

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Elwaine F. Pomeroy at
Chairperson

10:00 a.m./~~pm~~ on January 18, 1983 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~ were: Senators Pomeroy, Winter, Burke, Feleciano, Gaar, Gaines, Hein, Mulich, Steineger and Werts.

Committee staff present: Mary Torrence, Revisor of Statutes
Mike Heim, Legislative Research Department
Mark Burghart, Legislative Research Department

Conferees appearing before the committee:

Fred Allen, Kansas Association of Counties
Don Rectenwald, Kansas Emergency Preparedness Association, Salina, Kansas
Chris McKenzie, League of Kansas Municipalities
Annette Eslick, City Attorney's Office, Kansas City, Kansas
Kathleen Sebelius, Kansas Trial Lawyers

Senator Feleciano moved that the minutes of January 12 and 17, 1983, be approved;
Senator Mulich seconded the motion, and the motion carried.

Senate Bill 14 - Emergency preparedness immunity.

The chairman reminded the committee this bill came out of an interim study.

Fred Allen, Kansas Association of Counties, spoke in support of the bill. He stated they have not had problems along this line in the past and hopefully won't have any problem in the future. He said it is a reasonable immunity from liability under the Tort Claims Act.

Don Rectenwald, president of the Kansas Emergency Preparedness Association, testified the association is in support of this bill as written at this time. He said the bill will give them some security. A committee member inquired if they had experienced any difficulty getting insurance in the past. Mr. Rectenwald replied that they did not; that they were under the Tort Claims Act in the counties, and that is a means of protection if there is a large disaster.

Chris McKenzie, with the League of Kansas Municipalities, presented the committee with a copy of proposed changes to the bill (See Attachment #1). Mr. McKenzie explained the proposed changes to the committee. He stated their official position would be to remove all liability.

Annette Eslick, from the city attorney's office in Kansas City, Kansas, spoke in support of the amendment presented by the League of Kansas Municipalities. She stated they do not support SB 14 as it is drafted. She said the league's proposals clears up the difference between the Tort Claims Act and the Emergency Preparedness Act.

The chairman inquired if any committee members had a request for introduction of committee bills. Since there were none, the chairman then asked if anyone else had a request for introduction of committee bills. There were none.

Senate Bill 34 - Nonpartisan selection of judges.

The chairman directed the committee's attention to the copy of two statutes, K.S.A. 20-2903 and K.S.A. 20-2905 (See Attachment #2). He discussed the statutes and their relationship to the bill. The chairman reviewed the hearing held on the

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on January 18, 1983

SB 34 (continued)

bill yesterday. Following committee discussion, Senator Werts moved to amend Section 3 of the bill to make the effective date upon publication in the Kansas Register; Senator Burke seconded the motion, and the motion carried. Following further discussion, Senator Burke moved to report the bill favorably as amended; Senator Werts seconded the motion, and the motion carried.

Senate Bill 14 - Emergency preparedness immunity.

The chairman inquired if the committee would like to take up SB 14. The consensus was that they would like to wait. A committee discussion was held on the policy question of whether the governmental entity in all cases should be responsible even when employee acted with bad faith; and a further policy question would be to give tort immunity to both employer and employee.

Kathleen Sebelius, Kansas Trial Lawyers, presented a request for introduction of a committee bill dealing with workers' compensation payments concerning permanent partial disability payments (See Attachment #3). She explained the proposal to the committee. During discussion of the bill, the committee felt the proposed bill had some drafting problems that needed correcting. Senator Gaines then moved that the bill be introduced as a committee bill; Senator Steineger seconded the motion, and the motion carried.

Kathleen Sebelius presented a second proposal that deals with the workers' compensation act concerning redemption of liability. She explained the proposed legislation to the committee (See Attachment #4). During discussion, the committee pointed out a drafting problem to be corrected. Senator Gaines made a motion to introduce the bill and refer it to the appropriate committee; Senator Mulich seconded the motion, and the motion carried.

Kathleen Sebelius explained her third proposal would allow private individuals to bring action against an insurance company for unfair or deceptive act or practices by adding a subsection to K.S.A. 40-2404 (See Attachment #5). Committee discussion with her followed. A member of the trial lawyers will be brought in to further discuss the proposal. Drafting problems also were discussed.

The meeting adjourned.

1-18-85

GUESTS

SENATE JUDICIARY COMMITTEE

NAME

ADDRESS

ORGANIZATION

NAME	ADDRESS	ORGANIZATION
GERALD I. SMYTH	Rt. 1, SOLOMON	SELF
Lon Butler	Box 687, Newton, Ks.	Harvey Co. Emer. Prep.
DON RECTENWALD	SALINA, KANSAS	PRESIDENT KANSAS EMERGENCY PREP ASSOC
Rini C. Dewey	Wichita, Ks.	Sedgewick County
Fred Allen	Topeka	K. A. C.
Jay Cole	Topeka	The Adjutant General's
Larry D. Hamby		Sen. Feineger
David Kase	Mission, Ks.	FARMERS INTS. GROUP
Annette C. Clink	Kansas City, MO	City Attorney's Office
Chris McKenzie	Topeka	League of K's Men
M. Hoover	"	Capital Journal

League of 'ausse
Municipalities
1/15/83

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SENATE BILL No. 14

By Special Committee on Judiciary

Re Proposal No. 38

12-20

0017 AN ACT concerning emergency preparedness activities; relating
0018 to immunity from liability for certain damages; amending
0019 K.S.A. 48-915 and 48-934 and repealing the existing sections.

0020 *Be it enacted by the Legislature of the State of Kansas:*

0021 Section 1. K.S.A. 48-915 is hereby amended to read as fol-
0022 lows: 48-915. (a) ~~Neither the state nor any political subdivision~~
0023 ~~of the state, nor the agents or representatives of the state or any~~
0024 ~~political subdivision thereof, shall~~ *The state and political sub-*
0025 *divisions of the state, and their agents and representatives, shall*
0026 *not be liable for death, personal injury or property damage*
0027 *sustained by any person appointed or acting as a volunteer*
0028 *worker, or member of any agency, engaged in emergency pre-*
0029 *paredness activities. The foregoing This subsection shall not*
0030 *affect the right of any person to receive benefits or compensation*
0031 *to which he or she the person might otherwise be entitled under*
0032 *the workmen's compensation law or, any pension law or any act*
0033 *of congress.*

0034 (b) ~~Whenever a proclamation is issued declaring~~ *During the*
0035 *existence of a state of disaster emergency proclaimed pursuant to*
0036 *K.S.A. 48-924, neither the state nor any political subdivision of*
0037 *the state nor, except in cases of willful misconduct, gross negli-*
0038 *gence or bad faith, the employees, agents, or representatives of*
0039 *the state or any political subdivision thereof, nor any volunteer*
0040 *worker, or member of any agency, engaged in any emergency*
0041 *preparedness activities, complying with or reasonably attempt-*
0042 *ing or a state of local disaster emergency proclaimed pursuant to*
0043 *K.S.A. 48-932, the following shall not be liable for death, per-*
0044 *sonal injury or property damage resulting from compliance with*

neither the state nor any
political subdivision of the
state nor, except in cases
of willful misconduct, gross
negligence or bad faith, nor
the employees, agents, or
representatives of the state
or any political subdivision
thereof, nor any volunteer
worker, or member of any
agency, engaged in any
emergency preparedness
activities, complying with
or reasonably attempting

Atch. 1

0045 ~~or reasonable attempts~~ to comply with this act, or any proclama-
 0046 tion, order, rule or regulation promulgated pursuant to the pro-
 0047 visions of this act, or pursuant to any ordinance relating to
 0048 blackout or other precautionary measures enacted by any politi-
 0049 cal subdivision of the state, shall be liable for the death of or
 0050 injury to persons, or for damage to property, as a result of any
 0051 such activity performed during the existence of such state of
 0052 disaster emergency or other such state of emergency:

Keep

- 0053 (1) ~~The state;~~
- 0054 (2) ~~political subdivisions of the state; and~~
- 0055 (3) ~~except in cases of willful misconduct, gross negligence or~~
 0056 ~~bad faith, employees, agents and representatives of the state or~~
 0057 ~~of political subdivisions of the state and volunteer workers and~~
 0058 ~~members of any public or private agency engaged in emergency~~
 0059 ~~preparedness activities.~~

0060 Sec. 2. K.S.A. 48-934 is hereby amended to read as follows:
 0061 48-934. Law enforcement officers, military personnel, or other
 0062 persons authorized to assist them, while engaged in maintaining
 0063 or restoring the public peace or safety or in the protection of life
 0064 or property during a state of disaster emergency proclaimed
 0065 under K.S.A. 48-924 or a state of local disaster emergency pro-
 0066 claimed under K.S.A. 48-932, shall have all powers, duties and
 0067 immunities of ~~peace law enforcement~~ officers of the state of
 0068 Kansas in addition to all powers, duties and immunities now
 0069 otherwise provided by law and ~~The officers, personnel and~~
 0070 ~~other persons shall be immune from civil and criminal liability~~
 0071 ~~for acts reasonably done by them in the performance of their~~
 0072 ~~duties so long as they act without malice and without the use of~~
 0073 ~~excessive or unreasonable force. All such personnel~~ The officers,
 0074 personnel and other persons shall have the authority to enforce
 0075 any and all ordinances of any municipality within an area af-
 0076 fected by disaster as indicated in the proclamation of a state
 0077 disaster emergency issued under K.S.A. 48-924, and for such or
 0078 48-932. For that purpose, all such personnel they shall be
 0079 considered to be authorized officers of said the municipality.

0080 Sec. 3. K.S.A. 48-915 and 48-934 are hereby repealed.
 0081 Sec. 4. This act shall take effect and be in force from and
 0082 after its publication in the statute book.

20-2903. District judicial nominating commission; establishment; composition; chairperson, appointment, duties; purpose of commission. (a) There is hereby established in each judicial district a district judicial nominating commission, which shall consist of an equal number of lawyers and

non-lawyers. The lawyer members of each nominating commission shall be elected as provided in K.S.A. 20-2904, and the non-lawyer members shall be appointed as provided in K.S.A. 20-2905. The chairperson of the commission shall be a justice of the supreme court or a district judge who is not a judge in such judicial district, to be appointed by and serve at the pleasure of the chief justice of the supreme court. It shall be the duty of the chairperson to preside at all meetings of the commission, but he or she shall not be entitled to vote.

(b) The purpose of the district judicial nominating commission shall be to nominate persons for appointment to the office of judge of the district court in a judicial district. Any person so nominated shall have the qualifications prescribed by law for such office, and shall be a person of recognized integrity, character, ability, experience and judicial temperament, to the end that persons serving as judges of the district court will be the best qualified therefor.

History: L. 1974, ch. 137, § 3; L. 1976, ch. 145, § 97; Jan. 10, 1977.

20-2905. Same; non-lawyer members; numbers; qualifications; appointments; certification. (a) The appointments of non-lawyer members of a district judicial nominating commission shall be made as follows:

(1) In a judicial district consisting of a single county, each member of the board of county commissioners of such county shall appoint one non-lawyer to serve as a member of the nominating commission.

(2) In a judicial district consisting of two (2) counties, the board of county commissioners of each such county shall appoint two (2) non-lawyers to serve as members of the nominating commission.

(3) In a judicial district consisting of three (3) or more counties, the board of county commissioners of each such county shall appoint one non-lawyer to serve as a member of the nominating commission.

Each non-lawyer member of the nominating commission shall be a qualified elector of the county from which he or she is appointed.

(b) All appointments of non-lawyers to

serve as members of the first district judicial nominating commission of a judicial district shall be made and certified to the clerk of the supreme court prior to February 15 of the year following the general election at which the nonpartisan selection of judges of the district court is approved. Thereafter, all appointments of non-lawyers to serve for full terms on the commission shall be made and certified to the clerk of the supreme court prior to February 15 of the year in which such terms of office commence.

History: L. 1974, ch. 137, § 5; L. 1976, ch. 145, § 99; Jan. 10, 1977.

1-18-73
3 ①

PERMANENT PARTIAL DISABILITY PAYMENTS

AN ACT concerning certain rates of workers' compensation payments; amending K.S.A. 44-510e:

Section 1. K.S.A. 44-510e is hereby amended to read as follows:

(a) . . . The amount of weekly compensation for permanent partial disability shall be determined: (1) By multiplying the average gross weekly wage of the workman prior to such injury by the percentage of permanent partial general disability as determined under this subsection (a).

(2) By then multiplying the result so obtained by sixty-six and two-thirds percent (66 2/3%).

(3) THE AMOUNT OF WEEKLY COMPENSATION SHALL BE REVISED ON AN ANNUAL BASIS, SUCH TO BE ON THE DATE OF THE REVISION OF THE STATE'S AVERAGE WEEKLY WAGES AS PROVIDED IN K.S.A. 44-511(d) and 44-704(c). THE WORKMAN'S WEEKLY COMPENSATION SHALL BE REVISED IN ACCORDANCE WITH THE PERCENTAGE INCREASE OR DECREASE IN THE STATE'S AVERAGE WEEKLY WAGE. IN CASES WHERE THE WORKMAN'S WEEKLY COMPENSATION RATE IS THE MAXIMUM AS PROVIDED UNDER K.S.A. 44-510(c), SUCH NEW WEEKLY COMPENSATION RATE WILL EQUAL THE MAXIMUM WEEKLY COMPENSATION OR RATE FOR THAT YEAR AS PROVIDED IN K.S.A. 44-511(d).

The area in caps is the proposed new language.

section upheld. *Crouse v. Wallace Manufacturing Co.*, 207 K. 826, 828, 486 P.2d 1335 (1971).

3. Upon second injury workman is entitled to compensation under section only when the effect of the two result in total permanent injury. *Crouse v. Wallace Manufacturing Co.*, 207 K. 826, 828, 486 P.2d 1335 (1971).

4. Compensation awarded for temporary total disability arising from traumatic neurosis directly traceable to scheduled injury. *Berger v. Hahner, Foreman & Cale, Inc.*, 211 K. 541, 544, 545, 552, 506 P.2d 1175.

5. Award of temporary total disability in addition to award for scheduled injury authorized. *Bergemann v. North Central Foundry, Inc.*, 215 K. 685, 687, 689, 691, 527 P.2d 1044.

6. Fact that primary injury is scheduled injury does not bar workman's recovery for general bodily disability. *Reese v. Gas Engineering and Construction Co.*, 216 K. 542, 547, 532 P.2d 1044.

7. Award for permanent partial general bodily disability held proper under evidence. *Reese v. Gas Engineering and Construction Co.*, 219 K. 536, 537, 538, 540, 548 P.2d 746.

8. Award of permanent total disability affirmed; not limited by this section. *Hardman v. City of Iola*, 219 K. 840, 841, 842, 844, 549 P.2d 1013.

9. Award hereunder remanded to award of total permanent disability; sufficiency of evidence. *Reichuber v. Cook Well Servicing*, 220 K. 93, 551 P.2d 810.

10. Phrase "loss of the use" construed to mean impairment of function award based on functional disability affirmed. *Gross v. Herb Lungren Chevrolet, Inc.*, 220 K. 585, 586, 587, 552 P.2d 1360.

11. Applied; functional disability as test for determining award for permanent partial disability (dissenting opinion). *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 K. 191, 200, 558 P.2d 146.

12. Scheduled injuries as listed in this section not applicable to occupational disease cases; application of 44-510e. *Schubert v. Peerless Products, Inc.*, 223 K. 288, 293, 573 P.2d 1009.

13. Applied in construing former provision of 44-510f (L. 1974, ch. 203, sec. 16). *Boyd v. Barton Transfer and Storage*, 2 K.A.2d 425, 428, 580 P.2d 1366.

14. Apportionment of award between employer and workmen's compensation fund must take into account "work disability" and "functional disability" where both are involved. *Razo v. Erman Corp.*, 4 K.A.2d 473, 474, 608 P.2d 1025. Reversed: 228 K. 491, 618 P.2d 1161.

15. Employee limited to relief under 44-528 for settlement and award obtained through fraud of employer. *Yocum v. Phillips Petroleum Co.*, 228 K. 216, 217, 612 P.2d 699.

16. Award of partial disability following rehabilitation program must reflect extent worker's ability to perform work of same type and character being done when injured has been reduced. *Antwi v. C-E Industrial Group*, 5 K.A.2d 53, 58, 61, 612 P.2d 656.

17. General rules relating to appellate scope of review are reviewed and applied. *Crabtree v. Beech Aircraft Corp.* 5 K.A.2d 440, 445, 618 P.2d 849. Reversed: 229 K. 440, 625 P.2d 453.

18. Award of permanent partial loss was supported by sufficient evidence; affirmed. *Shank v. Mid-America Drilling Co.*, 5 K.A.2d 618, 619, 620, 621 P.2d 1019.

44-510e. Compensation for temporary partial or permanent partial general disabili-

ties; compensation terminated by death; limitation on total compensation; other remedies excluded. (a) Should the employer and the employee be unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 510d, as amended, the amount of compensation shall be settled according to the provisions of the workmen's compensation act as in other cases of disagreement: *Provided*, That in case of temporary or permanent partial general disability not covered by such schedule, the workman shall receive weekly compensation as determined in this subsection (a) during such period of temporary or permanent partial general disability not exceeding a maximum of four hundred fifteen (415) weeks. Weekly compensation for temporary partial general disability shall be sixty-six and two-thirds percent (66 $\frac{2}{3}$ %) of the difference between the average gross weekly wage that the workman was earning prior to such injury as provided in the workmen's compensation act and the amount he is actually earning after such injury in any type of employment, such weekly compensation in no case to exceed the maximum as provided for in K.S.A. 44-510c, as amended. Permanent partial general disability exists when the workman is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, as amended. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the workman to engage in work of the same type and character that he was performing at the time of his injury, has been reduced. The amount of weekly compensation for permanent partial general disability shall be determined: (1) By multiplying the average gross weekly wage of the workman prior to such injury by the percentage of permanent partial general disability as determined under this subsection (a); and (2) by then multiplying the result so obtained by sixty-six and two-thirds percent (66 $\frac{2}{3}$ %). The amount of weekly compensation for permanent partial general disability so determined shall in no case exceed the maximum as provided for in K.S.A. 44-510c, as amended. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such in-

1-18-83 (2)
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REDEMPTION OF LIABILITY

AN ACT concerning lump sum payment of awards; amending K.S.A. 44-531:

Section 1. K.S.A. 44-531 is hereby amended to read as follows: Where all parties agree to the payment of all or any part of compensation due under the workmen's compensation act or under any award or judgment, and where it has been determined at a hearing before the director or an assistant director that it is for the best interest of the injured employee or the dependents of a deceased employee, or that it will avoid undue expense, litigation or hardship to any party or parties, the director may permit the employer to redeem all or any part of his liability under the workmen's compensation act by the payment of compensation in a lump sum. WHERE PAYMENTS UNDER AN AWARD HAVE BEEN MADE FOR NOT LESS THAN SIX (6) MONTHS, THE WORKERS' COMPENSATION DIRECTOR MAY, WHEN HE, IN HIS SOUND DISCRETION, DETERMINES IT IS FOR THE BETTER INTEREST OF THE INJURED EMPLOYEE OR THE DEPENDENTS OF A DECEASED EMPLOYEE, REQUIRE THE EMPLOYER TO REDEEM ALL OR ANY PART OF HIS LIABILITY UNDER SUCH AWARD BY THE PAYMENT TO THE WORKMAN, OR THE DEPENDENTS OF THE DECEASED WORKMAN, IN A LUMP SUM. The employer shall be entitled to an eight percent (8%) discount on the amount of any such lump sum payment, exclusive of any compensation due as of the date of such lump sum payment. Upon paying such lump sum the employer shall be released and discharged of and from all liability under th workmen's compensation act for that portion of the employer's liability redeemed under this section.

The area in caps is the proposed new language.

Atch. 4

8. Applied; failure to file supersedeas bond authorized claimant to serve written demand under 44-512a. *Kelly v. Phillips Petroleum Co.*, 222 K. 347, 351, 352, 354, 566 P.2d 10.

44-530. Staying proceedings upon an award. In any proceedings upon the application of a workman for judgment against his employer upon an award hereinbefore provided and before judgment has been granted, the employer may stay proceedings upon such application by filing with the clerk of said district court a bond to be approved by the clerk of said court undertaking to secure the payment of the compensation as in said award provided, or by filing with said clerk a certificate of a licensed or authorized insurance company or reciprocal or interinsurance exchange or association that the amount of compensation to the workman is insured by it.

History: L. 1927, ch. 232, § 30; June 30.

Source or prior law:

L. 1911, ch. 218, § 30; L. 1917, ch. 226, § 18; R.S. 1923, 44-530.

Research and Practice Aids:

Bond to stay lump sum award, *Vernon's Kansas Forms* § 9935.

CASE ANNOTATIONS

Revisor's Note:

Explanation, see Revisor's Note under article title, ch. 44, art. 5.

1. Section construed with 44-529, filing of supersedeas bond not authorized to stay payment of compensation (see also 1961 amendments to 44-556). *Teague v. George*, 188 K. 809, 811, 813, 814, 365 P.2d 1087 (1961).

2. Giving of stay bond prevents judgment becoming effective as such; remains an award which does not survive death. *Jackovich v. Armour & Co.*, 132 K. 656, 660, 296 P. 708 (1931).

3. Cited in considering limitation on rights of appeal. *Norman v. Consolidated Cement Co.*, 127 K. 643, 650, 274 P. 233 (1929).

4. Bond provided when employer's financial ability to pay questioned; claimant may thereafter have award reviewed and increased. *Doss v. Cornelson & Kelly*, 124 K. 631, 632, 261 P. 584 (1927).

5. Indemnity bond; judgment against insolvent employer; casualty company as garnishee. *Blanton v. Cotton Mills Co.*, 103 K. 118, 119, 172 P. 987 (1918).

6. Mentioned; appeal to district court from examiner's award when review pending before director ineffectual. *Harper v. Coffey Grain Co.*, 192 K. 462, 464, 388 P.2d 607 (1964).

7. Mentioned; "self-insurer" construed for interpretation of 44-556; dissent. *Scammahorn v. Gibraltar Savings & Loan Assn.*, 195 K. 220, 221, 222, 223, 224, 404 P.2d 165 (1965).

8. Self-insurer required to file bond. *Griffith v. State Highway Commission of Kansas*, 203 K. 672, 674, 678, 456 P.2d 21 (1969).

9. Failure to file bond within time not jurisdictional prerequisite to perfection of appeal. *Boyd v. Yellow Freight Systems, Inc.*, 214 K. 797, 799, 522 P.2d 395.

10. Applied; failure to file supersedeas bond authorized claimant to serve written demand under 44-512a. *Kelly v. Phillips Petroleum Co.*, 222 K. 347, 351, 352, 566 P.2d 10.

44-531. Redemption of liability; lump-sum payment of award. (a) Where all parties agree to the payment of all or any part of compensation due under the workmen's compensation act or under any award or judgment, and where it has been determined at a hearing before the director or an assistant director that it is for the best interest of the injured employee or the dependents of a deceased employee, or that it will avoid undue expense, litigation or hardship to any party or parties, the director may permit the employer to redeem all or any part of his liability under the workmen's compensation act by the payment of compensation in a lump sum. The employer shall be entitled to an eight percent (8%) discount on the amount of any such lump sum payment, exclusive of any compensation due as of the date of such lump sum payment. Upon paying such lump sum the employer shall be released and discharged of and from all liability under the workmen's compensation act for that portion of the employer's liability redeemed under this section.]

(b) No lump sum awards shall be rendered under the workmen's compensation act except as provided in subsection (a) of this section, in cases of remarriage of a surviving spouse as provided in K.S.A. 44-510b, as amended, in cases involving compensation due the workman at the time the award is rendered as provided in K.S.A. 44-525, as amended, and in cases of past due compensation as provided in K.S.A. 44-529.

History: L. 1927, ch. 232, § 31; L. 1955 ch. 250, § 8; L. 1974, ch. 203, § 30; July 1

Source or prior law:

L. 1911, ch. 218, § 33; L. 1917, ch. 226, § 19, R.S. 1923, 44-531.

Research and Practice Aids:

Workmen's Compensation 1005.
Hatcher's Digest, Workmen's Compensation §§ 65, 69.

C.J.S. *Workmen's Compensation* § 337.
Application for redemption of liability, *Vernon's Kansas Forms* § 9936.

Lump sum payment, *Kansas Practice Methods* § 99.
Modification of award, *Kansas Practice Methods* § 993.

Law Review and Bar Journal References:

Mentioned in 1953-55 survey of act, Albert M. Ross, K.L.R. 325, 328 (1955).

Mentioned in discussion of second injury fund (H

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KSA 40-2404 (9)(o)

In addition to the powers of the Commissioner to enforce this act, the provisions of this subpart may be enforced by any person damaged by an unfair or deceptive act or practice so described, and such persons may recover their reasonable attorney fees if they prevail in the action. For the purposes of a private action, it is not necessary to prove that the act was done with such frequency as to indicate a general business practice.

40-2404. Same; certain methods, acts or practices defined as unfair. The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

(1) *Misrepresentations and false advertising of insurance policies.* Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular, statement, sales presentation, omission or comparison which:

(a) Misrepresents the benefits, advantages, conditions or terms of any insurance policy;

(b) misrepresents the dividends or share of the surplus to be received on any insurance policy;

(c) makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy;

(d) is misleading or is a misrepresentation as to the financial condition of any person, or as to the legal reserve system upon which any life insurer operates;

(e) uses any name of title of any insurance policy or class of insurance policies misrepresenting the true nature thereof;

(f) is a misrepresentation for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion or surrender of any insurance policy;

(g) is a misrepresentation for the purpose of effecting a pledge or assignment of or effecting a loan against any insurance policy; or

(h) misrepresents any insurance policy as being shares of stock.

(2) *False information and advertising generally.* Making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, misrepresentation or statement with respect to the business of insurance or with respect to any person in the conduct of such person's insurance business, which is untrue, deceptive or misleading.

(3) *Defamation.* Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging

the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of any person, and which is calculated to injure such person.

(4) *Boycott, coercion and intimidation.* Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of the business of insurance, or by any act of boycott, coercion or intimidation monopolizing or attempting to monopolize any part of the business of insurance.

(5) *False statements and entries.* (a) Knowingly filing with any supervisory or other public official, or knowingly making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or knowingly causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false material statement of fact as to the financial condition of a person.

(b) Knowingly making any false entry of a material fact in any book, report or statement of any person or knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report or statement of such person.

(6) *Stock operations and advisory board contracts.* Issuing or delivering or permitting agents, officers or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insurance. Nothing herein shall prohibit the acts permitted by K.S.A. 40-232.

(7) *Unfair discrimination.* (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(b) Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates

charged for any policy or contract of accident or health insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

(8) *Rebates.* (a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance contract or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

(b) Nothing in subsection (7) or paragraph (a) of this subsection shall be construed as including within the definition of discrimination or rebates any of the following practices:

(i) In the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance. Any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the company and its policyholders;

(ii) in the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expenses;

(iii) readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year

of insurance thereunder, which may be made retroactive only for such policy year.

(9) *Unfair claim settlement practices.* Committing or performing with such frequency as to indicate a general business practice of any of the following:

(a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(b) failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(c) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(d) refusing to pay claims without conducting a reasonable investigation based upon all available information;

(e) failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(f) not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(g) compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

(h) attempting to settle a claim for less than the amount to which a reasonable person would have believed that such person was entitled by reference to written or printed advertising material accompanying or made part of an application;

(i) attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

(j) making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made;

(k) making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(l) delaying the investigation or payment of claims by requiring an insured, claimant,

or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(m) failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

(n) failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(10) *Failure to maintain complaint handling procedures.* Failure of any person, who is an insurer on an insurance policy, to maintain a complete record of all the complaints which it has received since the date of its last examination under K.S.A. 40-222; but no such records shall be required for complaints received prior to the effective date of this act. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints, the date each complaint was originally received by the insurer, and the date of final disposition of each complaint. For purposes of this subsection, "complaint" shall mean any written communication primarily expressing a grievance related to the acts and practices set out in this section.

(11) *Misrepresentation in insurance applications.* Making false or fraudulent statements or representations on or relative to an application for an insurance policy, for the purpose of obtaining a fee, commission, money or other benefit from any insurer, agent, broker or individual.

(12) *Statutory violations.* Any violation of any of the provisions of K.S.A. 40-1515.

(13) *Disclosure of information relating to adverse underwriting decisions, as defined in K.S.A. 40-2,111.* Failing to provide applicants, policyholders and individuals proposed for coverage with the information required under K.S.A. 40-2,112 within the time prescribed in such section.

History: L. 1955, ch. 247, § 4; L. 1972, ch. 189, § 3; L. 1981, ch. 190, § 4; July 1.

Research and Practice Aids:

Trade Regulation=870.

Hatcher's Digest, Insurance §§ 10, 44, 67.

C.J.S. Trade-marks, Trade-Names, and Unfair Competition § 238.

CASE ANNOTATIONS

1. Insurer must make good faith attempt to settle claims; tort of bad faith not recognized in Kansas. *Spencer v. Aetna Life & Casualty Ins. Co.*, 227 K. 914, 922, 923, 924, 925, 926, 611 P.2d 149.

40-2404a. Rules and regulations. The commissioner may, after notice and hearing, promulgate reasonable rules and regulations, as are necessary or proper to identify specific methods of competition or acts or practices which are prohibited by K.S.A. 40-2404, but the regulations shall not enlarge upon or extend the provisions of K.S.A. 40-2404.

History: L. 1972, ch. 189, § 10; July 1.

40-2405. Same; power of commissioner. The commissioner shall have power to examine and investigate into the affairs of every person engaged in the business of insurance in this state in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by K.S.A. 40-2403.

History: L. 1955, ch. 247, § 5; L. 1972, ch. 189, § 4; July 1.

Research and Practice Aids:

Hatcher's Digest, Insurance § 4.

Law Review and Bar Journal References:

"Insurer's Bad Faith: A New Tort for Kansas?," Janet Amerine and Jan E. Montgomery, 19 W.L.J. 467, 476, 486 (1980).

40-2406. Same; powers and duties as to hearings; service of process. (a) Whenever the commissioner shall have reason to believe that any such person has been engaged or is engaging in this state in any unfair method of competition or any unfair or deceptive act or practice whether or not defined in K.S.A. 40-2404 and that a proceeding by him in respect thereto would be to the interest of the public, he shall issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than ten (10) days after the date of the service thereof.

(b) At the time and place fixed for such hearing, such person shall have an opportunity to be heard and to show cause why an order should not be made by the commissioner requiring such person to cease and