

MINUTES OF THE SENATE COMMITTEE ON LABOR, INDUSTRY AND SMALL BUSINESS

The meeting was called to order by Senator Dan Thiessen at
Chairperson

1:30 ~~am~~ p.m. on Tuesday, March 26, 1985 in room 529-S of the Capitol.

All members were present except:

Committee staff present:

Jerry Ann Donaldson, Legislative Research Department
Gordon Self, Office of the Revisor of Statutes
Marion Anzek, Committee Secretary

Conferees appearing before the committee:

Larry E. Wolgast, Secretary of Human Resources
Bill Morrissey, Div. of Workers' Compensation, Dept. of Human Resources
Bill Hutton, Local 1498
George Mallon, Kansas Trial Lawyer's Association
Larry McGill, Exec. Vice President, Independent Insurance Agents of Kansas
Fred Haag, Attorney representing Boeing and Ks. Assoc. for Commerce & Industry
George McCullough, Kansas AFL-CIO
Bill Abbott, Boeing Aircraft
Chris Miller, Staff Attorney-Kansas Insurance Department

The Chairman called the meeting to order at 1:30 p.m.

A motion was made by Senator Morris and seconded by Senator Gordon to approve the minutes of March 19 and 25, 1985. Motion carried.

SB 365: An Act concerning workers' compensation, relating to vocational rehabilitation.

Larry Wolgast: Senate bill 365 is the resulting efforts of major study and a period of work going on for a period of time. The area of 2 specific interest groups of employers and employees sat down and worked out an agreeable bill, and again as in the past this is something that either side would have if they voted upon their own, but it was give and take and the compromises worked out. The Department is in strong support of this bill, and we would certainly like to have the committee view it favorably.

Bill Morrissey: Senate bill 365 takes a basic approach to make vocational rehabilitation primary, rather than the methods for obtaining compensation, perse, or measuring compensation perse. When a person is injured and cannot return to the type of work that they were doing before, they are screened into this process and only after that process do we approach the question of the amount of permanent injury or compensation for permanent compensation.

What this does, is say that the provision for workers' compensation will screen these people and we will make the determination, whether these people should be re-evaluated for workers' compensation, if so, refer them to a counselor and the counselor will come up with a rehabilitation plan, schooling and on the job training, job placement or what ever, and that process is the cost of the evaluation. The training center is paid from our division, the fund that this bill creates in our division.

What we attempt to do is return the person to comparable, gainful employment. If this requires training, and a schooling type of training, they are paid compensation on total disability basis. When they complete the training the gauge for compensation is the difference of their earning capacity, the difference in what they were earning before and their earning capacity after training. It is different than the permanent general disability test that we have used in the past.

Chairman Thiessen: There would still be some lump sum settlements, who would these be approved by?

Bill Morrissey: Approved by the Vocational Rehabilitation Administration. Administered by the stand point that the person has completed rehabilitation.

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process or is not in need of rehabilitation. Workers' Compensation is out of the system. Some people do not want to participate. Right now we have penalties for their refusal.

Senator Werts: Would you tell us again how you arrive at partial or permanent injury, or one who elects not to be rehabilitated. How is this determined?

Bill Morrissey: This is based principally on medical opinions.

Bill Hutton: I am here, as neither a proponent or opponent. Basically, I speak for the Kansas Trial Lawyers and the Local 498 of the Teamsters Union. We are in favor of the vocational rehabilitation concept, and we are in favor of expanding that concept, because right now vocational rehabilitation is not working. I believe there is a conflict of interest created by having this vocational rehabilitation fund administered by the Workers' Compensation Division. What we are doing in effect, with this bill is creating a separate insurance company run by the workers' compensation director. They are the one's determining how much money it will take to operate this fund, and as such they have a self interest, from the director on down, to make decisions which allow that fund to be actuarial sound, to be solvent. For some time the 2nd injury fund of workers compensation fund was under the direction of the workers' compensation, which was taken out of the State Departments Insurance, and there was a conflict there, with having workers compensation fund, which is in effect, and insurance company, administering some rules and decisions in the department, and I think you have a problem. I think it would be better if we are going to have vocational rehabilitation fund, which we think is a good concept, to have it monitored by a separate entity, rather than workers' compensation.

The 2nd point I want to make. I realize this bill has concepts from SB 323 and SB 324, which were introduced at the end of February. I don't believe there has been enough public hearings that should be required for a bill, that basically changes our workers' compensation act, more than any time since 1974, when we had the last major provision. This past summer the interim committee met, both the House and Senate had members involved, which came up with SB 9 and eventually was killed in the initial process, and that bill dealing with the entire workers' compensation system, not vocational rehabilitation, not just permanent disability, and that bill in itself had many problems. Again, there was an option of a public hearing, and we had this for this bill, and what I am asking is that we give more time in an interim committee, because the bill will not die in this session, because it is not an election year, and there will be time for it to be heard next year.

Some of the provisions which I think are in conflict with present law.

1. Permanent partial disability. There are two definitions in this bill.
2. Workers' Compensation Fund can be found liable at a preliminary hearing for temporary compensation.

Until we know how this vocational rehabilitation system works, I think you are delaying a claim to be heard, and I don't think the workers want the courts to make decisions on workers compensation. We want the legislature to make those decisions. I like the concepts of the bill, but I think it is premature, to pass it now.

George Mallon: I am here representing my clients, both present and future, and also in regard to Kansas Trial Lawyers. I am one of the watch dogs for the entire labor force here in Kansas. If there was an agreement made, I believe it is a secret from all the members of the Kansas Trial Lawyers, and I believe it was made by not more than 20% of the people that represent the labor force. I want to talk about the new definition of permanent partial disability on page 5, starting with line 171. What job are you going to refer to when you determine his work disability, when you look at the wording in this bill? It does not tell you. Maybe he is 100% disabled from driving a truck, and he is 50% disabled from being a welder, and maybe he is 0% disabled from being a clerk. Say he had a 10% personal disability. He gets 10%, we know that, does he get another 40% because he can't do the welding, or does he get the additional 90% because he can't drive a truck. When we talk about workers disability, we are talking, the ability to earn a living. We believe not only will this statute reduce the amount of money

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that is awarded to the injured workman, it will become an administrative nightmare.

Larry Magill: I represent the Independent Insurance Agents, and I was here earlier this year on SB 323. I have written testimony and unless there are questions, I will relinquish to the next conferee. (Attachment A)

Fred Haag: I am here representing Boeing, and the Kansas Association for Commerce and Industry. I and George McCullough, who might join me here at the podium, have spent a great deal of time on SB 365. What labor and industry really want, is to return an injured worker to gainful employment. What we mean by that term, return them to a pre-injury economic status. The employers can receive benefit of reduction of compensation, and this bill is a compromise to plead our various respective positions. I would be more than happy to talk with you about any line in this bill, but rather than take 2 or 3 lines and say we don't like this, it ought to be amended.

This bill represents a package compromise, and we feel this is going to do something in Kansas that has never been done. We wanted to get something that you could say to your constituents, and we could say to our clients, we obtained something.

Chairman Thiessen: I think you should be commended for working on this and we had testimony earlier, that nationwide there are 421 thousand people that are injured, who just leave the job market entirely, and in Kansas about 4 thousand. So an effort in this direction, is certainly what we need to do, and we need to get something that will work and get started with it.

Senator Morris: I do think that the committee needs to assure itself, before we do that. It seems to me that maybe we could get the interim report, and raise some of those questions about returning a person back to work quicker, and where some of these questions are in the bill, and are they addressed, or is that just one of the situations that we just have to pass over.

Chairman Thiessen: I think that we need to do this.

Senator Feleciano: I personally, Mr. Chairman am tired of hearing that, it is an agreed to bill. People that I represent, are working at Boeing, Beach and Cessna, and I want to make sure when we pass something, whether it is agreed to or not, that we are not taking away the entire ship, simply because it is a compromise between labor and industry. I think that the Trial Lawyer's have raised some interesting questions, whether they are right or wrong. I think these are questions that have to be spread out for us, and truly have an understanding, so that when we go back to our constituency, we can say this is what we are attempting to do.

Fred Haag: Some of the compromises that we considered Senator, was on the definition of workers' ability or permanent partial general disability. We do have a definition included in the language. We reached many along the way, and I would be glad to go into any of them in detail, if you would like.

Senator Feleciano: I appreciate what you are saying, but with the time allotted to us, we do not have the time, but it makes more sense to me when I am able to look at this bill, and spelling out in great detail what we are doing.

Senator Steineger: I read the bill before coming into committee, and some of the things that the trial lawyers mentioned, I noted as well, but by in large, I think the testimony of the trial lawyers, is no real quarrel with the concept of the rehabilitation, and to me there doesn't seem to be any real basic problems, there is a problem with short notice. I had some questions answered by this gentleman, but for the trial lawyers, I have a couple more, and I agree with Senator Feleciano, maybe they can get some answers, and then give us a balloon, but I don't think there is a problem with getting the bill out.

Chairman Thiessen: You make a good point, and I think that we will need that balloon to show exactly what we are doing, so the committee knows the compromise.

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George McCullough: Everything has been said. I did promise Senator Morris the last day of the interim study, that we would work as hard as we possibly could, and this is what we came up with. The 1st draft, page 6 of this bill. When it came back it did not look like the draft that we sent down. We have thrown away many drafts, and have worked and worked, and finally came up with something we feel is a fair compromise. In this bill, we can get people re-trained and get them back to work.

Bill Abbott: We support this bill wholeheartedly and urge this committee to keep intact. Too, many times we see employees who do not go back to work, and they are worse off, if they are staring at four walls, instead of back on the job, and we encourage you to give this bill, the consideration possible.

Chris Miller: My intention today, was to explain what we do, and what I think this bill would do to our operations, and since we are running under time restraints, I would prefer to come back at the next hearing and explain this. To summarize it, I supplied you with some of our reports (Attachment B) and what will happen if you pass this, it will increase our liability tremendously. The 1st page of the report is an indication of where we have been going lately. Our total expenditures for 1984, fiscal year, were approximately 12 million dollars, and it looks like our projected expenditure for this year is going to be about 8 million dollars, which is probably one reason why we are here.

Chairman Thiessen: What do you attribute that to?

Chris Miller: Primarily court cases, like the Taco Tico case.

Chairman Thiessen: We will be glad to have you come back, and go into that.

Chairman Thiessen: adjourned the meeting at 2:40 p.m.

Testimony on SB 365
Before the Senate Labor & Industry Committee
By: Larry W. Magill, Jr., Executive Vice President
Independent Insurance Agents of Kansas

Thank you for the opportunity to appear in support of the language on lines 411-413 of SB 365 reversing the appeals court decision in Hines vs. Taco Tico. Probably no court case involving workers' compensation in recent years has created quite as much interest among our members and their clients as this case.

Attached to our testimony is page 4 of a bulletin issued by John Rathmel, Director of the Division of Workers' Compensation, summarizing the Hines vs. Taco Tico decision. Under the heading, "Rationale" the court found that an employer's knowledge of a prior injury was not sufficient to pass liability on to the fund and that the employer must establish that they knowingly hired or retained the employee despite the handicap and that they knew the injury was likely to affect or had affected the employee's work.

K.S.A. 44-566 defines the purpose of the Workers' Compensation Fund as to, "facilitate employment of handicapped workmen." K.S.A. 44-566 goes on to list a number of types of handicaps concluding with "17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or retaining employment." Thus, the act provides a very broad definition of handicapped.

K.S.A. 1984 Sub. 44-567 provides the requirements an employer must meet to implead the Workers' Compensation Fund for an injured employee. Under Subsection (b) an employer and his insurer are relieved of liability if the employer can prove that the employer had knowledge of the pre-existing impairment at the time the employer hired the handicapped employee or that the employer retained the employee after acquiring knowledge of

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the handicap. The employer can establish this knowledge by any "evidence sufficient to maintain the employer's burden of proof." If the employer files a notice with the Director of Workers' Compensation (Form 88) that will create a "presumption that the employer had knowledge of the pre-existing impairment." Thus, the Form 88 is not absolutely required, as it has been in the past, but if used by an employer, it does establish a presumption of knowledge.

However, now with the Hines vs. Taco Tico decision, the employer must further document a personnel file that the employer knew the injury had affected or was likely to affect the employee's work.

Although the requirement of the court in Hines vs. Taco Tico can be met by the employer, it seems to us to be an unreasonable additional recordkeeping burden on employers beyond the intent of the legislature when it placed the use of a Form 88 on an optional basis by the employer. It is particularly burdensome on contractors who hire workers for a specific job and do not keep separate personnel files on temporary laborers, for example. Then the job file itself would have to somehow be documented to meet this court test. The language proposed in SB 323 would not change the original legislative intent in our opinion, but merely takes the law back to where it was prior to the court decision. The employer still has the burden of proving knowledge of the preexisting impairment which would normally entail filing the Form 88.

We urge the committee to favorably report legislation making this change. We would be happy to provide any additional information the committee desires.

APPELLATE COURT REVIEW

In Hines v. Taco Tico, _____ Kan. App. 2d _____ (Docket No. 56,207), the Kansas Court of Appeals establishes that knowledge of a potential employee's prior injury does not necessarily qualify the employer for protection from liability for subsequent related compensable injury pursuant to K.S.A. 44-566 and 44-567. For knowledge of a prior injury to be sufficient to trigger Fund liability, the employer must establish that it knew the injury had affected or was likely to affect the employee's work.

FACTS: Claimant underwent surgery for a spinal fusion in 1974 after she fell from a horse. When she applied for a job at Taco Tico seven years later, she told the local manager of her 1974 back injuries, saying, however, she had had no problems with her back since the injury. Nothing further was said about the injury by claimant or the manager and claimant was hired as a cook and cashier. A few weeks later, claimant reinjured her back at work performing a job she usually did not perform. Medical examination revealed the 1974 surgery had not achieved fusion. A second spinal fusion was performed and was successful.

Respondent settled with claimant and proceeded against the Workers' Compensation Fund. Administrative Law Judge Howard excused the Fund from any liability; the Assistant Director reversed the decision and both the Director and District Court held the Fund completely liable for the compensation award. The Fund appealed to the Court of Appeals.

ISSUE: Whether the employer's knowledge of claimant's single back injury was sufficient knowledge of claimant's handicap to transfer liability to the Workers' Compensation Fund pursuant to K.S.A. 44-567.

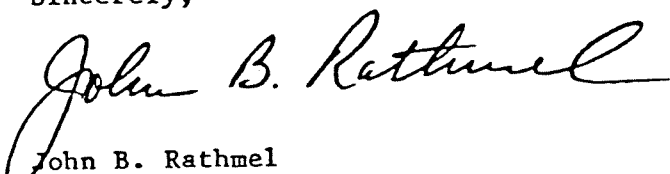
RULING: The Kansas Court of Appeals reversed the District Court and excused the Fund from any liability.

RATIONALE: Before liability can be assessed against the Workers' Compensation Fund, an employer must show that it knowingly hired or retained a handicapped employee. A single back injury does not necessarily affect one's work ability or employment possibilities and cannot be assumed to have recurring effects. An employer's knowledge of a prior injury may be sufficient to pass liability to the Fund only if the employer appears to have known that the injury had affected or was likely to affect the employee's work. In this claim, the employer knew of the prior injury, but neither the employer nor the employee knew of the employee's impairment prior to claimant's compensable injury. Therefore, the employer had no knowledge of handicap and the Workers' Compensation Fund cannot be held liable.

CONCLUDING REMARKS

The entire Division of Workers' Compensation is looking forward to the Seminar on October 24 and 25. We feel the Seminar will be enlightening, entertaining and will provide a forum for discussion of topics of current interest. We look forward to seeing you there.

Sincerely,



John B. Rathmel



DEPARTMENT OF HUMAN RESOURCES

DIVISION OF WORKERS' COMPENSATION

217 S.E. FOURTH, 1ST FLOOR TOPEKA, KANSAS 66603-3599
913-296-3441

August 1, 1984

TO: Chris Miller, Staff Attorney
State Insurance Department

FROM: Richard H. Smelser *Rich Smelser*
Administrative Assistant

SUBJECT: Calendar year losses paid by insurance companies and self-insureds

In response to your telephone call on July 31, 1984, the following information is being submitted:

<u>Calendar Year</u>	<u>Insurance Companies</u>	<u>Self-insureds</u>
1983	\$ 96,331,924.73	\$ 17,542,708.17
1982	84,584,264.38	15,611,560.16
1981	75,996,025.42	13,870,519.76
1980	72,106,436.01	11,670,599.44
1979	72,903,271.81	9,751,819.21

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WORKERS' COMPENSATION REPORT FOR DECEMBER 1984

TO: CHRIS MILLER, ATTORNEY
 FROM: VERLENE EVANS, ACCOUNTANT

WORKERS' COMPENSATION FUND BALANCE	9,042,632.36
DEPOSITS	29,267.93
COMPENSATION	481,635.48
MEDICAL EXPENDITURES	75,816.56
COURT REPORTING EXPENDITURES	8,937.95
ATTORNEY'S FEES EXPENDITURES	87,107.61
OTHER OPERATING EXPENSES	6,839.78
BALANCE ON DECEMBER 31, 1984	<u>8,411,562.91</u>
TOTAL WORK COMP DECEMBER EXPENSES	653,497.60
YTD LUMP SUM PAYMENTS	1,708,250.70
OTHER OPERATING EXPENSE LIMITS	129,593.00
EXPENSES TO DATE	43,156.61
BALANCE	<u>86,436.39</u>
85 YTD COMPENSATION EXPENDITURES	2,507,289.64
85 YTD MEDICAL EXPENDITURES	507,099.05
85 YTD COURT REPORTING EXPENDITURES	49,940.54
85 YTD ATTORNEY'S FEES EXPENDITURES	535,256.27
85 YTD OTHER OPERATING EXPENSES	43,156.61
85 YTD ALL EXPENDITURES	<u>3,642,742.11</u>
85 BEGINNING BALANCE	164,206.60
85 APPROPRIATION	4,000,000.00
85 YTD DEPOSITS	7,890,098.42
85 YTD EXPENDITURES	3,642,742.11
DECEMBER 31, 1984 FUND BALANCE	<u>8,411,562.91</u>

NEW CASES FOR NOVEMBER

NON-DEPENDENT DEATH	5
INSOLVENT EMPLOYER	0
REIMBURSEMENT	1
SECOND INJURY	84
NEW CASES	90

CLOSED CASES FOR NOVEMBER

NON-DEPENDENT DEATH	0
INSOLVENT EMPLOYER	4
REIMBURSEMENT	0
SECOND INJURY	83
CLOSED CASES	87

NEW CASES YTD

NON-DEPENDENT DEATH	14
INSOLVENT EMPLOYER	14
REIMBURSEMENT	1
SECOND INJURY	588
NEW CASES	617

CLOSED CASES YTD

NON-DEPENDENT DEATH	4
INSOLVENT EMPLOYER	16
REIMBURSEMENT	1
SECOND INJURY	403
CLOSED CASES	424

Work Comp Fund Fiscal 1984 Summary

	Non-Dep. Death	Second Injury	Insolvent	Reimbursement	Total
Impleadings	43	1097	43	11	1194
Closed	13	1077	26	11	1127

EXPENDITURES

Compensation	8,514,776.21	147,003.57	75,100.99	8,736,880.77
Doctors	29,931.63	29,352.72	-0-	58,744.35
Hospitals	64,707.48	88,479.96	-0-	153,187.44
Drugs	4,483.70	478.50	-0-	4,962.20
Misc.	213.95	801.50	-0-	1,015.45
Other Services	1,047.63	1,500.47		2,548.10
Medical Reimbursements	1,203,200.50	9,538.51	10,595.90	1,223,334.91
Attorney's Fees	1,134,438.71	45,668.92	1,743.65	1,181,851.28
Court Costs	79,506.78	11,622.34	2,492.39	93,621.51
Reimbursements	<u>15,000.00</u>			
Totals	11,046,766.59	334,446.49	89,932.93	11,471,146.01

Medical Totals

1,303,044.89	130,151.66	10,595.90	1,443,792.45
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WORKERS' COMPENSATION FUND EXPENDITURES

<u>Fiscal Year</u>	<u>Attorney's Fees</u>	<u>(Percentage)</u>	<u>Total Expenditures</u>	<u>(Percentage) (Increase)</u>	<u>Compensation</u>	<u>(Percentage)</u>	<u>Medical</u>	<u>(Percentage)</u>	<u>State-Wide Total Claims</u>
1979	\$ 234,706.01	(11.4 %)	\$ 2,067,052.43	—	\$1,587,196.04	(76.79%)	\$ 201,948.25	(9.77%)	\$ 37,945,398.00
1980	\$ 258,375.12	(10.8 %)	\$ 2,390,214.96	(15.63%)	\$1,934,187.73	(80.92%)	173,034.12	(7.23%)	\$ 49,468,941.00
1981	\$ 397,307.59	(9.9 %)	\$ 4,007,684.22	(67.67%)	\$3,298,917.38	(82.3 %)	\$ 283,163.68	(7.07%)	\$ 63,147,737.00
1982	\$ 580,793.70	(13.2 %)	\$ 4,415,898.74	(10.19%)	\$3,456,486.40	(78.3 %)	\$ 343,025.00	(7.76%)	\$ 74,510,905.00
1983	\$ 773,043.30	(12.76%)	\$ 6,056,502.54	(37.15%)	\$4,820,590.34	(79%)	\$ 419,347.05	(6.92%)	\$ 87,095,649.00
1984	\$1,181,851.28	(10.30%)	\$11,471,146.01	(89.4 %)	\$8,736,880.77	(76.16%)	\$1,443,792.45	(12.59%)	\$113,916,325.10
1985*	\$ 535,256.27		\$ 3,642,742.11		\$2,507,289.64		\$ 507,099.05		
1985**	\$1,070,512.54	(14.17%)	\$ 7,554,773.84	(-34.14%)	\$5,014,579.28	(66.38%)	\$1,014,198.10	(13.43%)	

<u>Fiscal Year</u>	<u>Percentage Increase of Total Claims</u>
1979	—
1980	30%
1981	27.6%
1982	17.99%
1983	16.89%
1984	30.79%

* actual expenses for F.Y. 1985, through 12/31/84 only

** projected expenses for F.Y. 1985, based on current data