Approved A Douville 4-8-87
Date

MINUTES OF THE House COMMITTEE ON Labor & Industry.

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

9:00 a.m./~~p.m.~~ on February 11, 1987 in room 526-S of the Capitol.

All members were present except:
Representatives O'Neal and Webb - Excused

Committee staff present:

Jerry Ann Donaldson, Research Department
Jim Wilson, Revisor of Statutes' Office
Juel Bennewitz, Secretary to the Committee

Conferees appearing before the committee:
Frederick J. Greenbaum, Attorney
McAnany, Van Cleave & Phillips, P.A., Kansas City, Kansas - Lenexa, Kansas

John David Jurcyk, Attorney
McAnany, Van Cleave & Phillips, P.A., Kansas City, Kansas - Lenexa, Kansas

Chairman Douville called the meeting to order. He stated that hearings on HB 2186 would continue next week and that an effort would be made to include the section on rehabilitation by Wednesday or Thursday. A meeting would be scheduled for Friday, if necessary, to finish hearing testimony. The following week will be for discussion on the bill.

The chairman recognized Frederick Greenbaum, an attorney from Kansas City, and asked him to step forward to give his testimony, see attachment #1.

There were questions for Mr. Greenbaum during his testimony. Representative Whiteman asked about adding an additional incentive to the employer to take the employee back to light duty by requiring that T.T. continue until either there is a return to light duty or until some type of settlement or hearing is reached. The representative stated that right now it is almost impossible to get someone back to light duty and she wants to add incentive to the employer to put an employee on light duty.

Mr. Greenbaum responded that many employers are not big enough to provide facilities for light duty and some have union requirements and can't do it so there is an "inherent problem" to begin with. He went on to state that he felt there was quite a bit of employer incentive in the bill as it stands.

Chairman Douville cited concerns about the large amount of litigation involved in these cases. The chairman asked how litigation could be disposed of and allow for return to getting benefits for the employee without having to wait 2-3 years and still have protection for the employer.

Mr. Greenbaum responded that part of the dilemma can be resolved by an administrative law judge who is running a good docket and stated that in his experience before one such judge in the Kansas City area, he has been able to have a case tried in a 60 day period with an award within 30 days following.

Chairman Douville asked how long it takes to get an award from the director's office at the present.

Mr. Greenbaum responded that he generally gets awards from the assistants within 30 days but also that he has some from the director that take from 9 to 12 months. He went on to emphasize that most of his cases are handled by the assistants and he estimated that between 75-80% are returned within 30 days.

The chairman asked Mr. Greenbaum if, in his experience, that the process is speeded along if the attorney comes in with despositions taken, testimony taken and are ready. The answer was affirmative.

Chairman Douville then asked Mr. Greenbaum if it was his experience that most administrative law judges put out their opinions in 30 days. The answer was negative, with the exception of one judge in Kansas City. Mr. Greenbaum went on to state that the average was not as good as the one judge that he had cited.

Representative Bideau asked Mr. Greenbaum if in his seven years of experience he had ever seen a case, other than an occupational disease case, that was denied. Mr. Greenbaum answered in the affirmative.

Mr. Greenbaum said that he wanted to make a comment on the attorney fee portion of the bill. He went on to state that he did virtually no claimant work but felt that no attorney could assume a claimant's case and see it through to the end for 15%. He felt that in any litigated case that it shouldn't be less than 25% and suggested that a better indicator of the work involved on the part of the attorney would be whether the case was settled or brought to award.

John David Jurcyk was recognized by the chairman and stepped forward to address the committee. See attachment #2.

Representative Green asked Mr. Jurcyk if he felt that a second medical opinion were required that it was best if it came from the claimant's family physician.

Mr. Jurcyk stated that he felt a second opinion from a physician trained to handle industrial injuries and to rate such injuries was better.

The chairman asked Mr. Jurcyk if he had experienced any other problems from what he had just discussed in regard to preliminary hearings. The chairman went on to state that the hearings were designed to be summary to get the claimant his benefits but they are being used to shift claimants from one doctor to another continuous disability even after their own doctor (first doctor) has indicated no objection.

Mr. Jurcyk answered in the affirmative and went on to address the chairman's concerns with regard to reducing litigation. He stated that there was no summary proceeding in comp. He cited a case from his experience in which he had 100 hours invested in a case which "never should have gone that long".

Minutes of the January 28, 1987, and February 3, 1987, meetings were approved by consensus of the committee.

The meeting was adjourned by the chairman at 9:50 a.m.

The next meeting will be February 12, 1987.

HOUSE COMMITTEE
ON
LABOR AND INDUSTRY

GUEST LIST DATE February 11, 1987

Name	City	Representing
[illegible]	Topeka	KTLA
Bob Habiger	Topeka	KTLA
Harry Nelson	Wichita	AFL-CIO
Wayne Michael	Topeka	" "
George McCulloch	" "	" "
Jim Wolff	Lawrence	" "
Bill Morrissey	Topeka	DHR/Work. Comp.
Don Gaches	Wichita	BMAC
Mark Beshears	Topeka	Public
Bill Sneed	Topeka	KADC
Susan Davis	K.C.	Leg. Intern
Lori Callahan	Topeka	am. ins. assoc.

McANANY, VAN CLEAVE & PHILLIPS, P.A.

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JOHN J. JURCYK, JR.
BILL E. FABIAN
ROBERT D. BENHAM
CLIFFORD T. MUELLER
JAMES R. GOHEEN
ROBERT B. VAN CLEAVE
PATRICK D. McANANY
FRANK D. MENGHINI
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MARGARET W. FABIAN
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ANDREW KY HAYNES
DOUGLAS M. GREENWALD
ANTON C. ANDERSEN
KEITH L. MARK
ROSEMARY PODREBARAC

EDWIN S. McANANY
(1871 - 1954)
THOS. M. VAN CLEAVE
(1887 - 1961)

REPLY TO:

☐ KANSAS CITY, KANSAS

☐ LENEXA, KANSAS

PREPARED TEXT-TESTIMONY TO THE KANSAS LEGISLATURE PROPOSED WORKERS' COMPENSATION LEGISLATURE

My name is Frederick J. Greenbaum. I am an attorney with the McAnany, Van Cleave & Phillips law firm - Kansas City, Kansas - Lenexa, Kansas. I completed by undergraduate work at Kansas State University with Bachelor of Science Degree in 1974. I graduated Magna Cum Laude from Washburn University Law School in May, 1980.

Since May, 1980, I have spent virtually every working day representing respondents and their insurance carriers in Kansas Workers' Compensation claims.

I believe the Kansas Workers' Compensation Act in its present form, when administered correctly, is basically a good body of law.

I have reviewed the proposed draft bill and feel some of the changes suggested would be beneficial and some would not.

Attachment #1
House Labor & Industry
2/11/87

(A) The greatest area of controversy on a consistent basis in Kansas Workers' Compensation law is work disability. The present law set out at K.S.A. 44-510e has been judicially interpreted to define "work" disability as the portion of claimant's job requirements he is unable to perform because of the injury (Ploutz v. Ell-Kan, Kan 234 953 [1984]). Consequently, evidence is generally presented to describe claimant's specific job on the date of his accident. Medical testimony is subsequently acquired to determine whether claimant should or should not be restricted from perfoming these duties. The administrative law judge weighs the testimony and makes a decision as to the ultimate percentage of disability.

A major advantage of the present law is it is easy to work with because standard is specific. The basic problem presented is whether this type of test bears a relationship to the actual intent of the Workers' Compensation Act.

It is assumed the purpose of the Act is to award benefits where appropriate, encourage employers to retain injured employees, and to encourage employees to return to work. Under the present standard, there is no reward for the employer who places an employee in a different job than the one he was working when injured. Further, if an employee is physically unable to return to a substantial portion of his prior job duties, there is no incentive to rehabilitate the employee to prepare him for other types of work.

Under the recommended bill, there should be incentive for the employer to retain the employee, or help him reach as good an employment situation as he had when injured.

The complicated litigated cases would be where an employee does not return to equally paying work, as the factors for judges to consider will then be numerous under the proposed statute as compared to present laws.

If the proposed change is not made, at least there should be a provision which states that return to the same job shall render work disability inappropriate.

(B) I do not feel it would be wise to adjust the temporary total rate to 125% of the state's average weekly wage. Nor do I feel reduction of the permanency rate to 50% of the average weekly wage would be advisable. I would recommend keeping both rates at 75% of the state's average weekly wage.

Under the recommendation, the temporary total rate in some cases could reach $411.66. In many situations already, it is very difficult to get employees to return to work. If the temporary total rate could reach this level, and the maximum permanency rate would be reduced to $165, the practical effect will be employees would benefit by staying off work as long as possible, particularly when they will never be able to return. This would substantially increase preliminary hearing litigation.

As a practical matter, reducing the permanency rate as suggested would not appreciably change final amounts received in most awards, but could have the effect of extending the pay-out time.

(C) I believe the present law regarding attorney fees is fair and should not be changed.

There is a provision in the proposed bill which would reduce claimant attorney fees to 15% in cases where the employer admits the claimant sustained personal injury by accident. That change would not be in the best interest of anyone.

As a practical matter, most workers' compensation claims are settled. Thus, the question is presented: was accident being admitted or denied. At the point of settlement, it is a moot point - stipulations are not taken.

Further, in litigated cases personal injury by accident is admitted the large majority of the time. Thus, the practical effect of this change would be to reduce attorney fees to 15% in most litigated matters. Yet there are issues which can be far more time consuming than the issue regarding whether there was personal inury by accident.

I do not think it is advisable for legislation to place attorney's interests in direct variance with those of their clients. Under this statute, a claimant's attorney might prefer respondent's lawyer deny accident so as to increase his fee. That denial, however, is a position which opposes his client's interest.

If claimant's attorneys can only receive 15% in a litigated case, it is likely many claimants will be foreclosed from receiving legal representation. It would often not be worth an attorney's time to try a time-consuming case with tough issues (i.e. - nature and extent, work disability, jurisdiction) for 15% of an award which in body as a whole cases would run eight years. Consequently, only claimants with the best cases would have a chance of receiving representation.

Under the present act, the insurance companies do their best to work out arrangements with the claimants without involving attorneys. Hopefully, only when the matter cannot be resolved do attorneys enter the picture. Often, a claimant will receive an offer and take his case to an attorney. The attorney should limit his fee to 25% of what he gets claimant in excess of the offer made by the respondent. I think codification of that practice would not be inappropriate.

I believe 25% is a fair statutory maximum attorney fee regardless of what stipulations are made. If the legislature thought a change was truly in order, I would certainly not reduce the 25% fee in any case that an attorney takes to a final award.

(D) I believe the changes set out in Section 15 regarding Fund liability are welcome additions to the act. They should eliminate the inconsistency we have seen in cases surrounding the knowledge issue.

(E) A proposed change at K.S.A. 44-510d(23) making repetitive use trauma to two extremities a scheduled injury would be well received by many employers. There is considerable frustration with regard to bilateral carpal tunnel claims because the origin of carpal tunnel syndrome relates to numerous factors.

The proposed statute apparently wants to provide the scheduled weeks for a single extremity plus 20% of that figure for a bilateral injury (i.e. forearm 200 + 40 = 240 bilateral). There still needs to be interpretation as to how a rating would be applied under such a policy. Do you average the extremity ratings? Do you take the higher of the two?

I think this proprosed statute is not yet in its completed form. I suggest that if you want to schedule bilateral extremity injuries you put a specific number of weeks on the schedule. For example -- two arms - 252 weeks; two legs - 240 weeks.

I would also caution you, though, as to serious problems which can exist with the pyramiding of scheduled injuries. Because scheduled benfits pay out over short periods of time (generally less than a year) an employee can collect for the same body part on a separate and regular basis. The credit statute (44-510a) does not control this situation.

CONCLUSION

Basically, I think the present Act is fair and workable if administered properly. Some of the changes proposed could benefit the system. My practice is primarily in front of Judges Howard, Corcoran and Witwer, and I think they do a good job. The major problems arise when the Act is not administered correctly. John D. Jurcyk has considerable experience in the Topeka jurisdiction, where these serious problems exist.

PREPARED TEXT TESTIMONY TO THE KANSAS LEGISLATURE
REGARDING THOSE CHANGES TO THE WORKERS' COMPENSATION ACT

My name is John David Juryck. I am an attorney and practice exclusively in the area of Workers' Compensation. The representation of my clients takes me throughout all areas of eastern Kansas. 100% of my practice is involved in Workers' Compensation litigation and I actively handle between 200 and 300 litigated Workers' Compensation cases at any given time.

I've reviewed the proposed draft bill and feel one additional area of legislation should be specifically addressed.

My clients, most of whom are self insured employers or Workers' Compensation insurance carriers, are greatly concerned about their ability to provide adequate and necessary medical care to injured workers. The specific section to which I am referring is K.S.A. 44-510(c) This is commonly known as the change of physician statute.

It must be remembered that the primary intent of the medical benefit section of the act is to provide the employee with the best possible available medical care and physically rehabilitate that person to a point where he can again seek substantial and gainful employment. The employer is of course motivated to provide the claimant with the best possible medical care for many reasons.

First, the employer is liable for the consequences of the medical treatment provided. These consequences are severe.

Attachment #2
House Labor & Industry
2/11/87

Not only is the employer liable for any treatment necessary to correct improper care, unnecessary and extended care or medical care of a lesser quality costs the employer not only through additional time off the job by the worker, but increased permanent disability awards.

Additionally, the employer is in a better position to judge the quality of physicians inasmuch as they deal with Workers' Compensation claim on a more regular basis.

These reasons were recognized by the legislature and embodied in the current law. The problem is not with the law itself but the way it has been interpreted by the courts and administered by an Administrative Agency. K.S.A. 44-510(c) states that if the services of a physician furnished as provided in subsection (a) are not satisfactory to the injured employee the director may authorize the appointment of another physician subject to the limitations set forth in this section in the regulations adopted by the director. Our courts have intrepreted that there are no restrictions in section (c). Employees are freely given licenses to consult the physician of their choosing merely by the asking. There is no standard that the treatment provided by the employer be unreasonable, unqualified or in any other way detrimental to the employee. The employee can choose their cousin to treat them, can choose a podiatrist rather than a board certified orthopedic surgeon or chiropracter to treat a ruptered disc with nerve impingement rather than a board certified neurologist, neurosurgeon or orthopedic surgeon.

Because the claimant is allowed to choose a physician merely on a whim it completely negates the portion of the statute which gives the employer the right to select medical care. It is my belief that this section of the statute should be changed. Rather than stating that the director may authorize the appointment of some other physician subject to the limitations set forth in this section, I believe the statute should read "the director may order the respondent to appoint another physician to treat the claimant". This change is wording would make it clear that the employer is the ultimate party responsible to select medical care. The benefits and public policy which led to this provision in the act would be supported and the contrary intent would not be realized.

The following are examples of how improper application of the section in question has affected my client and Workers' Compensation cases in recent months:

1. Barber v. J.C. Penney - The claimant was treated by a physician of his own choosing. This physician happened to be a chiropracter who advised the claimant he did not need knee surgery. This chiropracter kept the claimant off work and continued adjustments to his knee for more than one year. After the claimant accepted orthopedic treatment the knee was treated surgically and the claimant returned to work within eight weeks. It should be noted that from the begining of this claim the employer sought treatment by a qualified orthopedic surgeon and the claimant was awarded treatment at the physician of his choosing.

The claim eventually settled but it is my clients position that more than a year of temporary total disability benefits were unnecessarily provided. The employer also suffered by having to replace a valued employee in the work force for 52 unnecessary weeks.

2. Perhaps the most blatent case is exemplified by the following set of circumstances:

This case is still actively being litigated so I have chosen not to use the parties real names. The claimant in this case was being treated by a board certified orthopedic surgeon in Topeka, KS. The surgeon was providing the claimant with conservative treatment and medication for a back strain. Eventually, the claimants attorney got involved in the case and asked that the claimant be referred to a physician of her choosing. After being referred for care to the claimants personal choice of doctor over the objection of the employer, the claimants condition reached a point where she had to quit her job. It has been more than a year and a half and she has still not returned to work.

The first two hearings resulted in 30 weeks of treatment and temporary total disability benefits being provided to the claimant. The claimants only reason for wanting a change of doctor was that she professed a personal preference for the second doctor. After the third preliminary hearing the Administrative Law Judge entered an order finding that the claimants personal physician made her condition worse.

Yet 30 days later, the same judge on the same set of facts ruled that the claimant had the right to select her health care provider and because she wanted her personal physician she should be returned back to him.

This set of circumstances transpired more than a year and a half ago and we are still providing weekly medical treatment as well as benefits to the claimant. She still has not been released to return to work yet the case has been fully litigated.

Only with the employers right to choose the treating physician firmly set out in the statute can this section of the act be properly administered. I don't believe this ammendment would change the intent of this section of the act in any way but make its administration more consistant with the legislative intent that has always been present.