATERO: Assemblywoman Brown has a question.

ASSEMBLYWOMAN BROWN: It has been stated that there have been a lack of appeals in this area. To what do you attribute this fact?

MR. GOLDBERGER: To the hope that the Legislature would correct this obvious deficiency in the Hearing Bill. I know I myself, as Judge Napier has indicated, I have written to the judges and I've pleaded with the judges. It is an expensive, long process to appeal a case. I have spoken to the judges. Everyone know--they don't live in a vacuum--that there is a pending bill in the Legislature that would correct the defect. That is the reason that there have been no appeals.

JUDGE NAPIER: Assemblyman Patero, at least one judge who handles a substantial amount of these cases in Warren County, in old cases, cases filed prior in 1979 and prior thereto, wherever practicable, has been applying the new standards under the Occupational Hearing Loss Bill, but in accordance with applying those standards, he is applying the new rates. As far as I know, there have been no appeals as to that.

MR. GOLDBERGER: I, frankly, did not know of that, Judge. I know of no judge and I know of no case--and obviously, Judge Napier knows better than I--of any award giving a quid pro quo of a higher rate. Because, obviously, if there is a higher rate, it is relatively fair. You're being consistent. What I'm trying to point out, and it is obvious to everyone, it is inconsistent. You are saying that you've got to meet a stricter requirement, but even if you do meet that, we're not going to pay you at the higher rate, but, on the other hand, we're eliminating all those cases that were paid formerly at the low rate.

ASSEMBLYMAN PATERO: Well, we'll be reviewing this matter with Judge Napier at the committee meeting. Thank you very much.

MR. GOLDBERGER: Thank you.

ASSEMBLYMAN PATERO: Next, we have Mr. Richard Meyer, New Jersey State Chamber of Commerce, Workers' Compensation Committee.

LEWIS APPLIGATE: Mr. Chairman, obviously, I am not Richard Meyer. I am Lewis Applegate, Vice-President of the State Chamber of Commerce and also Executive Director of the Chemical Industry Council of New Jersey.

Both organizations oppose the passage of this bill and strongly endorse waiting not only for more detailed information on this particular subject, but also on all the other areas of workers' compensation which were revised, now, a year ago.

I would like to stress that passage of the total workers' compensation revision, including the Hearing Loss Bill, was a major effort on the part of those of us who represent industry and I know that you, as legislators, often stick your necks out. I think several of us had our necks out many miles because we already have suffered, in insurance rates alone, an increase of \$108 million and that doesn't include the self-insurance people.

I would urge and the organizations I represent urge that we do wait until we have detailed data. The previous speaker made a rather flat statement that no cases were being settled on the new rate and we know that there are cases settled on the new rates, when the new standards are being used. That, we feel, is an administrative matter and can be taken care of administratively.

Therefore, we would urge you to, at least, hold up further consideration of this bill until the review period has been reached. Thank you.

ASSEMBLYMAN PATERO: Thank you very much, Mr. Applegate. Are there any questions? (no response) Thank you. The next speaker is Mr. Austin Trimmer, Executive Board member, New Jersey Legislative Committee, United States Steelworkers of America, AFL-CIO.

A U S T I N T R I M M E R: Mr. Chairman, members of the Committee, I am Austin Trimmer, an officer of Local 5503, United Steelworkers of America, located in Phillipsburg, New Jersey and have been employed by Ingersoll Rand for 30 years.

I am here to speak on behalf of the 1,876 members of our local. The materials used in the products that we produce at Ingersoll Rand, materials like Waspalloy, hastalloy, stainless steel, certain forgings and fabricated parts and certain tooling, plus the centrifugal testing of impellers, testing of our centrifugal compressors and our turbine compressors, along with the people that work in the foundry and use pneumatic hammers to chip casting, are habitually exposed to hazardous noise in their employment.

We have 120 members of Local 5503 who have hearing loss claims pending. Some of these people have 30 to 40 years of service with the company and with the backlog of cases in Warren County, some of those cases are over three years old. Under the new Hearing Loss law, they are being denied their claims because of the retroactive provision of the Hearing Loss Law. I urge this committee to release Assembly Bill 1752 to the full General Assembly so that the unresolved claims can be processed under the old law. Thank you.

ASSEMBLYMAN PATERO: I have just one question. Can you tell me, Phillipsburg, is that Warren County?

MR. TRIMMER: Yes.

ASSEMBLYMAN PATERO: Are the claims being held, the court hearings, or are they being processed?

MR. TRIMMER: They are being held up.

ASSEMBLYMAN PATERO: Are they being held up by the court or by the petitioner requesting it or are they just not scheduled to be heard?

MR. TRIMMER: They're being held up for some reason. The attorney sent letters to all the claimants and said that the claims are being held up.

ASSEMBLYWOMAN BROWN: Judge Napier referred specifically to Warren County and he said that the rates there are being settled in accordance with the new schedule, the cases were being settled that way.

JUDGE NAPIER: The criteria or compensability is based on this new Occupational Hearing Loss Law. The rates are based on the new rates, that is the rates applied in 1980. I think that is inconsistent, but I'm just pointing out that it is being done and I'm not necessarily right and the judge is not necessarily wrong. There has been no appeal on the point and it has been a resolution of this particular problem. In addition, where a worker continues in that particular plant, I see no reason why a claim could not be amended to bring them through the new rate period. So, you could not only apply the new criteria, but the new rate, since the exposure continues. Then, you could bring it up to that hiatus between January 1, when the new rate went into effect, and March 1, when the new criteria was established by the Legislature.

Since I'm on my feet, I think, maybe, I ought to address the issue raised by Mr. Marciante suggesting that the Department was less than diligent in collecting the data. I would point out to the Committee that the date for the

presentation of that to the Legislature is July 1 of this year and we were tooling up to meet that deadline. So, I think we're ahead of schedule since I am presenting some data. I'll give you the additional data. It doesn't change the picture, but I have a six year experience from June to November exclusive. We had 457 hearing loss cases and they averaged \$1427, which is keeping with the figures I gave you comparing one June with another June. It is interesting to note that prior to the adoption of this statute, 20% of the cases fell into the category of less than \$500, that is, the award. Now, under this new statute, we really don't have a sufficient reservoir, that is, cases that were filed after March 1, 1980, that have been already adjudicated. Only 10% are under \$500 and the balance of 90% are higher. So, I think the objective, through our discussions with the Committee, prior to the adoption of the Hearing Loss Bill, was to eliminate the smaller claims and provide greater compensation for the more seriously impaired and it seems to be following through.

ASSEMBLYMAN PATERO: Thank you very much, Mr. Trimmer.

MR. TRIMMER: Thank you.

ASSEMBLYMAN PATERO: The next speaker is Lorenzo "Doc" Oakley, United Auto Workers.

L O R E N Z O O A K L E Y: Mr. Chairman and members of the committee, my name is Lorenzo Oakley. I'm an international representative for the U.A.W. and also secretary-treasurer for the Industrial Union Council of the AFL-CIO, which represents thousands of workers in the State of New Jersey. The statement I'm about to make in support of A-1752 is a statement endorsed by the Industrial Union Council, as well as the U.A.W.

Before I read my statement, Mr. Chairman, I'm sort of concerned about what's happening. I don't know what the retroactive provisions of the agreement have to do with data. What is your data going to do about the retroactive provision of this bill? The data is to be used to examine the new law and how it has been effective. It doesn't have anything to do with the retroactive provision of the law. You know, I've heard that companies are going to be affected by what decision you make on this particular piece of legislation. The companies, if new companies come to this state, they're going to be affected by the new law, not by the retroactive provisions of the law because they haven't been here. So, you know, it's apples and oranges for me. I don't understand the relationship to A-1752.

Now, to go on with my prepared statement, with the passage of the 1980 Workers' Compensation Act, the Legislature indicated its desire to increase the award to more serious claims while eliminating the smaller claims for inconsequential injuries. This tendency is most aptly illustrated in the change in the hearing loss statute. The 1980 hearing loss statute takes deep cuts into what were once considered valid and compensable claims. Today, those claims are no longer justified as compensable hearing loss claims, although no one has doubted the validity of the loss of hearing in these individuals.

Due to the tremendous change in the standards of compensability in the hearing loss area, combined with the retroactivity aspect of the bill, a dilemma has resulted for many once valide claim petitions. There are hundreds and perhaps thousands claim petitioners who, perhaps, as long as four years ago, filed a claim for a hearing loss. At that time, those individuals had compensable hearing loss claims and fully expected to recover some compensation for their injury. All these

workers had their personal expectations dashed by the retroactivity aspect of the 1980 hearing loss bill.

As well as the unfairness of the application of the 1980 hearing loss statute to these individuals, there is a practicality problem too. Most of these claimants already have hearing loss examinations and the form of the examination is not the same under the 1980 statute as it was under the previous statute. For instance, the hearing loss statute for 1980 requires measurements of hearing loss at the frequencies of 1,000, 2,000 and 3,000 hertz. The earlier statute did not require measurements at those same frequencies. So, the doctors' reports did not include them. This would then necessitate a reexamination, which would put the petitioner through undue, unnecessary and unreasonable expense plus inconvenience.

A new exam would also be required because under the 1980 statute, the petitioner must have been removed from the hazardous noise environment for four calendar weeks and that was not done for the previous examination. It is important to note, as well, that the new hearing loss statute requires exposure for a certain number of hours per day at certain noise levels to determine whether hazardous noise exists. In many of these previously filed claim petitions, conditions are no longer the same as they were when they were exposed to noise and/or the place of employment where the hazardous noise was no longer exists.

Now, it would seem that the last paragraph of the new statute solves this problem with its statement that the Act applies where "practicable." Therefore, it would seem that in cases where the new statute is not practicable, the old statute should apply. However, for the most part, judges of the compensation court have not chosen to use that interpretation, hence the 1980 statute has been applied in a retroactive manner.

The Legislature has taken a rather extreme measure in the new statute by stating that a loss of less than thirty decibels of hearing actually will perform as a bar against being compensated for any hearing loss. Now, this extreme measure presents no problem for prospective enforcement and application. However, when applied retroactively and combined with all the other aspects of the new hearing loss bill, a situation is created where many individuals who do have a measurable and demonstrative hearing loss are not going to be allowed to collect on claims which were, when filed, valid.

Now, these aren't cases of a worker with a scratch on the finger or an irritating hangnail. These are cases with individuals who have a daily problem with hearing. These individuals have to crank up their television so they can hear what is going on. These are the people who have to constantly ask others to speak up on the telephone. These are the people who, on the job, have to constantly ask, "What did you say?"

Perhaps in the future, claim petitioners will accept that this type of hearing loss is no longer compensable. However, those individuals who have filed for compensation realize that this was a compensable claim, have a legitimate interest in receiving compensation and that the only reason why they are unable to collect that compensation is because the workers' compensation courts were unable to process their claims quickly enough; that is, before the new Act went into effect. These workers should not lose their rights because the workers' compensation courts are backed up. It is unfair to make these claim petitioners suffer and lose their claims due to the deficiencies in the workers' compensation court system.

Passage of bill 1752 will not hurt anybody, yet help hundreds and perhaps thousands of individuals. It will eliminate the retroactivity aspect of the 1980 hearing loss statute and restore the rights of individuals which were improperly and unreasonably taken away from them. All this bill does is restore the status quo for those individuals. It does not change the law prospectively and the legislative intent for future cases will remain intact. It merely restores a right of many individuals and takes nothing away from anyone. It is a positive action to pass the bill which helps so many whose legitimate claims have been unfairly and abruptly rescinded. Mr. Chairman, I want to take this opportunity to thank you for the opportunity to testify before your Committee.

ASSEMBLYMAN COWAN: I think, if you will wait a second, Doc, I think we may have a question of you. Dan?

MR. BEN-ASHER: Doc, do you know if there are any appeals of decisions where judges have apparently decided not to take into account the "impracticable" language?

MR. OAKLEY: Well, again, I think most people know that this measure has been introduced and they are waiting to see the results of that before they take any action. As was previously stated, that is an expensive proposition. What you would be forcing people to do--the average working guy or girl doesn't have the kind of money to appeal cases. So, they are just waiting and hoping that the Legislature will restore the rights that they were entitled to. You know, this is the only thing that I find in that bill that is retroactive. Why aren't some of the benefits retroactive? Here, the only thing that you are doing is trying to take something away from people. If they would have made the whole bill retroactive to that particular date, it would make a little bit more sense. I don't think it is a good bill to begin with, but that would have made more sense than just picking out one section of that legislation and saying, "Hey, we're going back to an earlier date." It just doesn't seem fair to those people who had to wait and, in some cases, people have filed cases and have collected under the old legislation and filed at a later date and some people still have cases pending.

Another thing while I'm sitting here waiting, this bill was a companion bill of the major workers' compensation legislation. That's why we were really so busy fighting the major legislation that this sort of slipped by and, you know, I was down here on many occasions and nobody ever even talked about the hearing loss legislation because it was separated from the major piece of legislation.

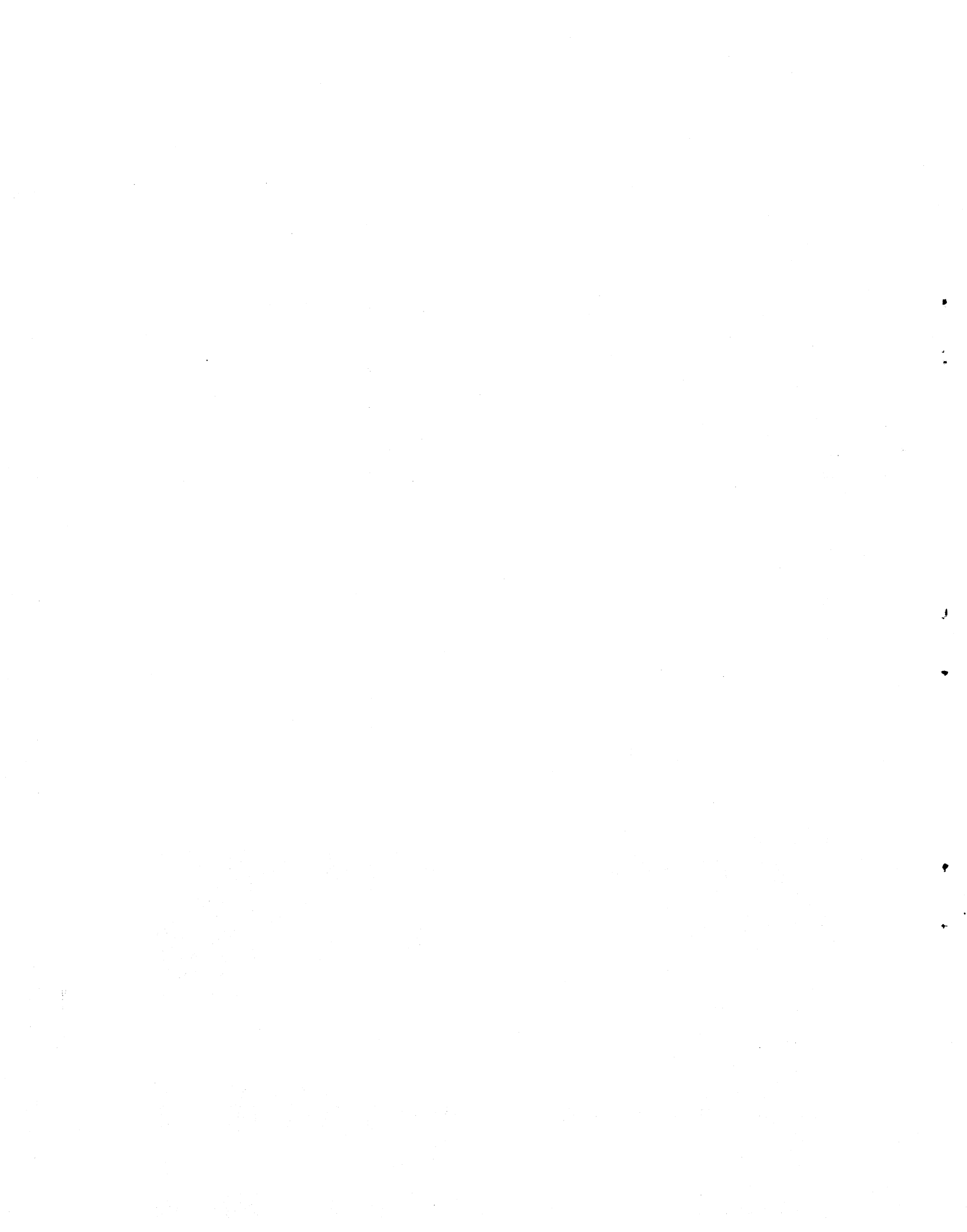
ASSEMBLYMAN PATERO: What we tried to do with this hearing bill was to make sure that we had certain guidelines we could follow, because, I think you are aware that one person would go to one doctor for one hearing test and another one would go to another doctor for a hearing test and it would have to be up to the judge to make a decision under which method he gets awarded for and that's the confusion that we were trying to correct.

MR. OAKLEY: And you corrected that with your legislation. The only thing that we're objecting to is the retroactivity feature of the bill. You know, I don't personally think that the bill is a good bill, but it is the law and certainly the law shouldn't be designed to take away the rights of people. As I said while you were absent, there are some people who filed four years ago whose cases haven't been heard and people who filed two years ago have already collected. Now, certainly, there isn't any justification in that. I suggested too, why this one piece of disability in the legislation is retroactive and all the others are effective as of the passage

of the bill, I don't know. Now, why didn't you make all the benefits retroactive? Then, it would really make sense to me. But, here, you are taking one disability out of all the disabilities that apply and making that retroactive.

ASSEMBLYMAN PATERO: Okay, any other questions. (No response) Thank you very much. I call this Committee hearing to a close. I would like to thank everyone for coming here and also the members of my Committee for coming and appearing here to listen to the testimony here today. Thank you.

(Hearing concluded)



United Steelworkers of America, AFL-CIO

LOCAL UNION 5503

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The five types of jet engines that we use at Ingersoll Rand to power compressors are the same type that is used to power airplanes, from the small Lear Jet to the 727 & 747. Anyone who has ever been near a jet at take-off knows the noise level they produce.

Statement by Assemblyman Pellecchia on A-1752

Assembly bill 1752 should be favorably reported by the Committee and reviewed and adopted by the Assembly. I believe that the present law governing compensation for hearing loss is inequitable, and may also be unconstitutional, because it prevents workers from collecting claims for hearing losses to which they would have been entitled under the provisions of the old law.

It is grossly unfair that workers who filed claims when the old law was in effect and whose cases were pending on the effective date of the new law will be subject to the more restrictive requirements now used to determine otological disability. This kind of treatment is an open invitation to expensive litigation. A-1752 would grant workers who filed claims under the provisions of the old statute the right to collect compensation as provided in that law. As you are no doubt aware, the new statute eliminates the 4000 dB hearing threshold level and consequently workers who had a legitimate right to file for compensation, and did so, suddenly found they no longer have valid claims. This is hardly equitable. Those who must work in noisy environments should not have their rights eroded.

There is another aspect of the problem I would like to discuss. Prior to 1977 a retired disabled worker collecting a disability pension could receive a second such pension if he could prove a second casually related disability. This is no longer the case. Payments for the second disability may now be set-off from payments made for the first disability. This is unfair to workers who retired before the law was changed. There are now several cases pending before the Supreme Court on this matter.

Let me again affirm my support for A-1732. The new law concerning compensation for hearing loss does a disservice to workers who filed under the old law. It is time to rectify that injustice.

Statement by
Richard Meyer, Chairman, New Jersey State Chamber of Commerce
Worker's Compensation Task Force

Mr. Chairman, members of the Committee, my name is Richard Meyer representing the New Jersey State Chamber of Commerce.

I, and the people I represent, thank you for the opportunity to outline the reasons why we object to the passage of A-1752 which deals with occupational loss of hearing.

First, by way of history, S-3362, better known as the loss of hearing bill, was passed by a wide margin by both houses of the Legislature and signed into Law by the Governor on 1/10/80. A real milestone in the history of Worker's Compensation for the State of New Jersey. This did not happen overnight. It took four years and over this lengthy process all interested parties had an opportunity to express their views.

The Legislature was commended for its courage, foresight, and perseverance for embracing such a controversial, complex, and sensitive subject. Courage, because it would cause a financial loss or reduction in benefits to some workers as well as a reduction or loss in legal fees. Perseverance, because of the complex, technical aspects. Foresight, because the Legislature had the wisdom to include the oversight provision.

Although I have devoted numerous hours, days, and years on the subject, the Legislature still wanted to measure the impact in 18 months or July, 1981. However, this bill, A-1752, was introduced on 6/9/80, less than 3 months after the effective date.

Why was S-3362 necessary? Because New Jersey was the only State in the Union without standards to measure occupational loss of hearing. A State that had more loss of hearing claims than any other State and paid more per claim to litigate the claim than any other State.

Statement by Richard Meyer, Chairman, New Jersey State Chamber of Commerce Worker's Compensation Task Force

A State that litigated claims from a neighboring State (New York-New Jersey Port of Authority) because New Jersey had no standards. Despite the numerous claims and the highest cost per claim, New Jersey was only paying a \$40 rate which generated a maximum of \$8,000 for total loss of hearing. Today, the maximum rate is \$18,600.

S-3362 gives New Jersey, for the first time, good standards to measure occupational loss of hearing and a rate which is fair and equitable.

Gentlemen, we should not be here today to upset, eliminate, delete, or destroy any portion of S-3362.

I do understand that certain interest groups parade horror stories before the committee to revive the "old system" which was more lenient. Why? Because from a very selfish standpoint to line their pockets. Without standards we have controversy. With controversy we have litigation. As we all know, New Jersey Worker's Compensation is being litigated to death at the expense of the worker.

I strongly suggest this committee not reverse itself at this juncture but wait to review the facts at the appropriate times. Do not discard or undo all the diligent or admirable work this Legislature has done in favor to a few who are interested in perpetuating the "old system" for their own benefit.

January 29, 1981

