Approved Arthur Douville 3-30-88
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry.

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

9:07 a.m./~~p.m.~~ on March 3, 1988 in room 526-S of the Capitol.

All members were present except:
Representatives R. D. Miller - Excused
Kerry Patrick - Excused
Burr Sifers - Excused

Committee staff present:
Jerry Ann Donaldson, Kansas Department of Legislative Research
Jim Wilson, Revisor of Statutes' Office
Juel Bennewitz, Secretary to the Committee

Conferees appearing before the committee:

George McCullough on behalf of David R. Hills, Attorney, Kansas City
George McCullough, AFL-CIO
Bob Kennedy, Kansas Workers Compensation Fund
Dennis Horner, Kansas Trial Lawyers Association

re: H.B. 3016
At the request of the chairman, George McCullough presented David Hills' submitted testimony, attachment #1. Mr. McCullough supported the points made by Mr. Hills. Banks will not honor a warrant until it is O.K.'d by some other institution. Mr. McCullough stated he had experience a wait of 10-15 days before a bank would honor a warrant. The chairman asked if this applied only to temporary total disability (TTD) payments. Mr. McCullough responded some companies pay by draft on settlements as well. Mr. McCullough was asked if he had had any experience with employers that are self-insured. He responded that he did not. Representative Acheson stated his understanding to be that some pay by bank draft. Warrant and draft are used synonymously in this text.

re: H.B. 2997
Jim Wilson explained this bill allows for a penalty to be assessed against the workers compensation fund as well as the employer. Chris Cowger, Staff Attorney for the Kansas Insurance Department, stated his main responsibility is with the workers compensation fund. He stated the department's support for the bill. He referred to a fiscal note (the committee has not received it at this date). There are 3,100 active accounts which makes it difficult for two people to compute the awards and comply with the 20 day limit. Representative O'Neal clarified that liability to the fund is derivative. The fund is different in that, by statute, it is paying on a monthly basis. There are civil penalties to apply to weekly non-payment where the fund is only liable to pay on a monthly basis. Secondly, part of the fund's responsibility after an award is to pay a portion of future payments but also to reimburse the carrier. Payments cannot be determined until the carrier's attorney provides information to the fund so the award can be computed. Representative O'Neal voiced concern over penalties being assessed a state agency, even more so when it is not the fault of the agency. Representative Bideau added that occasionally over the past decade appropriations for fund reimbursements to carriers has been depleted and payments could not be made until the next funding session. It was his opinion that a situation should not be created allowing for the assessment of a penalty when there is no money in the fund.

re: 3004
This bill provides that on appeal to the district court, if the claimant is not appealing, there is no question as to the claimant's right to compensation. The payment of compensation under the director's decision is not at stake. The claimant will receive compensation. Mr. McCullough suggested this bill be discussed with H.B. 3069 which can require many respondents to be brought into one case thus causing a lengthy delay.

re: H.B. 3069
At the chairman's request, Mr. McCullough explained the intent of the bill to be a "statutory" employee or contractor with no insurance allowing an employee to go through an employer to the principal contractor to receive compensation or to go through the employer to the fund if there is no insurance principal or the employer is unable to pay. This bill would allow all of the above to be brought into a hearing. He suggested the bill could be amended to provide, as it does from the director, the ALJ decide in those cases where the only dispute is who will make the payment. Representative O'Neal asked if the reference was to situations in which there is a review and none of the issues have to do with the right of the claimant to recover. The answer was affirmative. The representative suggested H.B. 3058 be considered also as there is no stay in that instance. There would be no need to grant interest and the claim continues to be paid per ALJs award. Mr. McCullough concurred interest on amounts not stayed would be better and was going to suggest if payments are made they can be made without an acquiesence fee tied to anyone making interest unnecessary. The chairman gave the following example of principals as used in H.B. 3069: A carpenter is working for a contractor who, in turn, becomes a subcontractor for another contractor working on a building. The contractor who employed the carpenter does not have insurance. This bill provides that the employee (carpenter) can sue up. He can sue his employer, then the contractor who engaged the employer as a subcontractor and so on up the line --- anyone having that work done so the employee can receive his compensation. Under present law the employee can only sue one of the principals. The chairman asked John Rathmel, Director of Workers Compensation, for comments on the bills presented. The director stated there would be no effect on the administration. He could understand the reason for multiple parties and indicated it may cause problems in some of the smaller courtrooms but no other foreseeable difficulties.

Bob Kennedy, representing the Kansas Workers Compensation Fund, testified the Kansas City office is seeing a number of claims from injured workers employed by an employer who failed to get insurance or is unable to pay compensation. He maintained more and more employers for whatever reason are finding it difficult to get insurance which presents a problem for the claimant. He felt K.S.A. 44-532a was meant to be a "pocket of last resort". Mr. Kennedy expressed the feeling the legislative intent was in the event there was no responsible person able to pay compensation to the employee, the workers compensation fund should pay. He stated he felt the original legislative intent to also be if there were other parties to, or could be made parties to, the proceedings and would have some liability and capacity to pay that they should rather than the workers compensation fund. He gave the following chronology: 1. The employer has no insurance. 2. The claimant's attorney impleads the fund. 3. The director, through ALJs, must make a finding that the employer does not have insurance and is unable to pay compensation. He contended there is a substantial amount of time used in gathering the information and making the determination. He asserted many of the employers cannot be found, are operating on a tenuous basis and/or if they are found are not anxious to cooperate in proving they cannot pay. He supported the bill stating it addresses the problem and provides the procedure necessary. In answer to the chairman's question, Mr. Kennedy felt this would simplify the number of lawsuits involving workers compensation. The chairman restated his question asking whether it would increase the complexity to the point where all parties would be hurt. The response was negative. He contended there is confusion on the part of the ALJs regarding their power when the claimant's attorney pleads a principal. The chairman responded the principal could implead a subcontractor. Mr. Kennedy concurred but cited civil procedures where it is mandatory all parties appear before the judge. He supported letting the ALJ determine liability then if ALJ is wrong, the principal, principal contractor or carrier has recourse against the fund to recover any amounts they should not have had to pay. The chairman asked if there is procedure to relieve the rest of the parties involved in the lawsuit once the determination of liability had been made. Mr. Kennedy felt it could be taken on review to the director and through the normal appeals channels. Representative O'Neal stated the purpose of the bill to be to involve the responsible principal and allow the fund to impleadk the principal. He asked if the bill should be expanded to allow the fund to be dismissed once the principal is impleaded. Mr. Kennedy concurred and suggested a blanket requirement that all parties not involved be dismissed. He added that in an instance where a principal and a principal contractor had been impleaded and the principal did not qualify under K.S.A. 44-503, if the contractor is held liable then the principal should be dismissed from the action.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Labor and Industry,

room 526-S, Statehouse, at 9:07 a.m./p.m. on March 3, 1988

Dennis Horner, Kansas Trial Lawyers Association, testified re: H.B.s 2997, 3004, 3016, 3058, 3062 and 3069, attachment #2.

re: H.B. 3004, Representative O'Neal asked if Mr. Horner would have objection to striking the word "only" from line 0041. As stated it applies to the claimant, by striking the word "only" it would make the bill fair to all parties involved. Mr. Horner stated he would have no objection.

re: 3062
Representative O'Neal proposed having a date certain from the time the E-1 is filed, saying it is at that point most files are turned to over to counsel. Mr. Horner's response was that he had no problem with it but was not sure what the future of it would be. He stated thought should be given to the claimant. He normally files a letter with the employer containing an E-1 and a demand for payment letter and stated he has encountered situations where the employer has not given the insurance company notice. He claims the 91 day rule from the filing date will force carriers to make a decision if discovery is not to the point of decision, then the insurance company will have to implead the fund anyway. Representative O'Neal stated that currently an insurance carrier does not need an attorney to implead the fund but merely needs to send a letter addressed to the fund.

The representative asked if the provision regarding the 10 day rule, if the provision said 10-20 days (negotiable) and the language were changed to the date from the date the regular hearing was first set rather than the date of the regular hearing, if that would solve the problem. Mr. Horner's response was that it may or may not depending on whether the respondent would have had an opportunity to bring them in. Representative O'Neal asked it should be handled if the respondentwere not given a regular hearing for the sole purpose of bringing in the fund. Mr. Horner responded 20 days from the setting of the trial should be ample. The representative pointed out the carrier needs 20 days notice to which Mr. Horner responded, while true, that is sometimes waived and if it is the right of impleading the fund, there may be a problem. Representative O'Neal stated the carrier has 20 days and the fund days. Mr. Horner responded that may be workable.

The meeting was adjourned at 9:56 a.m. Next meeting of the committee will be March 4, 1988, 9:00 a.m., Room 526-S.

GUEST LIST

COMMITTEE: HOUSE LABOR AND INDUSTRY DATE: March 3, 1988

NAME	ADDRESS	COMPANY/ORGANIZATION
George Dowell	Topeka	Ks AFL-CIO
Pat Culbertson	Topeka	KTLA
LEE VELASQUEZ	TOPEKA	Rep. Hensley
ROBERT L. KENNEDY	KANSAS CITY, KS	Ks Workers Comp Fund
Chris Cowger	Topeka, KS.	KS. Ins. Dept.
Rev John E Dowell	Great Bend, Ks.	Chaplain For Day
MARK WORKS	Topeka	K.I.D.
JOHN RATHMER	"	KDHR/WC

TESTIMONY BEFORE THE HOUSE COMMITTE ON LABOR AND INDUSTRY
IN SUPPORT OF HOUSE BILL 3016 AMENDING K.S.A. 44-512
PROVIDING FOR THE PAYMENT OF TEMPORARY TOTAL DISABILITY
BENEFITS BY CHECK ONLY. GIVEN MARCH 3, 1988.

Mr. Chairman and Members of the Committee:

My name is David Hills. I have been a Kansas practicing attorney in Kansas City for twenty-one years. Ninety percent of my practice is in the field of workers' compensation. The last fourteen years, I have principally represented injured workmen. The seven years prior to that I exclusively represented employers and their insurance carriers in workers' compensation matters.

In my experience, one of the most crucial times for an injured workman and his family is the hiatus between the time of injury and the beginning of the payment of temporary total disability benefits. The length of that delay can mean the difference between survival or death in a real, not just economic, sense.

I am sure that in your collective experience over the years in listening to attorneys testify that have represented injured workmen you have heard the horror stories that can visit the injured workmen and their families when there is an undue delay in the payment of compensation benefits. Eviction, repossession, harrassment from bill collectors, are commonplace. Infrequently, there is the surrender of children to welfare authorities and suicide.

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I would hasten to say that the enactment of the preliminary hearing procedures in 1974 has lessened the frequency of these hardships, but they do still occur because delay is inherent in the administration of the Kansas Workers' Compensation Act.

First, there is the statutory seven day waiting period after the inability to work before compensation is due. That means the workman must be off work a full two weeks before he receives his first payment of temporary total disability benefits. But that is of small consequence compared to the delay that often occurs between the time of the accident and the employer's reporting of the accident to the insurance carrier so that the carrier can place in motion the machinery to investigate the claim. This investigation in and of itself takes time in the obtaining of medical reports verifying that the injured workman cannot yet return to work. This investigation alone can sometimes take up to four or five weeks.

Should a written demand be made pursuant to the preliminary hearing procedures that the respondent and insurance carrier pay temporary total and/or medical benefits, there is another seven day wait after that demand before there can be filed an application for a preliminary hearing. I might add that in eastern Kansas where the bulk of my practice is, the administrative law judges there try very hard to give as much priority as they can to preliminary hearings, but due to their already heavily scheduled caseload and scheduled matters for hearing, there is at least a two week wait for a preliminary hearing.

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If as a result of a preliminary hearing, the employer and the carrier are ordered to pay temporary total disability, the machinery of the carrier normally takes another week in order to issue payment and most often that payment will include that last week.

Accordingly, under a best fact scenario, it can take up to at least five weeks after injury before the injured workman may receive his first temporary total disability payment. Imagine his surprise when he takes the payment instrument to his bank and is told that because the instrument is a draft and not a check, not only will he not get his money until the draft is paid at the drawee bank, he will also have to pay a collection fee ranging from ten to twenty dollars to his own bank for putting the draft in for collection through special handling procedures.

It has been my experience that the time between placing a draft in for collection and depositing of the payment in the workman's account is often a minimum of ten days and as long as fifteen to twenty days.

Since many insurance carriers have their origins back east, their banks are also located back east which lengthens the time between placing the draft in for collection and the payment on the draft. Even drafts drawn on banks in St. Joseph, Missouri or Booneville, Missouri, can take up to at least a week or longer before they are paid.

One large carrier with a large claims office in the Kansas City area writes drafts on the Commerce Bank of Kansas City. Until last August, their drafts could be presented in person at

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the Commerce Bank in Kansas City, Missouri and generally paid that same day with the assistance of an attorney. However, last year, in August of 1987, that practice was discontinued and their drafts now have to be presented through the injured workman's bank or his attorney's bank which in turn sends them to Commerce Bank where thereafter the carrier approves or disapproves payment. This process can take up to five days.

Last year, in order to be able to fully advise our clients as to whether or not they could expect a delay in obtaining funds even after the carrier agreed or was ordered to pay compensation, my office began compiling a list of the carriers and self-insured employers that paid by check and draft. Of the thirty-eight companies listed below, twenty-one pay by check, while seventeen pay by draft, to wit:

Checks

Aetna Insurance Company
American Manufacturers Mutual Insurance Company
Argonaut Insurance Company
CIGNA
CNA
Commercial Union Insurance Company
Continental Insurance Company
Employers Mutual Casualty Company
Employers of Wausau
Fireman's Fund Insurance Company
The Hartford
Iowa Beef Processors
Kemper Insurance Group
Liberty Mutual Insurance Company
National Union fire Insurance Company
Northwestern National Insurance Company
Old Republic Insurance Company
Royal Insurance Group
Safeco Insurance Company
St. Paul Fire & Marine Insurance Company
The Travelers

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Drafts

Chubb Group of Insurance Companies
Farmers Insurance Group
Farm Bureau Insurance Company
General Accident Insurance Company
General Casualty Companies
Great American Insurance Company
Home Insurance Company
Kansas Fire & Casualty Insurance Company
Lumberman's Underwriting Alliance
Maryland Casualty Company
Ohio Casualty Company
Ranger Insurance
State Farm Insurance
Southwestern Bell Telephone
Tri-State Insurance Company
USF&G
Zurich Insurance Company

It is submitted that the draft is an anachronism, a product of commerce when there were not the means of rapid communication as there are today. In looking at this list of companies, there does not necessarily seem to be any correlation between size and whether or not they use checks or drafts. It is felt that those companies using drafts as a method of payment is probably more rooted in custom and practice from a by-gone era than a conscious selection.

Obviously, there are safeguards in the use of drafts. The person issuing the draft is not the person that approves the payment of the drafts, an obvious internal control. Yet in this day of computer accounting where the home office hundreds of miles away will know instantly when a check is issued at a remote claims office, the value of the draft as a payment control becomes minimal, particularly when compared to the hardship it visits on the injured workman by the delay of payment and the charges he must absorb for that payment. Even a collection

charge of $10.00 a week over any period of time becomes a substantial loss to the injured workman since the applicable maximum temporary total rate, be it the present rate of $256.00 a week or $247.00 a week for last year, is substantially less than the wages of most skilled workmen. Of course, for those earning less, such as a minimum wage or barely above the minimum wage, the economic deprivation becomes much more accute.

In conclusion, it is submitted that House Bill 3016 is a very much needed change in the Kansas Workers' Compensation Act which I believe to be fair and reasonable to both the insurance industry and the injured workman and that the elimination of the hardships caused by the payment of temporary total disability benefits by drafts is in the best interest of the citizens of Kansas.

I thank you Mr. Chairman for your request that I appear today and to the members of the committee for their attention to this matter.

At this time, I will be pleased to respond to any questions that you may have. Thank you.

David R. Hills

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3/03/88

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OF COUNSEL
HYLTON HARMAN

March 2, 1988

Chairman Arthur Douville
Committee on Labor and Industry
State Capitol Building
Topeka, Kansas

RE: H.B. 2997
H.B. 3004
H.B. 3016
H.B. 3058
H.B. 3062
H.B. 3069

Dear Chairman Douville:

As a representative of the Kansas Trial Lawyers Association, I respectfully request the opportunity to address the above designated bills which are to be considered by your committee. The following is an outline of our position.

H.B. 2997 This proposed amendment to K.S.A. 44-512a merely requires the Kansas Workers' Compensation Fund to timely comply with orders and awards from the administrative law judges and director. The employers are required to timely comply with awards and it is only fair to all parties that the Fund is also responsible. This bill is supported by K.T.L.A.

H.B. 3004 Under our current law, any party to a preceding may request that the director review any final award of an administrative law judge. At the present time, it is not uncommon for decisions to be taken under advisement for six (6) to ten (10) months. During the time the award is being reviewed, any past due compensation awarded claimant is not paid and is invested by the insurance carrier or self insured. Often the past due compensation is substantial. This bill provides that the claimant will receive statutory interest while the matter is on review. This bill would likely reduce the number of director reviews requested for the puruposes of imposing a six (6) to ten (10)

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month delay and will be fair to all parties concerned. K.T.L.A. supports this bill.

H.B. 3016 K.T.L.A. supports this bill.

H.B. 3058 K.T.L.A. supports this bill.

H.B. 3062 This bill is designed to prohibit respondents from impleading the Kansas Workers' Compensation Fund immediately prior to a hearing. As a matter of fairness, the objective of this bill is reasonable and is supported by the K.T.L.A. While the objective of H.B. 3062 is endorsed, the bill as proposed will complicate the orderly handling of claims and precipitate additional litigation and expense in a already burdened system. In addition, this bill will impose certain hardships on both claimants and employers. This proposal has the following affects:

1. The employer is mandated to implead the Fund within 91 days of the written claim being served. Thereis a difference between a written claim and an application for hearing. Many written claims are served on employers and no formal claim/application for hearing is filed for months. Employers may be furnishing medical treatment and temporary benefits without formal intervention of the Department of Human Resources. In these, situations, there is no procedure for impleading the Fund.

2. In many instances, the claimant is receiving medical treatment and it may be difficult to evaluate whether permanent disability will remain. Requiring impleading of the Fund would seem useless.

3. In many cases where a formal application for hearing is filed by counsel, the insurance carrier or employer may voluntarily furnish benefits to claimant and not retain counsel. If mandatory impleading is required within 91 days of a claim or application for hearing, the employer and insurance carrier will have to retain the services of an attorney to implead the Fund immediately. This impleading might be required even though the investigation may later reveal the Fund should not be a party. This will increase the expenses of all employers and insurance carriers.

4. In all cases where the Fund may ultimately have some liability, impleading will be necessary regardless of whether a full investigation has been concluded so to avoid the time limitation. An impleading will force the Fund to employ counsel in many cases which will be dismissed against the Fund when all of the facts are known. This procedure will produce substantial additional expenses for the Fund.

5. The 91 day rule will require defense counsel to obtain statements and or sworn depositions of claimants in order to determine whether the Fund should be involved or implead the Fund in vertually every claim. The sworn statments and attorneys expenses will only serve to increase expenses.

In summary, the 91 day provision of K.S.A. 44-566a(c)(1)(A) is considered to be burdensome, expensive and will serve to further complicate our system. K.T.L.A. opposes this portion of H.B. 3062.

H.B. 3062 does contain a 10 day rule which requires the Fund to be implead more than 10 days before the first full hearing. This rule, if adopted, will allow the Fund ample time to retain counsel and appear for the scheduled hearing. This proposal is fair and K.T.L.A. supports this proposal.

H.B. 3069 This proposal is unnecessary and will further complicate our system. The claimant has the right to pursue either the subcontractor or principal and the principal has statutory authority to implead a subcontractor who may have hired the claimant. There is no need to grant the Fund authority to implead parties in a proceding.

I thank you and the members of your committee for your consideration.

Sincerely,

DENNIS L. HORNER

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