Approved March 20, 1984
Date

MINUTES OF THE House COMMITTEE ON LABOR AND INDUSTRY.

The meeting was called to order by Representative Arthur Douville at
Chairperson

9:05 a.m./~~p.m.~~ on February 27, 1984 in room 526-S of the Capitol.

All members were present except:

Representatives Hensley, Green and David Webb. All excused.

Committee staff present:

All present.

Conferees appearing before the committee:

Mr. George McCullough, KS AFL-CIO
Mr. Ed Johnson, Topeka City Attorney
Mr. Stu Entz, Iowa Beef Packers
Mr. Bill Morrissey, Dept. of Human Resources, Workers' Comp.

H.B. 2956: an act concerning the workmen's compensation act; relating to the definition of personal injury; medical and temporary total disability compensation; approval of structured settlements; failure to pay compensation due.

Mr. George McCullough was the first to take the speaker's stand, and he testified in support of H.B. 2956. He explained to the committee members the changes in this bill, and then answered questions. Mr. McCullough also gave the committee members attachments #1 and #2 which relate to H.B. 2938 and H.B. 2980.

Mr. Ed Johnson was the next to take the speaker's stand. He said that the only way he could support H.B. 2956 was if they struck lines 100 thru 104 on page 3.

Mr. Stu Entz took the speaker's stand next and also said that he was opposed to lines 100 thru 104 on page three, and explained to the committee members why he felt this way.

Mr. Bill Morrissey was the next to take the speakers stand. He said that the department opposes H.B. 2980 because it makes an illogical distinction between bi-lateral wrist injuries, if the injury is caused by one single accidental event or whether it is caused by repeated use injuries. If one single accident caused two wrist injuries the disability would be general. If repeated use caused injury then two scheduled disabilities, although both disabilities would be the same.

The meeting adjourned at 10:00 a.m.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Labor & Industry 2-27-84

Visitors	Representing
George E. McCullough	Kan AFL-CIO
Wayne Maichel	Kans AFL-CIO
B Moore	DHR/Worker Comp
Bill Morrissey	DHR/Workers Comp
Ed Johnson	City attorney/Topeka
Steve Ertz	IBP
Joe Furjanic	KASB

House Bill 2938 should be amended as follows:

Page 3, line 088, beginning with the word "for," the phrase through line 091 ending with the period after the word "injury" should be stricken.

Page 4, line 0153, beginning with the word "of" that is stricken through line 0154 with the word "injury" should be reinserted; further, on line 0154, beginning with the word "for" the phrase through the word "experience" on line 0156 should be stricken; and further on line 0156 beginning with the word "but" the phrase through page 5, line 0158, through the period following the word "evidence" should be stricken.

Page 4, line 0156, by adding the phrase after the comma after the word "reduced", said percentage shall include the inability of the worker to obtain and retain work of the same type and character because of said limitations.

Page 11, line 0390, by reinserting the stricken words "shall be", striking the word "which" on line 0330 through the comma after the word "act" on line 0391, and further on line 0395 by reinserting the stricken words and phrase "two hundred" and on same line striking the word "ninety", and striking the parenthesis (1) and the word "ninety"; and further, on line 0396 by striking the number (2), and on line 0397 by reinserting the words "two hundred" and on line 0398 the number "200" and striking the word "ninety".

Atch. 1

2-27 #2

Analysis of House Bill 2938 & 2980

House Bill 2938

The amendments at page 3 of House Bill 2938 define the date of accident when injury is repetitive as the date of the first symptom appears. It was brought to the committee's attention that many workers develop carpal tunnel syndrome as a result of overuse, constant pressure, or friction. They believe at first that it is simple muscle strain and that they will get used to the job. In many cases it is 6 months to a year before the condition progresses to the extent that it is necessary to see a physician.

The date that a worker must go off work because of this condition should be considered the date of the accident, not the date of first symptoms.

This is especially true in light of the following.

The amendments at page 11 provide that a written claim for compensation must be filed within 200 days and cannot be signed by the injured's union representative orattorney. We note 6 months is 180 days. Thus, this change eliminates 200 days and reinstates 90 days of years long ago and means that a big majority of the claimants are outlawed if the accident date was the date of first symptoms. These workers would not be able to receive compensation because written claim was not served within 90 days of when the symptoms first appeared.

Atch. 2

Under general law a bank has 5 years to sue on a note. A doctor, lawyer or grocer who has an open account has 3 years to sue before the claim outlaws. The injured worker has 3 statutes of limitations that can outlaw the worker's claim. First, the worker must give the employer notice within 10 days. Second, under present law, the worker must serve a written claim within 200 days of the accident or last payment of compensation, whichever is later. Third, the injured worker must file for a hearing before the Workers' Compensation Director within 3 years of the date of the accident or 2 years of last payment of compensation, whichever is later. The bank, the doctors and the lawyers have legal staffs. The injured worker in some instances failed to reach the 8th grade and is presumed to know the law but has 3 statutes of limitations that can deprive the worker of compensation. Most workers are honest and trustworthy people who think that because the law provides for workers' compensation they will receive it, not realizing that they must follow certain procedures or be outlawed.

The amendment at page 5 removes the test of the worker going back to the same type work. This is not necessary as the Supreme Court in the case of Ploutz v. Ell-Kan, copy marked Exhibit A is attached hereto, ruled that one does not have to be able to go back to the same job. The fact a worker can't go back to the same job does not of itself entitle a worker to total disability.

The Supreme Court did not set out the facts as they actually happened. This writer handled the Ploutz case. Mrs. Ploutz could not go back to work for her employer and this is an unquestioned fact and so found by the lower courts. The higher courts are bound by the lower courts' finding of fact, and that is that the claimant could not return to work for this employer due to the limitations because of her injury. The Supreme Court chose to ignore that finding and base its decision on facts not before the Court, to wit, return to the same position. I always believed that whether or not a claimant could return to the same or similar employment was necessary was the test, not the same position. The Court judicially legislated the ability to obtain and retain work of same type and character from the law. We argued to the Court in that case that the legislature should make that change if it was to be made, but the Court did not wait for a change in policy to be enacted by the legislature but judicially enacted it in the Ploutz decision. This decision enacts what the legislature is asked to enact by this amendment.

House Bill 2980

This provides for separate scheduled injuries. An example a forearm injury which would be an injury at the wrist is limited to 200 weeks. The bill provides for two separate scheduled injuries. Using Iowa Beef's figure that most permanent disabilities of the wrist ended up zero to 10% as scheduled injuries.

If we assume that an injured worker was off work 15 weeks and had 10% loss of use of each forearm, this bill does not determine how compensation would be paid. If we assume that two-thirds of this workers' wage exceeded $218.00, which is the maximum amount in effect at this dictation, the claimant would received 15 weeks' temporary total loss of use of compensation for one wrist at $218.00 per week. This bill states that there are two separate scheduled injuries. Another section of the statute states disability is presumed to begin at the date of the accident. Would this mean that this claimant would receive, because of two separate scheduled injuries, 15 weeks of temporary total at $218.00 a week for each wrist or $436.00? This bill creates that problem. Does the statute further mean if both wrists end up at 10% that 10% disability would be calculated by deducting 15 weeks from each 200 week schedule leaving 185 weeks for each wrist, 10% of which is 18.5 weeks? Does this mean, then, that this claimant would receive $436.00 for the next 18.5 weeks, that being $218.00 per week for each wrist? This bill says each would be separate a scheduled injury. Compensation payments for scheduled injuries to a hand, arm, leg and foot allow compensation for loss of use not disability as such and the worker lost the use of two separate members.

I refer to scheduled injury section of the law as the Shylock section because it provides for so many weeks for so many pounds of flesh, if you may. General body provides a disability for inability

to work. A scheduled loss of a forearm prevents a piano player from working but so what - 200 weeks and out.

Under the present law, if two forearms are injured, they are not scheduled injuries and therefore provides for a disability and have a maximum compensation of 415 weeks, provided they do not render the individual permanently and totally unable to engage in any substantial gainful employment. The statute, however, provides that temporary total or permanent partial disability combined cannot exceed $75,000.00. We note 415 times $218.00, the maximum in effect at this dictation, greatly exceeds $75,000.00. Thus, to stay within the statutory frame if an individual who receives an award based on $218 a weeks cannot exceed $75,000.00, this worker would receive compensation for approximately 344 weeks or 6.6 years. Of course, if this individual's wage was lower so that two-thirds of his wage did not equal $218.00 the worker would receive the lesser amount for a longer period but not more than 415 weeks.

Any award for 415 weeks or $75,000.00 is subject to review and modification and reduction as the worker's condition changes.

In the hearing before the House Labor Committee the Iowa Beef representative stated that their cost per employee over the last two years has risen 135% and the Boeing representative said over the 10 year period the Boeing's workers' comp has raised 418%. I can only assume that this huge increase includes these companies' attorneys'

fees for defending a claim against an injured worker. These companies try many of their cases that should not be tried and the cost of attorneys, of course, is quite expensive.

After hearing this, I checked with Mr. Smeltzer at the Workers' Compensation Office. Mr. Smeltzer gave the correct figures for insurance premium increases for workers' compensation from 1974 through 1983, a period of 10 years. The caveat is that there are 3 classes of risks so each year one class may be increased 40% and another class could be down 40% and that would show a zero increase for that year. So we asked that Mr. Smeltzer give us the average increase for all classes or average decrease for each year. They are as follows:

1974 - increase 22%

1975 - increase 7%

1976 - increase 13.1%

1977 - increase 11.3%

1978 - decrease 8.4%

1979 - increase 5.5%

1980 - increase 5.5%

1981 - increase 11.2%

1982 - decrease 2.9%

1983 - no increase or decrease

In this 10-year period, the insurance industry was allowed a total average increase of 64% or 6.4% a year.

At that hearing I heard there were a great number of awards for bilateral carpal tunnel wherein the injured worker received an award for $75,000.00. It was made to appear that these individuals were paid $75,000.00 in a lump sum and that's not the case. The law provides only for weekly payments. A lump sum can only be made by agreement of all parties. The employer never has to pay a lump sum, and the employer cannot be forced to pay a lump sum. Thus, if an injured worker earned a high enough wage that two-thirds of the wage equaled or exceeded $218.00, this worker could receive an award for 344 weeks at $218.00 a week because that would reach the $75,000.00 maximum.

Fox and Company made the determination of an employer who had a $75,000.00 award rendered against him at $218.00 a week. If the employer invested the $75,000.00 that was paid and reduced by $218.00 weekly for 6.6 years, at 15% the employer would receive interest of $73,600.00 only $1400.00 for this severe injury. If the employer used only the simple certificate of deposit averaging 8%, the employer during that period of time would receive $28,600.00. A copy of Fox and Company's calculations is attached hereto marked Exhibit B.

If the employer settles in a lump sum, my experience has been the employer usually want a big enough discount to cover the above because they will not settle for the statutory authorized 8%.

The examples given above depend on an individual making $327.00 per week or more because two-thirds of which would be $218.00. If the individual's wage was $270.00 per week, this individual would receive only $180.00 compensation not $218.00, but he would receive it for the full 415 weeks. Thus the employer would greatly increase the earnings on the employee's award. The employer would receive more back in interest during the 8-year period than actually was paid to the employee.

We note the above cost to the employer is minimal except for the loss of the use of the money and cost of the medical treatment that has been awarded during that period of time. What is the cost to the injured? Let's assume that the individual worker makes $327.00 a week, two-thirds of which would pay $218.00 a week compensation, but if the worker made $327.00 a week for the 344 weeks in the period of time he receives compensation he would, if he continued working, has made $112,226.40. During the same period of time, if the worker received compensation at $218.00 a week for the 344 weeks, the worker would receive $74,817.60, less attorney's fees. This means that in the 6.6 years the worker would lose $37,408.80 and that loss would be increased by the amount of the attorney fees. This is what the worker would lose during 6.6 years. We note the bigger financial burden for the injury is on the injured employee not the employer. If we take this a step further this injury and disability does not disappear after 6.6 years. The disability after 6.6 years and the economic loss

is suffered at the rate of 100% by the injured worker. In addition to the 100% loss, this worker also suffers pain and in many cases is eliminated from the sports he has enjoyed and limited to menial tasks.

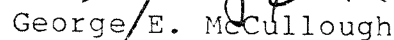
Whatever it costs for Iowa Beef or Boeing Airplane shows up in the hot dog or in the airplane, a consumer makes this payment not Iowa Beef or Boeing.

House Bill 2938 should be amended by striking the new language, reinserting the old language and adding a new phrase to overrule the Supreme Court in the Ploutz case. This language should provide that an injured worker be paid for disability to obtain and retain work so that if the injuries prevent an employee from being able to return to work for the former employer that that be considered in determining partial disability.

A suggested amendment to House Bill 2938 is attached hereto marked Exhibit C.

House 2980 should not be recommended for passage by the committee for reasons set forth above.

Respectfully,



George E. McCullough

GEM:kn

No. 55,527

ALICE M. PLOUTZ,
<u>Claimant-Appellant,</u>

v.

ELL-KAN COMPANY and/or ELL-KAN COMPANY, INC., and
LIBERTY MUTUAL INSURANCE COMPANY,
and
WORKERS' COMPENSATION FUND,
<u>Respondents-Appellees.</u>

SYLLABUS BY THE COURT

1.

Work disability is that portion of the job requirements that a worker is unable to perform by reason of any injury.

2.

Whether a permanent injury is <u>total</u> or <u>partial</u> is determinative of which section of Article 5 of Chapter 44, Kansas Statutes Annotated, applies. K.S.A. 44-510c covers both permanent or temporary <u>total</u> disability, while K.S.A. 44-510e applies to permanent or temporary <u>partial</u> disability. The test of being completely and permanently unable to engage in any type of substantial and gainful employment determines when disability is <u>total,</u> and the test of being unable to engage in work of the same type and character that was performed at the time the injury was incurred determines when a disability is <u>partial.</u>

3.

The test for determining permanent partial general disability is the extent to which the injured worker's ability has been impaired to engage in work of the same type and character he

Exhibit "A"

or she was performing at the time of the injury.

4.

In considering a permanent partial general disability under K.S.A. 44-510e, the work disability would be measured by the reduction, expressed as a percentage, in the worker's ability to engage in work of the same type and character that he or she was performing at the time of the injury.

5.

Where a claimant in a workers' compensation case is found to suffer a permanent partial general disability, the pivotal question is, what portion of claimant's job requirements is he or she unable to perform because of the injury?

6.

In the process of determining the percentage of permanent partial general disability suffered by a claimant, the fact that such claimant is or is not retained in the specific job he or she occupied at the time of the injury is not determinative. Thus, a finding by the trial court that a claimant suffers a permanent partial general disability of some stated percentage is not necessarily inconsistent with a finding that the claimant cannot return to the job he or she had when injured.

Review of the judgment of the Court of Appeals in Ploutz v. Ell-Kan Co., 9 Kan. App. 2d 9, 668 P.2d 196 (1983). Appeal from Ellsworth district court; HERB ROHLEDER, judge. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed. Opinion filed February 18, 1984.

George E. McCullough, of McCullough, Wareheim & LaBunker, of Topeka, argued the cause and was on the brief for the appellant.

Brock R. McPherson, of McPherson, Bauer & Pike, Chtd., of Great Bend, argued the cause and was on the briefs for the appellee, Workers' Compensation Fund.

Fred Spigarelli & Timothy A. Short, of Spigarelli, McLane & Short, of Pittsburg, were on the brief *amicus curiae* for the Kansas Trial Lawyers Association.

The opinion of the court was delivered by

PRAGER, J.:

This is a workers' compensation appeal. The facts in the case are undisputed and are as follows: The claimant, Alice M. Ploutz, was employed as a wire cutter by respondent, Ell-Kan Company, Inc. She claimed a 100 percent permanent partial general disability based on a back injury arising from and aggravated by three separate accidents occurring March 29, 1977, September 12, 1977, and March 19, 1979. Claimant sought medical treatment after each injury and was hospitalized each time. Claimant returned to work after recuperating from the first two accidents. Likewise, she returned to work after the third accident in March 1979, but continued to miss work frequently because of back pains, until she finally quit her job in November 1979. Claimant is now working in a liquor store owned by her son. Her duties include some light lifting, but do not involve lifting anything heavier than a single case of beer.

After a hearing, the administrative law judge found claimant's injuries were caused by the three accidents, with all three arising out of and in the course of her employment. The administrative law judge determined that claimant suffered a 40 percent permanent partial general disability to the body as a result of the injuries and also concluded that, under the circumstances, the claimant would not be able to return to the same position of employment with Ell-Kan. Both claimant and the Workers' Compensation Fund appealed to the workers' compensation director. The director modified the award, finding that claimant suffered a 20 percent permanent partial general disability as a result of the 1977 accidents, and a 50 percent permanent partial general disability following the more recent surgery and doctors' limitations. The director did not make a specific finding that she could not return to the same job that she previously held. All parties then took an appeal to the

district court from the director's award. That court accepted as accurate all findings of the administrative law judge, and adopted them as its own, thus reversing the director's order and reinstating the administrative law judge's order. The claimant perfected an appeal to the Court of Appeals which affirmed the district court in a published opinion Ploutz v. Ell-Kan Co., 9 Kan. App. 2d 9, 668 P.2d 196 (1983).

The sole issue before the Court of Appeals was this: Did the district court err in finding claimant had suffered a 40 percent permanent partial general disability to the body as a whole, when that court also concluded that such disability prevented the claimant from resuming her previous work with Ell-Kan Company? The Court of Appeals answered the question in the negative and affirmed the trial court. The Court of Appeals in a well-reasoned opinion by Judge Meyer stated the following general principles of law in the first six paragraphs of the syllabus:

> "Work disability is that portion of the job requirements that a worker is unable to perform by reason of an injury." Syl. ¶1.
>
> "Whether a permanent injury is total or partial, is determinative of which section of Article 5 of Chapter 44, Kansas Statutes Annotated, applies. K.S.A. 44-510c covers both permanent or temporary total disability, while K.S.A. 44-510e applies to permanent or temporary partial disability. The test of being completely and permanently unable to engage in any type of substantial and gainful employment determines when disability is total, and the test of being unable to engage in work of the same type and character that was performed at the time the injury was incurred determines when a disability is partial." Syl. ¶2.

"The test for determining permanent partial general disability is the extent to which the injured worker's ability has been impaired to engage in work of the same type and character he or she was performing at the time of the injury." Syl. ¶3.

"In considering a permanent partial general disability under K.S.A. 44-510e, the work disability would be measured by the reduction, expressed as a percentage, in the worker's ability to engage in work of the same type and character that he or she was performing at the time of the injury." Syl. ¶4.

"Where a claimant in a workers' compensation case is found to suffer a permanent partial general disability, the pivotal question is, what portion of claimant's job requirements is he or she unable to perform because of the injury?" Syl. ¶5.

"In the process of determining the percentage of permanent partial general disability suffered by a claimant, the fact that such claimant is or is not retained in the specific job he or she occupied at the time of the injury is not determinative. Thus, a finding by the trial court that a claimant suffers a permanent partial general disability or some stated percentage is not necessarily inconsistent with a finding that the claimant cannot return to the job he or she had when injured." Syl. ¶6.

In the opinion, Judge Meyer sets forth the rationale followed by the court in arriving at its decision. Essentially, the court found that the result in the case was controlled by the statutory provisions of the Workers' Compensation Act enacted by the 1974 Kansas legislature. In our judgment, the Court of Appeals

correctly interpreted the 1974 statutory provisions and we adopt the rationale of the Court of Appeals as the decision of this court. We, of course, recognize that a different rule has been applied at times in cases involving accidents occurring prior to the statutory changes of 1974. We specifically refer to Puckett v. Minter Drilling Co., 196 Kan. 196, 410 P.2d 414 (1966), and the more recent case of Reichuber v. Cook Well Servicing, 220 Kan. 93, 96, 551 P.2d 810 (1976), and other cases cited in those opinions. We simply hold that in cases involving accidents occurring after July 1, 1974, the effective date of the 1974 amendments to the Workers' Compensation Act, the amount of permanent partial general disability is to be measured by the test set forth in K.S.A. 44-510e.

The judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

McCULLOUGH, WAREHEIM & LaBUNKER

Memo to File

February 22, 1984

On this date, I received a telephone call from George McCullough requesting that we prepare certain calculations to aid him in testifying before a legislative committee regarding workmen's compensation:

FACTS:

Award amount is $75,000.
Payable at $218.00 per week for 344 weeks.

QUESTION:

If the insurance company takes $75,000 and invests the funds (alternatively at 8% and 15%), how much interest will they earn during the benefit period?

RESULTS:

Invested at 8%, approximately $28,600.00 in interest will be earned on an original principal sum of $75,000.00 from which $218.00 per week is withdrawn.

Invested at 15%, approximately $73,600.00 will be earned on an original principal sum of $75,000.00 from which $218.00 per week is withdrawn.

I conveyed the above to George by telephone on this date.

JRLuttjohann:ojd

Exhibit "B"